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USA's Response to Idaho and other Objectors

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

	Consolidated Subcase No. 91-7755
In Re the CSRBA	**UNITED STATES' RESPONSE TO THE STATE OF IDAHO'S AND OBJECTORS' MOTIONS FOR SUMMARY JUDGMENT**
Case No. 49576	

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INTRODUCTION

The United States of America ("United States") hereby responds to the following memoranda related to motions for summary judgment: 1) *State of Idaho's Memorandum in Support of Motion for Summary Judgment*, dated Oct. 21, 2016 ("State Brf."); 2) *Memorandum in Support of the North Idaho Water Rights Group's Motion for Summary Judgment*, dated Oct. 20, 2016 ("NIWRG Brf."); 3) *Memorandum in Support of Hecla's Motion for Summary Judgment*, dated Oct. 21, 2016 ("Hecla's Brf."); 4) *John McFaddin's Response to the State of Idaho's Motion for Summary Judgment*, dated Nov. 23, 2016; and 5) *John McFaddin's Response to the United States' and Coeur d'Alene Tribe's Joint Motion for Summary Judgment*, dated Nov. 23, 2016. For the reasons explained in this response, the United States moves this Court to deny the State of Idaho's ("State") and other Objectors' Motions for Summary Judgment. The United States requests that this Court grant the United States' and Coeur d'Alene Tribe's ("Tribe") Joint Motion for Summary Judgment, dated October 20, 2016, finding that the United States as trustee and the Coeur d'Alene Tribe as beneficiary are entitled to federal reserved water rights to fulfill the homeland purpose of the Coeur d'Alene Reservation ("Reservation"), which includes water for continuation of subsistence activities as well as for agriculture and industry.

The arguments in this brief are framed by the findings of the United States Supreme Court in *Idaho v. United States*, 533 U.S. 262 (2001) ("*Idaho II*"), which are outlined in Section I. The State's assertion that the Reservation was established in 1891 for solely agricultural purposes is wholly defeated by that case as well as the historic record. Section II clarifies the homeland purpose of the Reservation which includes traditional subsistence practices, such as hunting, fishing, and gathering, as well as modern activities, such as agriculture and industry.

Section III addresses the State's attempt to limit the non-consumptive, instream flow water rights to only trust lands. Such an argument fails because the federal reserved water rights analysis turns on whether the water is required to fulfill the reservation purpose—not whether the underlying lands are owned by the United States or Tribe. Section IV responds to various arguments seeking to improperly limit the consumptive use claims for irrigation, domestic, commercial, municipal, and industrial uses. As explained in Section V, the federal reserved water right in Lake Coeur d'Alene is not a power grab for control of the Lake but rather a necessary right to fulfill the purpose of the Reservation. Finally, Section VI demonstrates that off-reservation instream flows are legally justified and factually necessary to support the Reservation's adfluvial fishery; the Tribe's subsistence activities depend on such flows. Altogether, these arguments establish that the United States and Tribe are entitled to the claimed federal reserved water rights for the Reservation.

BACKGROUND

The following provides a brief review of the history surrounding the establishment of the Reservation. Additional details are provided in the *United States' and Coeur d'Alene Tribe's Joint Statement of Facts*, dated Oct. 20, 2016 ("JSF"), which primarily relies on the United States' Supreme Court's conclusions in *Idaho II*. The State's reliance on information previously rejected by the Supreme Court in *Idaho II* makes this brief restating of the history necessary.

1867: **President Johnson's Executive Order**— In the face of immigration into the Tribe's aboriginal territory, President Johnson issued an Executive Order setting aside a relatively modest reservation. JSF ¶ 43.

1871: **Tribe requests a reservation**— The Tribe was unaware of the 1867 Reservation until at least 1871, when it petitioned the Government to set aside a reservation. *Id.* at ¶¶ 47-52. The

Tribe subsequently argued that the 1867 boundaries were unsatisfactory, due in part to their failure to make adequate provision for fishing and other uses of important waterways. *Id.*

1873: **1873 Agreement between the United States and Tribe**— Following negotiations with the United States, the Tribe and the United States agreed to a more substantial reservation that covered part of the St. Joe River and most of Lake Coeur d'Alene. *Id.* at ¶¶ 54-61.

1873: **President Grant's Executive Order**—President Grant issued an Executive Order establishing the Reservation, effective immediately, that mirrored the boundaries of the Reservation delineated in the 1873 Agreement. *Id.* at ¶¶ 62-64.

1885: **Congress authorized further negotiations with the Tribe**— Congress authorized new negotiations to obtain the Tribe's agreement to cede aboriginal land outside the borders of the 1873 Reservation. *Id.* at ¶ 74.

1887: **1887 Agreement between the United States and Tribe**— The Tribe and United States reached agreement in 1887 that the Reservation, which included substantial waterways supporting subsistence uses, would be "held forever as Indian land and as homes for the Coeur d'Alene Indians." Id. at ¶ 74. Congress did not immediately ratify the 1887 Agreement due to an interest in obtaining additional lands from the Tribe. *Id.* at ¶¶ 74-76. Congress did not alter the 1873 boundaries unilaterally but rather authorized further negotiations with the Tribe. *Id.* at ¶ 77.

1889: **1889 Agreement between the United States and Tribe**— In the 1889 Indian Appropriations Act, Congress directed the Secretary of the Interior to negotiate for the purchase and release of portions of the 1873 Reservation that were valuable chiefly for minerals and timber that the Tribe would consent to sell. *Id.* The Tribe and Government negotiators reached an agreement in 1889 under which the Tribe would cede the northern portion of the Reservation for compensation. *Id.* at ¶¶ 79-80.

1891: **Congress ratifies 1887 and 1889 Agreements**— On March 3, 1891, Congress ratified both the 1887 and 1889 Agreements with the Tribe. *Id.* at ¶¶ 80-81.

ARGUMENT

I. THE STATE IS BOUND BY THE UNITED STATES SUPREME COURT'S CONCLUSION THAT THE COEUR D'ALENE RESERVATION WAS ESTABLISHED IN 1873 FOR PURPOSES INCLUDING SUBSISTENCE USES.

The State[1]—undeterred by the United States Supreme Court's express rejection of the State's account of Reservation history in *Idaho II*— repeats that same account here, asserting that the Tribe at the time of the Reservation creation had abandoned the fishing, hunting, and gathering practices that had been central to Tribal culture, subsistence, and existence for millennia. In seeking to defeat reserved water rights for these subsistence uses, the State argues: 1) over a period of 18 years (1873-1891), the Coeur d'Alene Tribe gave up fishing, hunting, and gathering; 2) the Reservation was created in 1891 and not 1873; and 3) only federal intent (and not the Tribe's) matters for determining Reservation purposes and this intent was limited to promoting agriculture. State Brf. at 34-44. *Idaho II* rejected all of these assertions and the State is precluded from re-arguing these issues here or elsewhere. Even if *Idaho II* had not resolved these arguments, they would still fail because they contradict the historical record and well-settled principles of Indian law.

These rejected arguments permeate the State's objection to all water rights for Tribal traditional uses— including fishing, hunting, gathering, cultural, spiritual or ceremonial needs— because, in the State's view, the Reservation sole purposes were cultivated agriculture and to promote the "progress, comfort, improvement, education, and civilization" of the Tribe. State

[1] Hecla and North Idaho Water Rights Group make similar arguments that are all jointly addressed in this response.

Brf. at 43-44, 65-68, 73-75. Due to the State's heavy reliance on these arguments, this brief addresses them in one section.

A. ***Idaho II* rejected the proposition that the Reservation was established in 1891 or that it was established solely for agricultural purposes. The historical record also fails to support the State's proposition.**

In *Idaho II*, the State asserted the same argument it advances here—that the 1873 Executive Order established a Reservation that was a temporary placeholder that Congress repudiated in 1889 and 1891 in favor of a Reservation solely to advance agriculture. Because this argument was squarely addressed and rejected in *Idaho II*, the State is precluded from making it now.

The State argued before the Supreme Court that: "Congress chose to repudiate the 1873 Reservation, and its inclusion of submerged lands." Brief for Petitioner at 38, *Idaho v. United States*, 533 U.S. 262 (2001) (No. 00-189) 2001 WL 76238 (Attachment A); "[t]he 1889 Act was not an affirmation of the 1873 Executive Order Reservation or its purposes; it was a mandate to radically alter the Reservation to meet the changing needs of the Tribe." *Id.* at 46; "the primary purpose of the continuing Reservation was to protect the Tribe's agricultural activities." *Id.* at 46; "Congress repudiated the Reservation as it then existed." *Id.* at 21; and "the language of the 1889 Act strongly implies that the primary purpose of the diminished Reservation was to provide lands to meet the agricultural needs of the Coeur d'Alene Tribe, and the legislative history described the Tribe's members as successful farmers." *Id.* at 21.

The State also asserted that the Ninth Circuit erred "by holding that Congress did not 'repudiate' the 1873 Executive Order Reservation" and that "Congress' action can be characterized as an 'acceptance' of the 1873 Reservation only through the most twisted application of logic." *Id.* at 37-38. It contended that the 1873 Executive Order "could not act as

an express conveyance or grant of permanent property rights to the Tribe." State of Idaho's Trial Brief at 29, *United States v. Idaho*, Civ No. 94-0328-N-EJL (D. Idaho, Nov. 17, 1997) (Attachment B).

The Supreme Court rejected the State's arguments, upholding the lower courts on these and other matters concerning the Reservation. The Supreme Court expressly held that "Congress [in 1891] recognized the full extent of the Executive Order reservation lying within the stated boundaries it ultimately confirmed." *Idaho II*, 533 US at 281. Indeed, the outcome of *Idaho II* would have been fundamentally different if the Court had accepted the State's argument that the Reservation was established in 1889 or 1891 for agriculture purposes, since Idaho became a State in 1890 and a post-Statehood date of reservation might have altered the analysis of whether the United States reserved title to submerged lands critical to Tribal subsistence uses.[2]

The State now acknowledges, as it must, that the "history and purpose of the 1873 Executive Order has been previously determined in litigation between the United States, the Tribe, and the State." State Brf. at 34. The State further admits that *Idaho II* found that the 1873 Executive Order reserved submerged lands for the Tribe in order to mirror the 1873 Agreement that provided the "Tribe with a reservation that granted tribal members exclusive use of the water resource." State Brf. at 35 *citing United States v. Idaho*, 95 F. Supp. 2d 1094, 1109 (D. Idaho 1998) ("*Idaho II*").[3] In fact, the water resource was reserved to provide the "basket of resources" necessary to sustain the Tribe's livelihood, including fishing, hunting, and gathering. *Idaho II*, 95 F. Supp. 2d at 1104. The State now argues, in contradiction to *Idaho II*, that Congress rejected the "Reservation, as established by the executive order . . . . In rejecting the Reservation,

[2] The State did not challenge any of the factual findings in *Idaho II* and cannot do so here. 533 U.S. at 265 n.1.

[3] For ease of reference, this brief refers to *Idaho II* as short form for the district court, Ninth Circuit, and Supreme Court decisions in that case.

Congress required substantial reductions to both lands and waters that effectively altered the purposes for which it was set aside." State Brf. at 36-37. *Idaho II*, however, establishes that Congress *did not* reject or alter the purposes of the Reservation through this later cession, even though Congress sent federal negotiators back to obtain a cession of a northern portion of the Reservation in 1889.

In *Idaho II*, the State argued that Congress created a new Reservation with an agricultural purpose through 1889 and 1891 legislation. The State asserted this argument, seeking to defeat the purpose of the 1873 Executive Order Reservation, which was found to protect subsistence use of waterways through tribal ownership of submerged land. With the alleged defeat of 1873 Executive Order, Idaho claimed that on its admission to the Union on July 3, 1890, title in the unreserved submerged lands vested in the State. But *Idaho II* rejected this paradigm. The Supreme Court explained that, after 1873:

> Congress undertook to negotiate with the Coeur d'Alene Tribe for reduction in the territory of an Executive Order reservation that Idaho concedes included the submerged lands at issue here. Congress was aware that the submerged lands were included and clearly intended to redefine the area of the reservation that covered them only by consensual transfer, in exchange for the guarantee that the Tribe would retain the remainder. There is no indication that Congress ever modified its objective of negotiated consensual transfer... Congress recognized the full extent of the Executive Order reservation lying within the stated boundaries it ultimately confirmed, and intended to bar passage to Idaho of title to the submerged lands at issue here.

Idaho II, 533 U.S. at 280-81. *Idaho II* thus establishes that Congress sought a consensual transfer of some northern lands but did not renegotiate the purposes of the remaining Reservation lands, including supporting subsistence uses such as fishing, hunting, and gathering (which included continued Tribal control of waterways).

The 1873 Reservation boundaries and purposes became fully effective upon President Grant's Executive Order. JSF ¶ 70. Congress, the Executive Branch, and Tribal leaders all viewed the 1873 Executive Order as establishing the Reservation. *Id.* at ¶ 64. Congress recognized the existence of the 1873 Reservation in subsequent legislation that authorized the March 1887 negotiations with the Tribe. *Id.* That law appropriated money to pay the costs of negotiating with Coeur d'Alene leaders "for the cession of their lands outside the limits of the present Coeur d'Alene reservation." *Id.* Similarly, the Commissioner of Indian Affairs specifically referenced the "executive order of 1873" as having "defined" the Reservation's boundaries. *Id.* In February 1888, the Senate published three maps created by federal officials in the 1880s, all of which depicted the Reservation's boundaries as established by executive order in November 1873. *Id.*[4]

In *Idaho II*, the Supreme Court confirmed that "the Tribe was understood to be entitled beneficially to the reservation as then defined [in the 1873 Executive Order]." 533 U.S. at 269. The district court had noted that "prior to Idaho's statehood, Congress was on notice that the Executive Order of 1873 reserved for the benefit of the Tribe the submerged lands within the boundaries of the Coeur d'Alene Reservation." *Idaho II*, 95 F. Supp. 2d at 1114. "[T]he

[4] The State argues that "[t]he reservation of water rights cannot be implied to remedy an omission in the act creating the Reservation." State Brf. at 9. The State, however, never identifies the "omission" to which it refers. The State may be referring to the lack of Congressional ratification of the 1873 Agreement. The State's argument amounts to asserting that silence in an executive order regarding water rights means that no such rights can exist—an assertion that has been clearly repudiated by the *Winters* Doctrine, which recognizes the *implied* reservation of water rights. *See, e.g., Winters v. United States,* 207 U.S. 564, 576 (1908) ("*Winters*") (interpreting ambiguities in the Indians' favor when finding implied water rights for the Fort Belknap Reservation even though document was silent as to water); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47-48 (9th Cir. 1981) ("*Walton I*") (implied water rights based on a one-paragraph executive order reservation). The State accepts, as it must, the Indian canons of construction but alleges that the canons do not apply here because the United States and Tribe are attempting to insert new language into the record that does not exist. *See* State Brf. at 10-13. On the contrary, the United States is not attempting to add anything to the historic record: The law requires that courts give effect to the entirety of the historic record, including what the Tribe would have understood to be included in its 1873 Executive Order Reservation.

Executive Order of 1873 had effectively conveyed beneficial ownership of those lands to the Coeur d'Alenes." *Id.*; *see also* JSF ¶ 82. The district court explained that "[u]ntil Congress approved the Executive reservation, however, the Tribe's property right was 'subject to termination at the will of either the executive or Congress.'" *Idaho II*, 95 F. Supp. 2d at 1110.[5] The court then reviewed Congress' actions between 1873 and 1891 in seeking consensual release of some of the Reservation's northern lands and found that "Congress acknowledged that the Executive Order of 1873 had effectively conveyed beneficial ownership of those lands to the Coeur d'Alenes" and that "Congress recognized and then ratified the Executive reservation of the submerged lands for the benefit of the Tribe." *Id.* at 1114. The Court's finding in *Idaho II,* precludes the State from arguing that the federal government's negotiation for a portion of the northern area of the Reservation amounted to "rejection" of the entire Reservation. State Brf. at 36-37. Consequently, it is settled, and binding on the State, that the Reservation was created in 1873 and its purposes unchanged by the subsequent cession of the northern portion.

B. Idaho and Objectors are precluded from raising issues already decided in *Idaho II* under the doctrine of issue preclusion or collateral estoppel.

Issues resolved in *Idaho II* are conclusively resolved for this adjudication. "The preclusive effect of a federal-court judgment is determined by federal common law." *Stilwyn, Inc. v. Rokan Corp.*, 158 Idaho 833, 839 (Idaho 2015) (*citing Taylor v. Sturgell*, 553 U.S. 880,

[5] The State cites to the Tribe's expert Richard Hart's Report describing the Executive Order "as a temporary measure to fully protect the agreement until the necessary legislation could be passed" and "Congress confirmed the reservation." State Brf. at 36. This is consistent with the *Idaho II* Court's holding that the reservation was subject to Congressional termination, but, as Hart notes, Congress could "confirm" the reservation. In fact, Hart later explains that the "1887 Agreement confirmed the Coeur d'Alene's 1873 Reservation." E. Richard Hart, *A History of Coeur d'Alene Tribal Water Use: 1780-1915*, p. 214, submitted to Coeur d'Alene Tribe, Nov. 25, 2015 ("Hart 2015 Report") (Attached as Ex. 6 to Affidavit of Richard Hart, submitted with Coeur d'Alene Tribe's Memorandum In Support of Motion for Summary Judgment). Hart further provides that "[t]he 1887 Agreement confirmed that the Coeur d'Alene Reservation set aside in the 1873 Agreement and Executive Order would continue to 'be held forever as Indian land and as homes for the Coeur d'Alene Indians . . .'" Hart 2015 Report at 335. As the record and *Idaho II* show, Congress never "rejected" or "terminated" the 1873 Reservation.

891 (2008)). Under the doctrine of issue preclusion, or collateral estoppel, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party (or privy) to the prior litigation." 18-132 Moore's Federal Practice - Civil § 132.01 (*citing Montana v. United States*, 440 U.S. 147, 153 (1979) ("*Montana*") ("[A] 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction ... cannot be disputed in a subsequent suit between the same parties or their privies,'" (*quoting Southern Pacific R. Co. v. United States,* 168 U.S. 1, 48-49 (1897)); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979) (determination of issue is conclusive in subsequent suits based on different cause of action involving party to prior litigation). To preclude parties from contesting matters that they have had a full and fair opportunity to litigate "protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana*, 440 U.S. at 153-154.

When a state is party to litigation involving matters of general public interest, such as the allocation of natural resources, the state acts as the representative of its citizens, who are bound by the resulting judgment. 18-131 Moore's Federal Practice - Civil § 131.40 (*citing* W*ashington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 692-93 n.32, *modified on other grounds,* 444 U.S. 816 (1979) ("*Passenger Fishing Vessel*") (commercial fishermen were represented by state in proceedings involving interpretation of treaty regarding fishing rights of Indians); *see also Wyoming v. Colorado*, 286 U.S. 494, 509 (U.S. 1932) (water claimants in Colorado, and those in Wyoming, were represented by their respective States and are bound by the decree); *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340-41 (1958)

("The final judgment of the Court of Appeals was effective, not only against the State, but also against its citizens, including the taxpayers of Tacoma, for they, in their common public rights as citizens of the State, were represented by the State in those proceedings, and, like it, were bound by the judgment."); *Alfred L. Snap & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982) (governments may act in their *parens patriae* capacity as representatives for their citizens in suit to recover damages for injury to sovereign interest); *Eyak Native Village v. Exxon Corp.*, 25 F.3d 773, 777 (9th Cir. 1994) ("Where the State is a party to relevant proceedings, then citizens are represented in those proceedings and are bound by the judgment.")). For these reasons, the Objectors other than the State, such as the North Idaho Water Rights Group and Hecla, are also bound by *Idaho II*.

The role of the State as representing its citizens is of particular importance in a case such as *Idaho II*, which concerned the ownership of submerged lands underlying navigable waters. Ownership of these lands can "carr[y] with it the power to control navigation, fishing, and other public uses of water . . ." which are "essential attribute[s] of sovereignty." *United States v. Alaska*, 521 U.S. 1, 5 (1997) (citations omitted). Accordingly, the State in *Idaho II* was acting as the representative of its citizens, who are bound by the resulting judgment.

As illustrated below, the State advances the same arguments that were addressed and conclusively rejected in *Idaho II*:

State Argument	**State's *Idaho II* Brief to United States Supreme Court**	**State CSRBA Brief**	***Idaho II* Holding**
Congress repudiated the 1873 Reservation and created one with different purposes through the 1889 and 1891 Acts	"Congress chose to repudiate the 1873 Reservation" (Idaho Sup Ct brief at 38) "[t]he 1889 Act was not an affirmation of the 1873	"the Coeur d'Alene Reservation, as established by the executive order, was ultimately rejected by Congress." State Brf. at 36-37	"Congress did not simply alter the 1873 boundaries unilaterally. Instead, the Tribe was understood to be entitled beneficially to

	Executive Order Reservation or its purposes; it was a mandate to radically alter the Reservation to meet the changing needs of the Tribe." *Id.* at 46. "Congress' action can be characterized as an 'acceptance' of the 1873 Reservation only through the most twisted application of logic." *Id.* at 37-38.	"In rejecting the Reservation, Congress required substantial reductions to both lands and waters that effectively altered the purposes for which it was set aside." *Id.* at 37.	the reservation as then defined …" 533 U.S. at 269. "submerged lands and related water rights had been continuously important to the Tribe throughout the period prior to Congressional action confirming the reservation and granting Idaho statehood." *Id.* at 275. "preservation of the land within the reservation, absent contrary agreement with the Tribe, was central to Congress's complementary objectives of dealing with pressures of white settlement and establishing the reservation by permanent legislation." *Id.* at 276. "Congress recognized the full extent of the Executive Order reservation lying within the stated boundaries it ultimately confirmed." *Id.* at 281.
Reservation purpose does not include traditional subsistence activities, such as fishing, hunting, and gathering	"the primary purpose of the continuing Reservation was to protect the Tribe's agricultural activities." *Id.* at 46	"the primary purposes of the 1891 permanent Reservation were to provide a reservation suitable for the Tribe's ongoing and future agricultural endeavors" State Brf. at 43-44.	"The Tribe depended on the waterways for a year-round source of fish, small mammals, waterfowl and plant materials." 95 F. Supp. 2d at 1101. "the Coeur d'Alenes required a reservation that included the Tribe's fishery."

			95 F. Supp. 2d at 1106. "a purpose of the 1873 agreement was to provide the Tribe with a reservation that granted tribal members exclusive use of the water resource.... a purpose of the Executive Order was to reserve the submerged lands under federal control for the benefit of the Tribe." 95 F. Supp. 2d at 1109

Accordingly, Idaho and other objectors are bound by *Idaho II*'s conclusion that the Coeur d'Alene Reservation was established in 1873 for purposes including subsistence uses. Even if the State and other objectors were permitted to reargue aspects of *Idaho II*, only the Supreme Court has the authority to revisit its holding.

C. **Even if *Idaho II* had not already affirmed, with binding effect here, that the 1873 Executive Order established the Reservation, it is well settled that Executive Order reservations have the full force and effect of a reservation established by any other means, such as treaty or statute.**

The State argues that the "1873 Executive Order was a temporary measure that did not permanently reserve water rights." State Brf. at 34. The argument appears to be premised on the fact that Congress did not ratify the 1873 Agreement. *Id.* at 36 (State asserting that in his 1873 Executive Order, "the President intended to act in a manner that preserved for Congress the final decision regarding the lands and water that would be permanently reserved for the Tribe's use."). The contention is foreclosed by federal law, however, because executive order reservations have the same force and effect as those established by treaty or statute. The Coeur d'Alene Reservation was fully established by the 1873 Executive Order.

It is well settled that executive rrder reservations "have the same validity and status as any other reservation." Nell Jessup Newton, et al., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 15.04[4], at 1013 (ed. 2012) [hereinafter, COHEN'S HANDBOOK]. "Numerous Supreme Court cases have reaffirmed these principles." *Id.* (*citing United States v. Dion*, 476 U.S. 734, 745 n.8 (1986) ("Indian reservations created by statute, agreement, or executive order normally carry with them the same implicit hunting rights as those created by treaty"); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 133 n.1 (1982) ("The fact that the Jicarilla Apache Reservation was established by Executive Order rather than by treaty or statute does not affect our analysis; the Tribe's sovereign power is not affected by the manner in which its reservation was created."); *Arizona v. California*, 373 U.S. 546, 598 (1963) (*Winters* doctrine of water rights applies to executive order reservations) ("*Arizona I*"); *Spalding v. Chandler*, 160 U.S. 394, 403 (1896) ("When Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated"); *see also Parravano v. Masten*, 70 F.3d 539, 547 (9th Cir. 1995) (executive-order reservation fishing rights entitled to same protections as treaty reservation rights)). It is well-accepted that "[b]oth Congress and the executive generally treat executive order reservations the same as those created by treaty or statute." COHEN'S HANDBOOK, § 15.04[4], at 1013. Similarly, *Walton I* confirmed implied water rights for both agriculture and fishing for the Colville Reservation that was established by executive order. *Walton I*, 647 F.2d at 47-48.

An understanding of the historical progression of the establishment of Indian reservations is critical to the United States Supreme Court's conclusion that executive order reservations must be afforded the same treatment as other reservations. *Arizona I*, 373 U.S. at 598. Until 1871, the

United States primarily established Indian reservations via treaties negotiated with tribes. *See* COHEN'S HANDBOOK, § 1.03[9], at 69-70. On March 3, 1871, Congress passed an Appropriations Act including language ending the era of treaties with tribes: "[H]ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." Act of March 3, 1871. § 1, 16 Stat. 544 (codified at 25 U.S.C. § 71). The end of the treaty era gave rise to a period characterized by agreements, statutes and executive orders—all of which receive the same treatment as treaties.

> With the 1871 law, Congress had to develop new procedural methods of dealing with Indians, but practically, little changed. . . . The federal government continued to make agreements with the Indians, but now both houses approved them. *Furthermore, the federal-Indian relationship continued to develop outside the federal legislature by way of executive orders, under which reservations had been created as early as 1855, and which continued until 1919, when Congress ended the practice of establishing reservations by executive order.* Once approved by Congress, such agreements, statues, and *executive orders* are the 'supreme law of the land' creating rights and liabilities that are virtually identical to those established by treaty.

COHEN'S HANDBOOK, § 1.03[9], at 70-71 (emphasis added). The President's power to establish reservations by executive order was acquiesced in by Congress for such a long period of time that the Supreme Court concluded that the practice was consistent with legislative approval. *See, e.g., United States v. Midwest Oil Co.*, 236 U.S. 459, 469-473 (1915).[6] Indeed, Congressional acceptance of the Executive Branch's authority to establish reservations by executive order was so evident that an Act was required to end the practice. Act of June 30, 1919, § 27, 41 Stat. 3. It is noteworthy that the main Indian law treatise cites to the Coeur d'Alene Reservation as an

[6] In 1882, the Attorney General for the United States issued an opinion affirming the executive authority to establish reservations because it had been done for so many years absent any objection from Congress. COHEN'S HANDBOOK, § 15.04[4], at 1012 (*citing* 17 Op. Att'y Gen. 258 (1882)).

example of "an executive order [that] withdrew land to effectuate an agreement later ratified by Congress." COHEN'S HANDBOOK, § 15.04[4], at 1013, n. 105 (*citing Idaho II*, 533 U.S at 271).

The above fully demonstrates the validity of executive order reservations. Applied to the Coeur d'Alene Reservation, the historical record abundantly demonstrates that the 1873 Executive Order established the Reservation, and that Congress subsequently affirmed this 1873 Reservation, for several reasons. First, when Congress ratified the March 26, 1887 agreement with the Coeur d'Alene Tribe, it included a provision confirming "the boundaries of their present reservation," which had been established by the 1873 Executive Order. Act of March 3, 1891, 26 Stat. 989 at 1026–1028, USA-CDA00021598.[7] In addition to being "accepted, ratified, and confirmed" by Congress on March 3, 1891, the 1887 agreement also clearly revealed federal officials' acknowledgement of the existence of the "present Coeur d'Alene Reservation" in Articles 1–2, the boundaries of which had been established by President Grant in November 1873. *Id.*

Second, less than two months before the negotiation of the March 1887 Agreement, Congress enacted the General Allotment Act (commonly known as the "Dawes Act"). Act of February 8, 1887, 24 Stat. 388 (1887) USA-CDA00021885. In authorizing the President to allot lands on Indian reservations nationwide, the Dawes Act made no distinction between reservations created by executive order, by treaty, or by legislation. Specifically, the Dawes Act allowed for allotments "in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use." *Id.*

[7] All cites to USA-CDA documents refer to historical documents referenced in Reports authored by Ian Smith and are attached to the Affidavit of Ian Smith, dated October 18, 2016.

Third, the historical record includes numerous additional instances of federal officials recognizing the Coeur d'Alene Indian Reservation prior to the Dawes Act, the 1887 Coeur d'Alene Agreement, and the 1891 Act ratifying it. Ian Smith, *A Response to the Expert Report of Stephen Wee Regarding the Establishment of and Purposes for the Coeur d'Alene Indian Reservation*, p. 4-11, submitted to the U.S. Department of Justice by Historical Research Associates, Inc., May 26, 2016 ("Smith 2016 Report") (Attached as Ex. 2 to the Affidavit of Ian Smith, dated October 18, 2016).

The State contends that the 1873 Executive Order Reservation was rejected by Congress because it did not ratify the 1873 Agreement and, instead, ultimately passed the 1891 Act. State Brf. at 37. According to the State, the 1891 Act amounts to a Congressional action that "supersedes the prior action taken by the President," *e.g.*, the 1873 Executive Order. *Id.* The State bases its argument on one case, *British-American Oil Producing Co. v. Bd. of Equalization,* 299 U.S. 159, 163 (1936) ("*British American Oil*"), which the State alleges established what it terms a "last reservation doctrine." *Id.* The State's argument must be rejected. First, as demonstrated above, the subsequent Congressional legislation affirmed, rather than superseded, the 1873 Executive Order Coeur d'Alene Reservation albeit with amended boundaries.[8] Second,

[8] The State improperly utilizes the term "diminish" when it asserts that an "agreement to diminish the Reservation was signed on September 9, 1889." State Brf. at 39. "Diminishment" is a legal term of art with a unique meaning in federal Indian law that should not be implied because it does not apply in this instance. Specifically, "diminishment" refers to a change of an Indian reservation's boundaries based on clear congressional intent to alter the boundaries usually in a manner that removes certain lands within the reservation from Indian Country jurisdiction. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) ("Solem"). Diminishment of an Indian reservation is not considered lightly as there is a presumption in favor of the continued existence of a reservation and any intent of Congress to diminish reservation boundaries must be clearly expressed. *Id.* at 472; *see also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). For example, the Supreme Court has held in numerous cases that the act of opening a reservation alone does not diminish its Indian Country status. *Solem*, 465 U.S. at 472; *Mattz v. Arnett*, 412 U.S. 481, 503-04 (1973); *Seymour v. Superintendent*, 368 U.S. 351, 356 (1962). The Coeur d'Alene Reservation has not been diminished and the State rightfully does not argue that it has in this case. However, the use of the term is inappropriate because it insinuates a question of validity of the Reservation that does not exist. As explained above, the boundaries of the 1873 Reservation were changed as a result of the 1889 Agreement, but use of the term diminishment in this context is misleading.

this "doctrine" relied on by the State has never been applied in federal Indian Law and is contrary to the significant caselaw demonstrating that executive order reservations are fully effective. Finally, *British-American Oil* fails to support the State's claims.

British-American Oil involved a claim by a non-Indian oil company that Congress had not authorized state taxation of oil and gas production from leases of mineral estate beneath allotments on the Blackfeet Reservation. This in turn depended in part on whether the Blackfeet Reservation should be considered a reservation created by treaty or legislation, as opposed to executive order. 299 U.S. at 162-63. The land at issue had initially been reserved by an 1851 Treaty and an 1855 Treaty for multiple tribes, including the Blackfeet. Through three Executive Orders between 1873 and 1880 and an 1874 Act, "the Blackfeet and certain of the other Indians associated with them came to occupy a large part of this original as a reservation specially set apart for them." *Id.* at 162. A subsequent agreement ratified by Congress ceded most of this intermediate reservation leaving three reservations, one for the Blackfeet and the other two for "other Indians." Finally, in 1896, Congress ratified an agreement through which the Blackfeet reserved a portion of its remaining reservation and ceded the remainder. The Court, without an in-depth analysis, concluded that it was the reservation boundaries as determined by the 1896 Act that governed, and not the earlier executive orders, treaties, or statutes for purposes of determining whether Congress had authorized state taxation of oil and gas production.

The State characterizes the situation in *British-American Oil* as one in which "new reservations" were established. State Brf. at 38. As an initial matter, that characterization does not apply to Coeur d'Alene because *Idaho II* rejected the argument that Congress created a new reservation for the Coeur d'Alene after 1873. 533 U.S. at 269. Although *British-American Oil* references the last reservation in the series of historical events as relevant for its analysis of

taxation on the Blackfeet Reservation, the case does not stand for the larger principle upon which the State relies—that only the boundaries of the last reservation are relevant for analysis of purposes of the reservation.

British-American Oil has nothing to do with determining Reservation purposes, and no "last reservation doctrine" exists in Indian Law. *See e.g.* COHEN'S HANDBOOK (absence of any reference to a "last reservation doctrine"). Indeed, if such a doctrine existed and applied here meant that the State acquired title to submerged lands in the Coeur d'Alene Reservation, the doctrine should have been argued and considered by the Court in *Idaho II.* The State is precluded from relitigating that case in the context of this water adjudication. Finally, even if *British-American Oil* spawned a "last reservation" doctrine, it would not apply in this context, where the Court held on the merits that Congress never rejected the 1873 Reservation or its inclusion of waterways to provide for subsistence use.

D. Fishing, hunting, and gathering remained important to the Tribe not only in 1873, but throughout the years leading to Congressional ratification of the Reservation in 1891, and through present times.

The State repeats the assertion, rejected by *Idaho II*, that the Reservation was established in 1891 and that, by this time, fishing was not particularly important to the Tribe and would not have been a Reservation purpose. State Brf. at 71. Similarly, the State argues that, by 1891, the "parties did not feel the need to make any provision for hunting, gathering, or for cultural, spiritual or ceremonial needs" and, accordingly, the Coeur d'Alene Reservation was not established for the purpose of continuing subsistence uses. State Brf. at 66. The State's attempt to ignore the central role that subsistence practices historically played and continue to play in the Tribe's existence, as recognized by *Idaho II*, must be rejected.

It is undisputed that water has been essential to both the physical and cultural existence of the Tribe for millennia, with Lake Coeur d'Alene forming the heart of Tribal territory since time immemorial and its waters providing for fishing, hunting, and gathering. JSF ¶¶ 6-11, 16-25. Tribal leaders demanded an expansion of the 1867 Reservation boundaries to include lands along the Coeur d'Alene and St. Joe Rivers, noting the continued importance of traditional subsistence, such as hunting and fishing, to tribal members. JSF ¶¶ 50-52, 55-60, 65-68. In *Idaho II*, the Court noted the Tribe's continued dependence on waterways as of the 1873 Reservation creation for food, fiber, and transportation and expressly rejected the State's argument that the Tribe had converted to an agrarian society. JSF ¶ 54.

Contrary to the State's attempt to write the Tribe's fishing, hunting, and gathering out of existence as of 1891, State Brf. at 39-40, the record shows that Tribal members continued to rely on waterways for these activities through and beyond 1891. JSF ¶¶ 85-89; Smith 2016 Report at 30-34. For example, in July 1891, the Interior official designated the "Resident Farmer" at DeSmet complained about the difficulty of obtaining an "accurate" census of the Coeur d'Alene Tribe because many tribal members had "gone in to the mountains hunting and fishing which made it impossible to see them all." Smith 2016 Report at 31. In fact, Interior Department hearings held in 1910 detailed ongoing tribal uses of Lake Coeur d'Alene, Chatcolet Lake, Benewah Lake, and the St. Joe and Coeur d'Alene Rivers for fishing, hunting, camping, and transportation through the first decade of the twentieth century. JSF ¶ 86.

Expert reports thoroughly document the Tribe's reliance, from time immemorial through and beyond Reservation creation, on the waterways for fishing, hunting, gathering, trade, culture, and general survival. *See* JSF ¶¶ 5, 6, 8, 10, 11, 12, 13, 14, 37-39, 69, 71 (Tribe's overall reliance on waterways for multiple activities); 6, 8, 10, 13, 14, 16-18, 37-39, 46 (fishing); 6, 8, 10, 13, 14,

19-21, 37-39, 46 (hunting); 6, 8, 10, 13, 22-24, 37-39 (gathering); 10, 26 (trade); 85-89 (continuation of traditional activities after reservation creation); 94-96 (modern day efforts to protect and restore water resources); 97-98 (continued Tribal connection to water resource).

The State argues that a land cession at Harrison "several years after 1889" is evidence of Tribal abandonment of fishing. State Brf. at 73. The State again omits the extensive waterways with access to fisheries that are contained in the Reservation. Indeed, if the submerged lands and related waters that remain in the Reservation were so minimal, why did the State appeal all the way to the United States Supreme Court in seeking title to the submerged lands on the Reservation?

E. Even if the Reservation establishment date were 1891, neither the Federal Government nor the Tribe intended the Tribe to abandon subsistence use.

Even assuming, for argument's sake, that the Reservation were established in 1889 or 1891, *Idaho II* and the historical record do not support the State's contention that Congress unilaterally switched Reservation purposes to solely agriculture or that the Tribe agreed to such a change. State Brf. at 38. The State acknowledges that the *Idaho II* Court was well aware of the 1889 Tribal cession of northern lands in the Reservation and subsequent 1891 Act. State Brf. at 72. The Court had the same historical circumstances before it that the State advances now. Yet the Court denied the assertion that the 1889 events resulted in a Tribal and Federal abandonment of subsistence uses of waterways (that would have led to submerged lands passing to the State in 1890 upon statehood). The Tribe did not abandon subsistence use of waterways, such as fishing, hunting, and gathering, because it still retained a substantial body of waterways within the Reservation.

The State tries to sidestep the Supreme Court's holding in *Idaho II* by citing *Skokomish Indian Tribe v. United States*, 401 F.3d 979 (9th Cir. 2005), a case concerning a distinct

reservation, in support of its argument that fishing was not sufficiently important to constitute a Reservation purpose for Coeur d'Alene. State Brf. at 72 n.23. This is wrong for two reasons. First, Supreme Court precedent directly applicable to the Coeur d'Alene Reservation controls. Second, the State relies on language that the Ninth Circuit expressly deleted from its published decision. Specifically, the Ninth Circuit, in its amended decision, stated: "Part II Section B, labeled 'Reserved Water Rights Claim,' is deleted." *Skokomish Indian Tribe v. United States*, 2005 U.S. App. LEXIS 10188 (9th Cir. Wash. June 3, 2005). The State cannot rely on language that the Ninth Circuit panel ultimately declined to include in its final opinion.

The State encourages this Court to ignore *Idaho II*'s extensive and dispositive investigation and analysis of Reservation purposes and, instead, argues for reliance solely on the text of the 1891 Act. State Brf. at 40 (citing to the appropriation of money to "promote the progress, comfort, improvement, education, and civilization" of the Tribe). If only the 1891 Act were dispositive, *Idaho II* would not have needed to engage in an extensive analysis of the circumstances and history of Reservation creation. Moreover, the Ninth Circuit in *Walton I* summarized the process necessary to determine the Reservation purpose: "[t]o identify the purposes for which the Colville Reservation was created, we consider 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 circumstances." 647 F.2d at 47 (*citing United States v. Winans*, 198 U.S. 371, 381 (1905)). The State's focus solely on the text of the 1891 Act ignores the holding in *Idaho II* and fails to comply with well-established canons of construction.

Furthermore, the State argues that subsistence uses must not have been a Reservation purpose since there is not an *explicit* on-reservation fishing, hunting, or gathering right in the

1889 Agreement or 1891 Act. State Brf. at 66, 73. Such express language is not required, however, because it is well established that "on-reservation hunting, fishing, and gathering rights are implied from the establishment of a reservation for the exclusive use of a tribe, whether the reservation was set aside by executive order, statute, agreement, or treaty." COHEN'S HANDBOOK, § 18.03, at 1158-59 (*citing Menominee Tribe v. United States*, 391 U.S. 404, 406-407 (1968) (holding that "the language 'to be held as Indian lands are held' includes the right to fish and to hunt"); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 326, 343-344 (1983) (recognizing exclusive tribal rights to regulate hunting, fishing, and gathering activities on reservation established by executive orders)).

The State also seeks to rely on *United States v. Adair,* 723 F.2d 1394 (9th Cir. 1983), for its argument that an express right is necessary because there was an express fishing and gathering right in the Klamath Termination Act in that case. State Brf. at 66-67, 73. But an express fishing, hunting, or gathering right is not necessary for a reserved water right. In *Winters*, 207 U.S. at 565, the reservation was based on an agreement between the Tribes and the United States, ratified by Congress in 1888, that reserved a tract of land "as an Indian reservation as and for a permanent home and abiding place" for the Tribes. *Id.* The agreement did not mention water or water rights. *Id.* Similarly, in *Walton I*, the executive order setting aside lands was entirely silent regarding the purpose of the reservation or the particular activities that would use water thereon. 647 F.2d 42. Despite this silence, the Ninth Circuit analyzed the "circumstances surrounding its creation, and the history of the Indians for whom it was created" to determine that the implied water rights included water for both agriculture and fishing, two uses consistent with the general homeland purpose. *Id.* at 47-48. *Idaho II* undertook this analysis of circumstances surrounding the Coeur d'Alene Reservation creation, and the history of the

Indians for whom it was created, to find that subsistence use of waterways on the Reservation was so important to the Tribe that it defeated the State's title to submerged lands.

The State attempts to distinguish *Walton I's* finding of a water right to support fishing. The State admits that "the fishing rights of the resident tribes were implied by land ownership, rather than expressly reserved" but asserts that the water rights for the Colville Reservation relied on "the fact that the Reservation, which bordered the Columbia River for many miles, had been set apart primarily to provide the tribes access to traditional fishing locations on the River." State Brf. at 74, *citing Walton I*, 647 F.2d at 48. As discussed in the *United States' Memorandum in Support of Motion for Summary Judgment*, dated Oct. 20, 2016, p. 11 ("United States' Opening Memo"), there are close parallels between *Walton I* and Coeur d'Alene regarding water rights for fishing. In finding that a Reservation purpose was continued access to fishing, *Walton I* noted that the Colville Tribe traditionally fished and that fishing was of economic and religious importance. 647 F.2d at 48. Likewise, *Idaho II* found that the "resident fishery was a main staple of the Tribe's diet" and that "the Tribe's spiritual, religious and social life centered around the Lake and rivers." *Idaho II*, 95 F. Supp. 2d at 1100. Like *Walton I,* the Coeur d'Alene Reservation includes traditional fishing locations. JSF at ¶ 16-17. In both *Walton I* and the present case, a major impetus for setting aside a reservation was to avoid hostilities as non-Indians encroached on each Tribes' territory. *Walton I*, 647 F.2d at 44; *Idaho II*, 533 U.S. at 276. Similar to the Coeur d'Alene, the northern half of the Colville reservation was opened to homesteading. *Walton I*, 647 F.2d at 44. Further, the Colville Reservation was allotted in 1906 pursuant to the General Allotment Act. *Id.* Finally, at the time that their reservation was set aside, the Confederated Colville Tribes were "described as 'good farmers.'" *Id.* The State argues that the Coeur d'Alene 1889 cession of some northern lands distinguishes the present case from *Walton*

I, State Brf. at 75, but, in *Walton I*, 20 years after the 1872 Executive Order, the north half of the original Colville Reservation was restored to the public domain by Act of July 1, 1892 (27 Stat. 62). The reasoning in *Walton I* strongly supports a reserved water right for fishing for the Coeur d'Alene Reservation.

In support of its argument that subsistence practices must have been abandoned by the Tribe, the State cites Tribal agricultural endeavors in 1887 as well as the 1891 Congressional approval of funding to "promote the progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians." State Brf. at 40-41, *citing* 26 Stat. at 1031. While it is true that agriculture is one aspect of the homeland purpose of the Reservation, it is not the only purpose. *See* United States Opening Memo at 46. The State argues that *Adair* found the language "to promote the well-being of the Indians, advance them in civilization, and especially agriculture, and to secure their moral improvement and education" as establishing that an "essential purpose" of the reservation was the promotion of agriculture. State Brf. at 40, *citing Adair*, 723 F.2d at 1410. But *Adair* had "no difficulty" finding a reserved water right "not only for the purpose of supporting Klamath agriculture, but also for the purpose of maintaining the Tribe's treaty right to hunt and fish on reservation lands." *Adair*, 723 F.2d at 1410 (emphasis added). The State also seeks to distinguish *Adair* in arguing that agricultural prospects were better on the Coeur d'Alene Reservation than the Klamath Reservation. State Brf. at 68. But *Adair* does not rely on poor agricultural prospects to uphold a water right for fishing. *Adair* concluded that the Klamath Reservation reserved water for both agricultural purposes and traditional purposes such as hunting, fishing, and gathering. *Adair*, 723 F.2d at 1410. The court highlighted that the Supreme Court has never "require[d] us to choose between these activities or to identify a single essential

purpose which the parties to the 1864 Treaty intended the Klamath Reservation to serve." *Id.* (citations omitted).

The State asserts that "[n]ot once during the 1887 or 1889 negotiations did the Tribe express concern about loss of subsistence hunting and fishing on the ceded lands and waters." State Brf. at 43. That is false: The Tribe actually expressed great resistance to ceding the land and the record shows no indication of intent to deprive the Tribe of subsistence fishing, hunting, and gathering on the non-ceded lands. The State omits that the Tribe adamantly pushed for, and received a guarantee, in the March 26, 1887 Agreement, that the remaining Reservation lands, which included substantial waterways supporting subsistence uses, would be "held forever as Indian land and as homes for the Coeur d'Alene Indians." JSF ¶ 74. Tribal leaders informed the 1887 commission that "we wanted the land of our present reservation, provided we were to hold it forever; as had been promised." *Id.* Interior Department officials reported, in February, 1888, that "these Indians have all the original Indian rights in the soil they occupy." Ian Smith, *Historical Examination of the Purposes for the Creation of the Coeur d'Alene Indian Reservation*, p. 93, submitted to the U.S. Department of Justice by Historical Research Associates, Inc., Nov. 30, 2015 ("Smith 2015 Report") (Attached as Ex. 1 to Affidavit of Ian Smith, date October 18, 2016); *see also* USACDA00021564. Even after the Tribe's 1889 cession of some northern lands, the 1873 Reservation, as ratified by Congress in 1891, included access to waterways supporting hunting, gathering, and fisheries valued by the Tribe. JSF ¶¶ 101, 102. Fish that spend a portion of their life cycle in the Lake and that at a given time are within the Reservation, freely move to other areas in response to their biological needs. JSF ¶¶ 102, 104.

The Tribe's reluctance to cede lands combined with its insistence that it maintain access to its subsistence resources continued into the 1889 negotiations. For example, the non-

ratification of the 1887 Agreement remained a significant obstacle throughout the month-long negotiations held with the Coeur d'Alenes in August–September 1889. Smith 2015 Report at 98; *see also* USACDA00003948. At a council in August, 1889, Chief Seltice reiterated the importance of ratifying the 1887 Agreement, with its assurances that the Tribe would hold its lands forever, when he emphasized the significance of the earlier negotiations. Smith 2015 Report at 98. At the final 1889 council, Seltice indicated how difficult it was for tribal leaders to consent to the land sale, comparing it to "cutting my left arm off." JSF ¶ 79. In reporting the 1889 Agreement to the Secretary of the Interior, the Commissioner of Indian Affairs indicated that it required "much argument and entreaty" to secure the agreement, stating that tribal leaders "absolutely refused to entertain any proposition" for the sale of any lands, without the "express condition that the old [March 1887] agreement should be ratified and carried into effect." Smith 2015 Report at 101; *see also* USA-CDA00003948.

None of these communications indicate any intent by the Tribe or federal government to abandon subsistence uses of the considerable waterways remaining in the Reservation. Again, if the record showed this abandonment in 1887 and 1889, then *Idaho II* may well have resulted in a holding that submerged land title passed to the State upon 1890 statehood. But it did not.

II. FEDERAL WATER RIGHTS WERE RESERVED FOR THE COEUR D'ALENE TRIBE'S HOMELAND RESERVATION TO PROVIDE FOR TWO PURPOSES: 1) CONTINUE TRADITIONAL SUBSISTENCE ACTIVITIES; AND 2) PURSUE AGRICULTURE AND INDUSTRY.

The homeland purpose of the Coeur d'Alene Reservation provides a meaningful framework that effectively considers the intentions of the United States and Tribe in establishing the Reservation. The State, in contrast, proposes a primary-secondary purposes test with reserved rights based only on the primary purpose. Even if this approach, which arose in the analysis of non-Indian federal reservation, were applied to Indian reservations, the outcome of such a test in

this context would lead to the same outcome as the homeland analysis. That is because the Coeur d'Alene Reservation was established for two primary purposes: 1) continue fishing, hunting, gathering and domestic activities; and 2) develop modern activities, including agriculture and industry.

A. Federal law provides the homeland purpose as a framework to effectuate the historical intent of the parties.

The State contends that the homeland purpose is "too generic" and that the Court should apply the primary-secondary distinction outlined in *United States v. New Mexico*, 438 U.S. 696, 700 (1978) ("*New Mexico*"). *See* State's Brf. at 13-16. The State's argument misconstrues the role of the homeland purpose.[9]

The homeland purpose approach best characterizes how the federal courts have analyzed reserved water rights on an Indian Reservation. *Winters*, 207 U.S. at 565 (recognizing the Fort Belknap Reservation as providing "a permanent home and abiding place"); *Arizona I*, 373 U.S. at 599 (finding that waters from the Colorado River were "essential to the life of the Indian people" and necessary to make the reservations "livable"); *Walton I*, 647 F.2d at 47 (noting that "[t]he general purpose, to provide a home for the Indians, is a broad one and must be liberally

[9] The State contends that the *Winters* doctrine "does not establish any substantive rule of law," but simply provides a methodology to imply intent of parties to reserve water rights. State Brief at 10 (emphasis added). This argument is contrary to federal law and turns the implied nature of federal reserved water rights on its head. Intent of parties is relevant regarding purpose of the reservation; not water rights themselves. *Winters*, 207 U.S. at 567 ("all of the waters of the river are necessary for all those purposes and the purposes for which the reservation was created"); *Adair*, 723 F.2d at 1409-10 (analyzing the purposes of the Klamath Reservation to determine whether water rights were impliedly reserved). The basic tenet of the federal reserved water rights doctrine is that water rights will be implied to fulfill the purpose of the reservation even if not expressly discussed or negotiated. Indeed, the Act establishing the Ft. Belknap Reservation never mentioned water, yet the *Winters* Court concluded that water rights were impliedly reserved. 207 U.S. at 565. The State's argument attempts to improperly narrow the examination of historic intent to water rights when caselaw is clear that the inquiry applies to the purpose of reservation. Analysis of the general purpose of an Indian reservation is "a broad one that must be liberally construed." *Walton I*, 647 F.2d at 47. The State is simply wrong when it asserts that "[a]ctual, original intent to reserve water has always been a requirement of the *Winters* doctrine, starting with the decision of *Winters* itself." State Brief at 10. It is well-settled in caselaw that the court should examine the intent of the parties as to purpose of the reservation itself and then the necessary water rights are implied to fulfill that purpose, not the other way around.

construed"). The homeland purpose of an Indian reservation recognizes its unique status among federal reservations of land because, unlike a national park or a federal forest, Indian reservations were established for the special purpose of providing a tribe with a place to live that was somewhat sheltered from interactions with non-Indians. No other federal reservation must provide the necessary resources for all aspects of life for a group of people, ranging from opportunities for economic development to the exercise of cultural practices and daily subsistence.

Providing a homeland is the first step, but the analysis of the purposes of a reservation does not end there. The Arizona Supreme Court explained the homeland framework in *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 35 P.3d 68 (Ariz. 2001) ("*Gila V*"). As an initial matter, the *Gila V* court agreed with the United States Supreme Court that "the essential purpose of Indian reservations is to provide the Native American people with a 'permanent home and abiding place,' that is, a 'livable' environment." 35 P.3d at 74 (*quoting Winters*, 207 U.S. at 565 and *Arizona I*, 373 U.S. at 599). But *Gila V* did not stop there. The court continued by outlining factors to consider to determine the water rights necessary to meet the overall homeland purpose. First, the court conducted an analysis of the practicably irrigable acreage ("PIA") standard and concluded that it was relevant for quantifying an agricultural right, but was not the "exclusive quantification measure for determining water rights on Indian lands." *Gila V*, 35 P.3d at 79. In addition, the court listed a number of factors which should be part of the "fact-intensive inquiry that must be made on a reservation-by reservation basis" to determine the water rights necessary to fulfill the purpose as a homeland. *Id.* The court observed that the factors include tribal history and historical water use as well as modern plans for economic development on the reservation. *Id.* at 79-80. In sum, *Gila V*

demonstrates the importance of the overall homeland purpose as providing the framework under which multiple reservation purposes are considered. Applying such rationale in this case demonstrates that, to serve the overall homeland purpose, the Court should analyze the United States' and Tribe's intent as to the specific activities contemplated to make the Coeur d'Alene Reservation a homeland.

The State cites two cases—*Lummi* and *Big Horn*— in support of its assertion that the homeland purpose is "too generic." State's Brf. at 15-16 (*citing United States v. Washington*, 375 F.Supp. 2d 1050 (W.D.Wash. 2005) ("*Lummi*") and *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988) ("*Big Horn*"). The State's argument ignores the majority of federal cases on this subject as outlined above and in the United States' Opening Memo at 9-16 (citing additional cases in support of the homeland standard). Moreover, even the two cases cited do not support the State's conclusion.

As an initial matter, the *Lummi* decision was expressly vacated pursuant to a settlement agreement and, therefore, has no precedential effect. *United States ex rel Lummi Indian Nation v. Washington*, No. C01-0047Z, 2007 WL 4190400 (W.D. Wash. Nov. 20, 2007), *see also* State Brf. at 15, n. 7. Nonetheless, even if the Court were to consider the decision, it does not support rejection of the claims in this case. *Lummi* acknowledged the homeland language in *Winters* and *Walton I*, but concluded that the "[c]ourt cannot find a 'homeland' primary purpose and end its inquiry." *Lummi,* 375 F.Supp.2d at 1065. Instead, the *Lummi* court continued and applied the primary purposes test while expressly noting that "[t]here may be more than one primary purpose of a reservation." *Id.* at 1063 (citing *Adair*, 723 F.2d at 1410). The *Lummi* court rejected the State of Washington's argument that the sole purpose of the Lummi Reservation was agriculture, instead finding two primary purposes: agriculture and domestic use (as fishing was not put at

issue in the case).[10] *Id.* at 1064-65. Such a conclusion is consistent with finding two primary purposes for the Coeur d'Alene Reservation in this case: 1) traditional use for hunting, fishing, and gathering as well as domestic needs; and 2) agriculture and industry.

In a similar manner, *Big Horn* does not support the State's argument that the homeland purpose should be rejected in this case. Instead, *Big Horn* supports an inquiry into the history of each particular Tribe and documents related to the establishment of each unique Indian reservation. For example, the *Big Horn* findings were specific to the 1868 Second Treaty of Fort Bridger with the Shoshone and Bannock Indians that established the Wind River Indian Reservation. 753 P.2d at 83. When examining the purpose of the reservation, the district court concluded that *"[o]n the very face of the Treaty*, it is clear that its purpose was purely agricultural." *Id.* at 95 (emphasis added). The Wyoming Supreme Court cited several articles of the Treaty verbatim and relied on those particular provisions that specifically provided for agriculture. *Id.* at 95-97. The court continued by noting that the factual record in that case did not indicate "a dependency upon fishing for a livelihood nor a traditional lifestyle involving fishing." *Id.* at 98. In other words, the *Big Horn* court acknowledged that more than one purpose could exist for an Indian reservation, but that only one purpose existed for the Wind River Indian Reservation.

Moreover, to the extent that *Big Horn* stands for the rejection of the general homeland purpose of an Indian reservation, it is contrary to "the majority of courts." COHEN'S HANDBOOK, § 19.03[4], at 1220. While it is certainly true that "the general federal policy of confining tribes on reservations included the creation of agrarian societies," it is equally true that "the Indians

[10] The *Lummi* case did not include an analysis of fishing rights by the Lummi Nation because the case was narrow in scope and limited to consideration of the federal reserved water rights to the groundwater below the Lummi Reservation only. "Fishing rights are not at issue in the present case because the Lummi Nation concedes that fishing necessarily takes place in surface water, not groundwater." 375 F. Supp.2d at 1076.

certainly contemplated that the reservations would serve as their homelands; most tribes ceded vast tracts of aboriginal territory in exchange for federal promises of protection and permanency on the reservation." *Id.* For these reasons, "more is encompassed within the homeland purpose than merely transforming the tribes into agrarian societies." *Id.*

B. The primary-secondary purposes test, if applied here, leads to the same outcome as the homeland purpose analysis because the Coeur d'Alene Reservation was established to fulfill two primary purposes.

Instead of the homeland purpose, the State asserts that the Court should apply the primary-secondary purposes distinction addressed in *New Mexico*, 438 U.S. at 700. *See* State Brf. at 13. The State's argument fails to acknowledge the fundamental differences between Indian reservations and other federal reservations. The *New Mexico* Court considered the water rights for a national forest and limited federal reserved water rights in that context to what it characterized as the primary purposes of the Forest Service Organic Act. *New Mexico*, 438 U.S. at 700. The differences between Indian reservations and other federal reservations demonstrates, however, that the primary-secondary distinction should not apply in the Indian context. The fundamental difference is that Indian reservations were set aside as homelands for tribes to achieve the goal of tribal self-sufficiency, whereas Congress's intent with respect to other federal reservations varies widely, but through such reservations Congress generally sought to achieve more narrow federal goals, such as protection of natural resources. *Compare Arizona I*, 373 U.S. at 600-01 (Indian reservations), *with New Mexico*, 438 U.S. at 700 (national forest). The United States acted as trustee for Indian tribes in the first instance, rather than to serve more limited sovereign interests. COHEN'S HANDBOOK § 19.03[4], at 1217-18.

Again, the Arizona Supreme Court's analysis in *Gila V* is instructive. In considering "the question of whether the primary-secondary purpose test applies to Indian reservations," the *Gila*

V court concluded that "the significant differences between Indian and non-Indian reservations preclude application of the test to the former." 35 P.3d at 76-77. The court explained that "while the purpose for which the federal government reserves other types of lands may be strictly construed, the purposes of Indian reservations are necessarily entitled to broader interpretation if the goal of Indian self-sufficiency is to be attained." *Id.* at 77 (*quoting* W. Canby, AMERICAN INDIAN LAW, 245-46 (1981)).

Even if the Court were to apply the primary-secondary purposes analysis in this case, however, it would reach the same conclusion as the homeland analysis because an Indian reservation can have more than one primary purpose. In *Walton I*, the Ninth Circuit found that the Colville Reservation was established to serve two purposes: 1) maintenance of the tribes' "agrarian society," and 2) provision for the tribes to continue traditional fishing activities that were of "economic and religious importance to them." 647 F.2d at 47-48. The *Walton I* court reached this conclusion of dual-purposes in the context of recognizing the overall, broad homeland purpose that must be "liberally construed." *Id.* at 47.[11] In a similar manner, the Ninth Circuit again found dual-purposes for the Klamath Reservation to continue subsistence hunting, fishing and gathering while also providing for agricultural development. *Adair*, 723 F.2d at 1410. The *Adair* court observed that *New Mexico* did not require a "single essential purpose" but relied on *Walton I* to confirm that Indian reservations may have multiple primary purposes. *Id.* Such multiple purposes are consistent with the overall homeland purpose. Moreover, these cases demonstrate that application of the primary-secondary purposes test to the Coeur d'Alene

[11] It bears repeating that the court reached its dual-purpose conclusion based on a single paragraph executive order that did not mention water, fishing or agriculture. *See Adair*, 723 F.2d at 1410 (noting that the *Walton I* court "found an implied reservation of water to support both of these activities . . . in a one-paragraph Executive Order." The State's insinuation that the 1873 Coeur d'Alene's Executive Order's silence regarding fishing should somehow support its argument that fishing was not a purpose of the Reservation is directly contrary to the implied-nature of federal reserved water rights and must be rejected. *See* State's Brief at 4-5 (noting "no express reservation to fish").

Reservation would result in a dual-purposes conclusion that the Reservation was established to provide for both traditional subsistence practices and agricultural uses.

C. The State's contention that agriculture was the sole and primary purpose of the Reservation must be rejected.

The crux of the State's argument is that the Coeur d'Alene Reservation had only one primary purpose—agriculture. Accordingly, the State asserts that any claims based on traditional subsistence activities, such as fishing, hunting, and gathering, must be denied. State Brf. at 65-68 (wetlands and springs) and State Brf. at 71-75 (instream flows). The State's contention of a single, agriculture purpose must be rejected because the Reservation was established in 1873 (*see* Sec. I above) for the purpose of ensuring continuation of both subsistence activities as well as agriculture and industry.

As an initial matter, *Idaho II* rejected the State's argument to limit the Reservation purpose to agriculture. Moreover, the courts have rejected similar arguments by other states in similar cases. For example, the *Gila V* court aptly observed that "[l]imiting an Indian Reservation's purpose to agriculture, as the PIA standard implicitly does, assumes that the Indian peoples will not enjoy the same style of evolutions as other people, nor are they to have the benefits of modern civilization." 35 P.2d at 76 (*quoting Big Horn*, 753 P.2d at 119 (Thomas, J., dissenting)). The *Gila V* court continued its analysis by stating "that the homeland concept assumes that the homeland will not be a static place frozen in an instant of time but that the homeland will evolve and will be used in different ways as the Indian society develops." *Id.*, *see also Adair*, 723 F.2d at 1409 (Ninth Circuit rejecting the State of Oregon's argument that the purpose of the Klamath Reservation was limited to agriculture).

III. NON-CONSUMPTIVE WATER RIGHTS NECESSARY TO SUSTAIN TRADITIONAL SUBSISTENCE PRACTICES ON THE RESERVATION WERE RESERVED REGARDLESS OF UNDERLYING LAND OWNERSHIP.

Since the Coeur d'Alene Reservation serves the purpose of sustaining subsistence hunting, fishing, and gathering rights for the Tribe, water rights for instream flows to sustain the fishery and springs and wetlands to sustain plants and animals for Tribal harvest were reserved. The State asserts that such water rights can only apply on trust lands. State Brf. at 77-79. The State's argument twists the logic of the federal reserved rights doctrine from a requirement that the water be necessary to fulfill the purpose of the reservation into a requirement that the Tribe or United States own the lands over which the water flows. The State's argument is contrary to law because non-consumptive water rights to sustain the fish, plant, and animal resources necessary to fulfill the subsistence purpose of the Reservation do not require ownership of all underlying lands.[12]

An important clarification regarding land ownership must be made—the instream flow water rights that cross private property provide important habitat but do not equate to Tribal harvest rights on private lands. The State cites *Blake v. Arnett*, 663 F.2d 906, 911 (9th Cir. 1981) for the proposition that Tribal fishing rights do not continue past allotment and transfer of lands. State Brf. at 69-70. But the instream flow water right claims on behalf of the Coeur d'Alene Tribe do not rely on rights to fish on private lands. Rather, the instream flow rights support fish populations harvested by the Tribe on Tribal lands. Fish need water throughout the stream, not

[12] The priority date of these water rights is time immemorial, regardless of the land ownership over which they flow, because the subsistence rights support continuation of the Tribe's aboriginal practices. Therefore, to the extent that the State argues that the priority date of these water rights equates with a date of reacquisition of underlying lands, such an assertion is incorrect. *See* State Brf. at 51; *see also* Sec. IV below regarding reacquisition dates of priority for irrigation rights.

just on Tribal lands. JSF ¶¶ 101-106. The scope and location of harvest rights are not at issue in this case.

The State contradicts federal reserved rights caselaw, Idaho statute, and basic prior appropriations law in asserting that the Tribe's instream water rights are limited to flow over trust lands. The State argues that the Tribe "has no right to require the maintenance of instream flows or fish habitat on those waterways where the underlying beds and banks are no longer held in trust for the Tribe." State Brf. at 79. The State reasons that "implied water rights are incidents of title: if title to reservation lands is conveyed to nonmembers without an express reservation of the water right, then the water right is either conveyed with the lands or abrogated." State Brf. at 77.[13]

A. The State's argument is contrary to federal law, which does not require ownership of underlying lands to support instream flow water rights necessary for subsistence resources such as fish, plants, and animals.

The State cites to *Anderson* as support for its proposition that implied rights cannot flow over non-trust lands. State Brf. at 77. That reliance is misplaced. The federal district court in *Anderson* determined "that one of the purposes for creating the Spokane Indian Reservation was to insure the Spokane Indians access to fishing areas and to fish for food." *United States v. Anderson*, 591 F. Supp. 1, 5 (E.D. Wash. 1982), *rev'd on other grounds*, *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984). The *Anderson* court awarded an instream flow water right to maintain the fishery in support of this reservation purpose. 591 F. Supp. at 5. This

[13] The State makes a similar argument for lake levels, except that the State refuses to even acknowledge Tribal water rights on the Lake within the Reservation where the Tribe does own the submerged lands. The State argues that there can be no *in situ* right to water without the Tribe's owning the *entirety* of Lake Coeur d'Alene and all hydroelectric facilities. State Brf. at 55. In fact, the State's assertion that "implied water rights are incidents of title," State Brf. at 77, supports a reserved right to lake levels at least above Tribal submerged lands. The discussion of the federal reserved water right in Lake Coeur d'Alene is addressed in Section V below.

reserved right was affirmed on a reservation where non-Indians own fee lands, which demonstrates that federal instream flow rights exist on a reservation regardless of whether they flow over non-Indian fee lands. *Anderson*, 736 F.2d at 1391 ("The Spokane Indian Reservation is not exclusively owned and resided upon by Indians."). In fact, the court noted that "much of the reservation land with state water rights is immediately adjacent to the creek" in which the reserved rights were confirmed. *Id.* at 1366. Such a finding confirms that federal reserved instream flows exist despite flowing over or adjacent to non-Indian fee lands. The State's reliance on *Anderson*, State Brf. at 77, is also misplaced because the cited holding concerned the water right of a private homesteader and not the Tribe's reserved rights. 736 F.2d at 1363 ("a homesteader is not entitled to rely on the *Winters* doctrine").

The State conflates the legal concept of appurtenance with the physical proximity concept of adjacency in arguing that reserved waters must be physically attached to a real property right. State Brf. at 21.[14] As a leading treatise states, "[r]eserved waters therefore need not be physically connected to reservation lands, but extend to all waters reasonably necessary to fulfill the reservation's purpose." 2 WATERS AND WATER RIGHTS § 37.02(d) (Amy K. Kelley, ed. 3rd ed. LexisNexis/Matthew Bender 2016). The State argues that commentators have stated that water rights are limited to waters within or bordering a reservation. State Brf. at 20. In fact, commentators conclude that "the fact that a reservation was detached from water sources does not prove an absence of intent to reserve waters some distance away." David H. Getches, WATER LAW IN A NUTSHELL 324 (3rd ed. 1997); *see also* Sec. VI.A below explaining that off-reservation water rights are "appurtenant" to the reservation if necessary to fulfill its purpose.

[14] The North Idaho Water Rights Group argues the same. NIWRG Brf. at 5.

The case law regarding federal reserved water rights turns on an analysis of the benefits received by the reservation, not on the physical location of the waterway. Thus, the cases examine the purposes of the reservation, and whether water is necessary to fulfill those purposes. *See, e.g., Arizona I*, 373 U.S. at 577 (noting that "water from the river would be essential to the life of the Indian people and the animals they hunted and the crops they raised"); *Adair*, 723 F.2d at 1409 (finding an implied water rights reservation because "one of the 'very purposes' of establishing the Klamath Reservation was to secure to the Tribe a continuation of its hunting and fishing lifestyle"). The Ninth Circuit in *Adair* noted that "'[w]hile the purpose for which the federal government reserves other types of lands may be strictly construed, the purposes of Indian reservations are necessarily entitled to broader interpretation if the goal of Indian self-sufficiency is to be obtained.'" 723 F.2d at 1408, n.13 *quoting* W. Canby, AMERICAN INDIAN LAW 245-246 (1981) (other citations omitted).

The *Adair* court also concluded that federal reserved water rights may include instream flows to support subsistence uses regardless of whether instream flows are authorized by state law. 723 F.2d at 1411, 1411 n.19 ("the entitlement consists of the right to prevent other appropriators from depleting the streams waters below a protected level in any area where the non-consumptive right applies" . . . "The fact that [these] water rights . . . are not generally recognized under state prior appropriations law is not controlling as federal law provides an unequivocal source of such rights."). In *Adair*, the court noted that "Supreme Court decisions in *New Mexico* and *Cappaert* establish beyond any doubt that the *Winters* doctrine is a source of rights to a streamflow." 723 F.2d at 1411.

In addition to contradicting federal law, the State's argument that the Tribe must own all of the land underlying a stream or lake in order to hold any instream water right advances the

very riparian theory that the State so strenuously rejects elsewhere where it argues that the Desert Lands Act "reserved all waters on the public domain for private appropriation" and *thus severed that water from the land.* State Brf. at 33.[15] While the Desert Lands Act provided that, at the sufferance of the United States, private rights could be established in waters on the public domain, the federal government withdrew its consent to the extent those waters were needed to fulfill a reservation purpose. 2 WATERS AND WATER RIGHTS § 37.01(a).

Finally, it bears repeating that *Idaho II* expressly noted the importance of retaining water flows for the Reservation and explained that "the 1873 agreement guarantees 'that the water running into said reservation shall not be turned from their natural channel where they enter said reservation.'" 95 F. Supp. 2d at 1108. The State argues that the July 28, 1873 Agreement was never ratified so it has no bearing on instream flows. State Brf. at 74, n. 24. But as *Idaho II* noted, "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" and a "purpose of the 1873 agreement was to provide the Tribe with a reservation that granted tribal members exclusive use of the water resource." 95 F. Supp. 2d at 1109 (citations omitted). Thus, the 1873 Agreement provides important context for Reservation purposes to maintain water resources related to subsistence practices.

The State argues that the 1873 Agreement water flow provision does not pertain to instream flows for fish but, instead, preserves public rights of navigation. State Brf. at 74, n. 24. The State then points to several treaties that include public navigation rights over reservations. *Id.* The State's argument demonstrates, in fact, that the 1873 Agreement could have readily used the term "navigation" if that were the intent concerning preserving water flows. Since the intent

[15] The State's Desert Lands Act arguments are addressed in Section VI.C below.

of the 1873 Agreement was to honor the Tribe's demand for fishing grounds, the logical interpretation of the water flow provision is to keep water in the streams for fish. The State argues that the water flow provision actually modifies earlier language concerning highways and thus must pertain to navigation. It is illogical to conclude that a sentence about routes, roads, and highways actually concerns water navigation without any discussion of navigation or ship traffic. The State joins the water flow provision with the highway provision into one sentence. But they are separate sentences and have separate purposes. *See* 1873 Agreement at USA-CDA00021490 (four lines up from "2nd" on original handwritten version (barely legible)); Attachment C is a translation of the 1873 Agreement provided herewith to illustrate the separate sentences (Vine Deloria, DOCUMENTS OF AMERICAN INDIAN DIPLOMACY, Vol. 2, at 1396-97 (1999)).

B. The State's argument also contradicts Idaho law and general principles of the prior appropriation doctrine.

By insisting that instream flow rights are limited only to lands owned by the United States and Tribe, the State also contradicts Idaho law which long ago adopted the prior appropriation system in which private water rights are obtained by beneficial use rather than ownership of underlying lands. Idaho Code § 42-101 (providing for "appropriation and allotment to those diverting the same therefrom for any beneficial purpose"); *Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho 484, 491 (Idaho 1909) ("A riparian proprietor in the state of Idaho has no right in or claim to the waters of a stream flowing by or through his lands that he can successfully assert as being prior or superior to the rights and claims of one who has appropriated or diverted the water of the stream and is applying it to a beneficial use. To this extent, therefore, the common-law doctrine of riparian rights is in conflict with the constitution and statutes of this state and has been abrogated thereby."). Under Idaho's system, a junior water right holder upstream of a senior user has no authority, by virtue of land ownership, to stop the water flowing

over his land to satisfy the downstream senior right. Similarly, underlying private land ownership provides no basis to defeat an instream water right.

Idaho law expressly recognizes the value and legality of maintaining instream flows, including lake levels, regardless of underlying land ownership. Idaho Code § 42-1501 ("the public health, safety and welfare require that the streams of this state and their environments be protected against loss of water supply to preserve the minimum stream flows required for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality."); Idaho Code § 42-1503 (applying streamflow statute to "unappropriated waters of *any* stream") (emphasis added); *Id.* (including preservation of "lake levels"). The fact that a stream crosses private land does not defeat the Tribe's water right any more than it would defeat the State's water right in the same types of water bodies.

The State cites the *Big Horn* adjudication for the proposition that reserved water rights are extinguished when Tribal land is conveyed. State Brf. at 77. The *Big Horn* holding was that an irrigation water right was no longer needed for agricultural lands conveyed out of Tribal ownership. *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 899 P.2d 848, 854 (Wyo. 1995) ("*Big Horn II*") ("Treaty of Ft. Bridger impliedly reserved water for the Wind River Indian Reservation and for the Tribes and the Indian allottees to pursue agriculture…When the Tribes ceded their land to the United States for sale, the reserved water right disappeared because the purpose for which it was recognized no longer pertained."). In fact, the PIA claims in the present case only concern lands still in Tribal ownership. But this is distinguishable from instream flows necessary to support fish with a migratory life cycle requiring water in streams flowing over different land ownerships. Instream flows continue to support Reservation lands held in trust for the Tribe by supporting fishing on those Tribal lands.

JSF ¶¶101-106. Westslope Cutthroat Trout and Bull Trout, which are the focus of the Instream Flow Claims, exhibit an adfluvial life history strategy that depends on a combination of lake and riverine habitats within and external to the 1891 boundaries of the Reservation. JSF ¶ 101.

The State cites *Adair* for the proposition that "water rights must be explicitly reserved in order to survive the alienation of reservation lands to nonmembers." State Brf. at 78. In *Adair*, Congress terminated the original Klamath Reservation by Congressional Act. 723 F.2d at 1398. The Court noted that the 1864 Treaty with the Klamath Tribe reserved to the Tribe the exclusive right to hunt, fish, and gather on its reservation and that this right survived the Klamath Termination Act. *Id.* at 1408. While the Klamath Termination Act expressly disclaimed any abrogation of water rights, *id.* at 1412, *Adair* does not hold that in all other cases water rights must be explicitly reserved to survive alienation of land.[16] In fact, *Adair* noted that explicit treaty language is not required to reserve water rights and observed that the *Walton I* court "discovered the purposes of the reservation and implied water rights" from a one paragraph Executive Order, "a much less explicit text than that provided by the 1864 Klamath Treaty." *Adair*, 723 F.2d at 1410. Moreover, *Adair* recites the longstanding rule that Tribal rights, like those inherent in the 1873 Reservation, are not abrogated by implication. *Id.* at 1412, *citing Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968) (it is "difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation by destroying property rights conferred by treaty.").

Idaho II documents the importance of the Coeur d'Alene Tribe's subsistence practices, such as fishing. Fish populations targeted by the Tribal instream flow claims require water flows throughout the claimed stream reaches, and not just on Tribal lands. JSF ¶¶101-106. It would

[16] Unlike the Klamath Tribes, the Coeur d'Alene Tribe did not face termination and, thus, did not need Congress to reserve expressly any rights that might otherwise be alienated like the Klamath rights.

defeat the fishing purposes for instream flow water rights to intermittently begin and end only on Tribal lands. The State's argument thus contradicts federal reserved rights caselaw, Idaho statute, and basic prior appropriations law in attempting to hold the Tribe to a requirement that its instream water rights flow solely over trust lands.

C. The federal reserved water right to sustain subsistence resources applies to trust allotments.

In its trustee capacity, the United States asserts claims for maintenance of springs and wetlands to sustain plants and animals for harvest on all trust lands within the Reservation, including trust allotments. The State argues that even if the Court grants water rights for the maintenance of springs, seeps, and wetlands, "such water rights could not be decreed for places of use that fall within allotted lands." State Brf. at 69. The argument is premised on the State's allegation that the Tribe has limited authority over allotments. *Id.* at 70 (""the [allotted] lands are no longer reserved for the Tribe's use, but rather for the sole use and benefit of the allottee."). The argument fails for the same reason that it fails as to private lands—it ignores the reservation of non-consumptive water rights throughout the Reservation to serve the purpose of sustaining subsistence resources. Moreover, in the context of trust allotments, there are additional flaws in the State's argument: 1) it dismisses the role of the United States as trustee for trust allotments within the boundary of the Reservation; and 2) it ignores the body of law confirming that allotments are entitled to a share of the overall tribal water right so are, therefore, still part of the Reservation for purposes of water rights adjudications.

As an initial matter, it is necessary to provide a general overview of federal law regarding allotments. Allotment is a term of art in Indian law which describes a parcel of land owned by the United States in trust for an individual Indian ("trust" allotment). COHEN'S HANDBOOK, §

16.03[1], at 1071 (*citing United States v. Clarke*, 445 U.S. 253 (1980)).[17] Under federal law, trust allotments are subject to restraints on encumbrance and alienation as well as exempt from taxation. *United States v. Dann*, 873 F.2d 1189, 1199 (9th Cir. 1989). For the most part, allotments arose under the General Allotment Act, 24 Stat. 388 (1887) (also known as the "Dawes Act"), or a reservation-specific statute, in which Congress authorized the allotment in severalty of lands within many Indian reservations. The policy of allotment was ultimately viewed as a failure and officially ended in 1934 with the passage of the Indian Reorganization Act ("IRA"). 25 U.S.C. § § 461-465. The IRA prohibited further allotment of tribal lands and provided that trust allotments remained in trust until Congress provided otherwise. *Id.* at §§ 461-462.

Contrary to the State's argument that allotments are wholly separate from the larger reservation, trust allotments within an Indian reservation are entitled to a portion of the tribe's agricultural water rights. 25 U.S.C. § 381; *United States v. Powers*, 305 U.S. 527, 533 (1939), *see* Sec. IV.C below discussing the agricultural water right for allotments. Allotments are not completely divorced from the Reservation as the State asserts. In fact, allotments constitute Indian country, over which the United States and Tribes exercise governmental authority. *See* 18 U.S.C. 1151; *Alaska v. Native Village of Venetie,* 522 U.S. 520, 527 (1998) ("Although [Indian country] by its terms relates only to federal criminal jurisdiction, we have recognized that it also generally applies to questions of [tribal] civil jurisdiction such as the one at issue here."). Allotments, therefore, remain part of the Reservation and benefit from a portion of the overall Tribal water right. As the trust owner of allotments, the United States has the authority to assert

[17] Allotments can also be held in restricted fee or in fee by the tribal member. *See* COHEN'S HANDBOOK, § 16.03[1]. However, only "trust allotments" are addressed in this brief because those are the only type of allotments on which the United States asserts water rights in this case.

water rights on those allotments and typically does so in the context of its overall claim for a reservation. For the same reasons outlined above for private lands, the Reservation-wide instream flow water right applies to allotments. Such claims do not include the rights of Tribal members to access allotted lands to exercise hunting or fishing rights, but only seeks to ensure that the habitat is available to sustain the overall subsistence purpose of the Reservation.

IV. THE HOMELAND PURPOSE REQUIRES WATER FOR MODERN INDUSTRIAL, COMMERCIAL, AND AGRICULTURAL ACTIVITIES IN ORDER TO MEET THE GOAL OF ECONOMIC SELF-SUFFICIENCY. THE TRIBE IS NOT LIMITED TO THE TECHNOLOGY AVAILABLE IN THE LATE 19TH CENTURY.

The State asserts a number of arguments that improperly seek to limit the water rights for agriculture, as well as domestic, commercial, municipal, and industrial ("DCMI") uses on the Reservation. For example, while the State concedes that one purpose of the Reservation is for agriculture, it contends that the PIA methodology may not apply here because dry land farming allegedly might provide a moderate living for the Tribe.[18] In an effort to further limit the irrigation right, the State argues that certain reacquired lands should have a later priority date than the date that the Reservation was established. State Brf. at 53-54. Also in the context of the tribal irrigation rights, *pro se* John McFaddin raises issues related to the treatment of trust allotments within the Reservation. Another theory espoused by the State is that any industrial water uses by the Tribe are limited to those types of industrial uses contemplated in 1891. Finally, the State seeks to fold domestic water use into the overall agricultural quantification.

[18] The State objects to the United States' "overlapping" claims for PIA and wetlands maintenance in two instances. State Brf. at 70-71. As noted by the State, the United States' claims expressly disclaim any "double claim" to the water but instead assert separate justifications for the same water. For the reasons explained in Sec. II, the Tribe is entitled to water rights to serve both the agricultural and subsistence purposes of the Reservation, thus, the water right could be decreed for both purposes as long as it is limited to the single amount of water claimed.

Each of these assertions must be rejected as contrary to legal precedent and the overall federal and tribal goal of economic self-sufficiency for the Reservation.

A. The moderate living doctrine does not apply to the PIA analysis.

The State asserts a novel argument that the "moderate living" analysis relied on in *Passenger Fishing Vessel*, 443 U.S. at 686, in the context of fishing rights protected in a specific set of treaties, should apply to limit PIA. Such a limitation has never been applied to PIA claims, is contrary to the reasoning underlying both the PIA standard and the moderate living analysis, and should not be applied here. The State's attempt to limit agriculture to dry land farming of low value crops is contrary to the federal goal of Indian economic self-sufficiency.

The PIA standard was established to provide a clear quantification method for the agricultural purpose of an Indian reservation with a goal of providing a consistent methodology resulting in a specific water quantity. Addressing Indian reservations in the arid Southwest that relied heavily on agricultural uses, the *Arizona I* Court concluded "that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage." 373 U.S. at 601. The Court continued by confirming the "various acreages of irrigable land which the Master found to be on the different reservations." *Id.* Notably, the Court did not apply any additional limitations, such as a moderate living ceiling, to its analysis. The PIA quantification method is straightforward—"a tribe must demonstrate that the land is capable of sustained irrigation based on arability and engineering feasibility, and that it is capable of irrigation at a reasonable cost." COHEN'S HANDBOOK, § 19.03[5][b], at 1222 (*citing State ex rel. Martinez v. Lewis*, 861 P.2d 235, 247 (N.M. Ct. App. 1993); *Big Horn*, 753 P.2d at 101-105). Since *Arizona I*, the PIA methodology has been applied on several occasions. *Id.* None of those cases included a moderate living limitation or any other additional factors that might limit the applicability of

the general PIA analysis of acreage within the reservation. On the contrary, the PIA analysis has been summarized simply as "a two-step process" wherein "[f]irst, it must be shown that crops can be grown on the land" and "[s]econd, the economic feasibility of irrigation must be demonstrated." *Gila V*, 35 P.3d at 77-78. Adding any additional steps, such as a moderate living analysis or limitation to irrigation techniques available in the late 1800s (*see* State Brf. at 36), would be contrary to the very cases which established PIA as a standard to measure an agricultural water right.

In contrast, the moderate living concept was established in the context of interpretation of a shared treaty fishing right to provide a "ceiling" on the "Indians' apportionment to prevent their needs from exhausting the entire resource and thereby frustrating the treaty right of 'all [other] citizens of the Territory.'" *Passenger Fishing Vessel*, 443 U.S. at 686. The Court established a two-step process to determine allocation of the fish resource. First, the Court determined that the Tribes were entitled to up to 50% of the fish resource to give effect to the "in common" nature of the off-reservation fishing right established in the Stevens Treaties. *Id.* at 686-87. Second, the Court noted that the 50% tribal share could be reduced "upon proper submissions to the District Court" if "changing circumstances" determine that a reduction in share would still "provide the Indians with a livelihood—that is to say, a moderate living." *Id.*, *see also Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 932 (8th Cir. 1997) (recognition by the Eighth Circuit that the *Passenger Fishing Vessel* Court applied the moderate living analysis after first conducting an apportionment of a natural resources between treaty and non-treaty users of the resources) ("*Mille Lacs*"). Examples of changed circumstances provided by the Court were if "a tribe should dwindle to just a few members, or if it should find other sources of support that lead it to abandon its fisheries"—circumstances the Court found "could

not reasonably require an allotment of a large number of fish." *Passenger Fishing Vessel,* 443 U.S. at 687.

This review of the moderate living standard in its proper context demonstrates two reasons why it should not apply to the PIA standard. First, the moderate living ceiling has been applied in the context of managing harvest of a fishery resource shared by tribes and non-Indians generally off-reservation rather than an agricultural use within a reservation boundary. *Passenger Fishing Vessel,* 443 U.S. at 686-87; *see also United States v Washington*, 157 F.3d 630, 651-52 (9th Cir. 1998) (Shellfish sub-proceeding) (examining the moderate living standard after establishing the treaty share of shellfish available for harvest). This distinction is important because it demonstrates that the ultimate purpose of the moderate living limitation is to ensure that the shared nature of the off-reservation fishery is preserved for non-Indian fishermen—a concern that is absent in the on-reservation agricultural context. Moreover, the notion of shared water rights, which a moderate living standard seeks to incorporate, is foreign to the law of water in the Idaho and most of the western United States, which is premised on prior appropriation. In such a system, the senior water right holder is entitled to all of his or her rights before a more junior right-holder receives any water.

Second, the *Passenger Fishing Vessel* Court referenced *Arizona I* as an example of a case that quantified the necessary amount of the resource to provide the Indians with a livelihood. 443 U.S. at 686. The Court did not assert that an additional moderate living step should be added to the PIA analysis. *Id.* Rather, it referred to the PIA analysis as a quantification that inherently meets the moderate living standard by simply determining whether lands are capable of sustained irrigation at a reasonable cost. COHEN'S HANDBOOK, § 19.03[5][b], at 1222 (*citing State ex rel. Martinez v. Lewis*, 861 P.2d 235, 247 (N.M. Ct. App. 1993); *Big Horn*, 753 P.2d at 101-105).

The State argues that "where sustainable agriculture is possible without irrigation, and irrigation would simply enable the growing of higher value crops," State Brf. at 44, that "reserved water right claims for irrigation should be denied if the Tribe can earn a 'moderate living' by raising basic grain or other crops on the claimed places of use on a long-term sustainable basis without irrigation." *Id.* at 45. This argument amounts to asserting that the Tribe should be limited to low-value grain crops rather than allowed to develop its agricultural economy with high-value crops that require irrigation. This argument fails because such a "profitability" test is not part of the PIA analysis, nor could the moderate living analysis be used to argue that it should be inserted as a step in the PIA analysis. *See, e.g.*, *Passenger Fishing Vessel*, 443 U.S. at 686-87 (the "changed circumstances" referenced by the Court included dramatic changes in tribal population or lack of reliance on fish, not whether the tribe's economic development or profitability should be limited to low-value crops). Indeed, the State's argument runs counter to the federal policy to promote economic self-sufficiency on Indian reservations by condemning the Coeur d'Alene Tribe to limited agricultural development based on low-value crops that presently can be raised through dry-land farming (but perhaps not under future changing climactic conditions).

For all of these reasons, the Court should deny the State's request to formulate a new PIA methodology to include a moderate living analysis.

B. The priority date of the Tribe's PIA and DCMI water rights should be the date that the Reservation was established rather than later dates based on reacquisition of certain lands.

For DCMI and agricultural water rights, the United States asserts an 1873 date-of-reservation priority date. The State agrees with the date-of-reservation priority (though asserts that such a date is 1891) for these categories of water rights with two exceptions. The State

argues that water rights for use on the following two categories of lands have priority dates that correspond with the date that the Tribe and/or United States reacquired the lands: 1) reacquired allotments that were sold to non-Indians (though the State concedes that any water rights that were continuously used by the non-Indian owner would also have a date-of-reservation priority date); and 2) reacquired homestead lands. State Brf. at 53-54. The State relies on *Anderson* for its argument. *Id.*, *citing* 736 F.2d at 1362-63. The Wyoming Supreme Court's approach to reacquired lands in *Big Horn* provides a simpler and analytically consistent approach, however, because it avoids a parcel-by-parcel analysis that could result in a patchwork of priority dates in favor of recognizing that reacquired lands were historically part of the reservation and, thus, should be treated in a manner that serves the overall purposes of the reservation once they are reacquired by the Tribe. 753 P.2d at 114.[19]

The *Big Horn* Court analyzed the priority date of reacquired lands and reasoned that "[b]ecause all the reacquired lands on the ceded portion of the reservation are reservation lands, . . . , the same reserved water rights apply." *Id.* In other words, the Court found that the Tribes regained the full reserved water rights that were originally appurtenant to the reservation lands that had left Indian ownership but were eventually reacquired. *See* COHEN'S HANDBOOK, § 19.03[8][c], at 1234 (*citing Big Horn*, 753 F.2d at 114).

Admittedly, the *Anderson* court took a different approach to reacquired lands. The primary difference applies to reacquired homesteaded lands, where *Anderson* held that the priority date depended on whether the non-Indian successor(s) perfected the water rights: if so, then the priority is determined under state law; if not, then the priority is the date of

[19] The State's rationale regarding the priority date for water rights on reacquired lands does not apply to non-consumptive use claims for the reasons outlined in Section III. Accordingly, the reacquired lands analysis would only apply, if at all, in the contest of consumptive use claims (PIA and DCMI).

reacquisition. 736 F.2d at 1361. The court reasoned that the homesteader must rely upon state appropriation laws because the lands lost their federal purpose(s) and thus the homesteader acquired no federal water rights upon transfer. *Id.* at 1362-63. Upon reacquisition, however, the *Anderson* court concluded "it becomes necessary to utilize the *Winters* doctrine to assure that the Tribe has sufficient water to 'fulfill the very purposes for which [the] reservation was created.'" *Id.* at 1363 (citations omitted). It is noteworthy that *Anderson*, like *Big Horn*, concluded that the reacquired lands must be included to accomplish the overall purposes of the reservation. Such reasoning demonstrates that the *Big Horn* approach of assigning date-of-reservation priority to reacquired lands, based on those lands' original character as part of the reservation and the need for those lands to contribute to the overall reservation purpose, is the doctrinally consistent approach that should be applied here.

C. Trust allotments are entitled to a just share of the Tribe's overall water right, including its PIA right.

The State incorrectly asserts that allotments are wholly separate from the larger reservation. State Brf. at 69-70. On the contrary, trust allotments within an Indian reservation are entitled to a portion of the tribe's agricultural water rights. *United States v. Powers*, 305 U.S. 527, 533 (1939), *see* Sec. III.C above for a general summary of allotments. Section 7 of the General Allotment Act authorized the Secretary of the Department of the Interior ("DOI") to set rules "as he may deem necessary to secure a just and equal distribution" of irrigation water for allotments." 25 U.S.C. § 381. The federal courts have interpreted this authority to provide a "just share" of the tribe's overall agricultural water right to allottees. *Segundo v. United States*, 123 F.Supp. 554, 558 (S.D. Cal. 1954) (citing "just and equal distribution" language of the General Allotment Act). In the context of quantification of an allotment water right, the allottee's right is

calculated as a "ratable share" of the tribe's overall irrigation water rights. *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 401 (9th Cir. 1985) ("*Walton II*").

The United States, as trust owner of allotments within the Coeur d'Alene Reservation, has the authority to assert water rights for those allotments. Typically, the United States asserts the overall water rights for the Reservation, including trust allotments lands in its analysis, and then works with the Tribe subsequent to the completion of the adjudication to ensure that trust allotments have access to their ratable share of the tribal water right pursuant to a tribal water code. Such a share includes a just portion of domestic water as well as irrigation water rights.

Pro se objector John T. McFaddin argues that the Coeur d'Alene Tribe cannot own the water rights for use on trust allotments within the Reservation and that the United States has a trust obligation to protect the water rights for those trust allotments. John McFaddin's Response to the United States' and Coeur d'Alene Tribe's Joint Motion for Summary Judgment, dated Nov. 23, 2016 ("McFaddin Response to United States"); and John McFaddin's Response to the State of Idaho's Motion for Summary Judgment, dated Nov. 23, 2016 ("McFaddin Response to State"). As explained above, the United States is trust owner of allotments, as well as appurtenant reserved water rights, within the Reservation and, as such, will review the Tribal water code to protect the trust allotees' access to the ratable share of the overall tribal water right. Mr. McFaddin appears to misunderstand the United States' claims as "confined to tribal lands." McFaddin Response to United States at 1 (emphasis added). On the contrary, the United States' Opening Memo, p. 41, specifically states that the place-of-use for consumptive claims applies to "Trust Lands—lands owned by the United States and held in trust for the Coeur d'Alene Tribe or an allottee." (emphasis added). The United States asserts claims for the overall Coeur d'Alene Reservation in a manner that will enable it to carry out its trust responsibility for allotments by

claiming water for each allotment in the context of the overall Reservation purposes and the characteristics of the allotment. Moreover, regardless of the tribal affiliation of the allottees, the United States' claim for the tribal water right applies to all trust allotments within the Reservation. *See* McFaddin Response to State at 2 (asserting that a number of trust allotments are held for the benefit of members of other tribes).

D. In order to achieve the federal goal of economic self-sufficiency, the Tribe's industrial, commercial, and municipal water rights are not limited to technology and uses available in 1891, nor can these claims be subsumed within agricultural uses.

The State appears to accept that some industrial and commercial water uses are necessary to serve the purpose of the Reservation. *See* State Brf. at 47. Yet, the State argues that such water uses should be limited to agrarian endeavors authorized by the 1891 Act such as "a steam powered saw mill and a grist mill." *Id.* at 49. The State proceeds to assert that the existing commercial activities, such as the Tribe's hotel and casino, as well as the proposed future development uses, such as a commercial fish hatchery, do not meet the purposes of the reservation. The State's argument misses the forest for the trees by failing to consider the overarching federal goal to achieve economic self-sufficiency on Indian reservations.

The broad homeland purpose of Indian reservations rests in part on the "federal goal of Indian self-sufficiency." *State ex rel. Greely v. Confederated Salish and Kootenai Tribes*, 712 P.2d 754, 768 (Mont. 1985) (*citing United States v. Finch*, 548 F.2d 822, 832 (9th Cir. 1976), *rev'd on other grounds* 433 U.S. 676 (1977); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1973)). "Water for a homeland should be reserved to the extent that it is required to develop, preserve, produce, or sustain food and other economic resources of the reservation, whether those were new uses for the tribes or represented the continuation of aboriginal ways of life." COHEN'S HANDBOOK, § 19.03[5][c], at 1224 (emphasis added). The

importance of economic development and self-sufficiency was examined by the Arizona Supreme Court in *Gila V*. There, the court provided an outline of factors for judicial consideration when analyzing commercial and industrial claims:

> In conjunction with natural resources, the court should look to a tribe's economic base in determining water rights. Tribal development plans or other evidence should address, and the court should consider, "the optimal manner of creating jobs and income for the tribes [and] the most efficient use of the water..." Economic development and its attendant water use must be tied, in some manner, to a tribe's current economic station. Physical infrastructure, human resources, including the present and potential employment base, technology, raw materials, financial resources, and capital are all relevant in viewing a reservation's economic infrastructure.

Gila V, 35 P.3d at 80 (citations omitted); *see also Greely*, 712 P.2d at 765 (Montana Supreme Court noting that industrial purposes may be necessary to serve the overall purpose of an Indian reservation).

In order to achieve economic self-sufficiency, Indians cannot be constrained to 19th Century technology, such as steam powered saw mills, any more than non-Indians are constrained by such technology. Again, the Arizona Supreme Court captures this important need for equality by concluding that "[o]ther right holders are not constrained in this, the twenty-first century, to use water in the same manner as their ancestors in the 1800s." *Gila V*, 35 P.3d at 76. After noting the national migration from farming employment to more urban-based jobs since the 1880s, the court concluded that "[j]ust as the nation's economy has evolved, nothing should prevent tribes from diversifying their economies if they so choose and are reasonably able to do so. The permanent homeland concept allows for this flexibility and practicality." *Id.*

In the context of fishing harvest, federal courts have rejected the argument that tribes are constrained to the technology available at the time that the right was reserved. For example, when examining off-reservation fishing rights reserved in the Stevens Treaties, the federal

district court in Western Washington considered whether the tribes were limited to the traditional fishing techniques utilized at treaty time in the mid-19th century. *United States v. Washington*, 384 F. Supp. 312, 402 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975). In rejecting such a limitation, the court concluded:

> Just as non-Indians may continue to take advantage of improvements in fishing techniques, the Treaty Tribes may, in exercising their rights to take anadromous fish, utilize improvements in traditional fishing methods, such for example as nylon nets and steel hooks.

Id. at 407, *see also Grand Traverse Band of Ottawa & Chippewa Indians v. Dir., Mich. Dep't of Natural Resources*, 141 F.3d 635, 639 (6th Cir. 1998) ("treaties did not in any way, limit the means by which fish were to be taken from the lakes or restrict the treaty fishers to using technology that was in existence at the time of the treaty"). The logic utilized by the courts to reject the argument that tribes should be limited to utilizing traditional technologies to harvest fish applies equally here. The Coeur d'Alene Tribe is not limited to industrial and commercial activities specifically contemplated in the late 19th Century. Instead, just like non-Indians, the Tribe must be able to access and utilize technological advances available to it to promote economic development to achieve Indian self-sufficiency.[20] As discussed above, for the same reasons, the Tribe is not limited to irrigation techniques available in the late 1800s.

The Coeur d'Alene Tribe is entitled to water rights to support industrial and commercial uses necessary for economic development on the Reservation and can take advantage of modern technology to achieve that goal. The Coeur d'Alene Casino, including the related hotel and golf course, is the type of enterprise recognized by Congress as "a valuable economic development

[20] To the extent that the State accepts technological advances but still asserts that the Tribe's industrial or commercial water rights are limited to "agrarian purposes of the Reservation," (*see* State Brf. at 49), such an agriculture-only purpose should be rejected based on the establishment of the Reservation in 1873 rather than 1891 for continuation of subsistence purposes as well as agriculture (*see* Sec. I above).

tool." COHEN'S HANDBOOK, § 12.01, at 876 (*citing* 25 U.S.C. § 2701 et seq. (Indian Gaming Regulatory Act of 1988)). In a similar manner, claims for water to develop a fish hatchery, water park, and an energy plant uniquely utilize the "[p]hysical infrastructure, human resources, including the present and potential employment base, technology, raw materials, financial resources, and capital" that are available on the Coeur d'Alene Reservation to provide "economic opportunities for tribal members and overall tribal self-sufficiency." *See Gila V*, 35 P.3d at 80.

For these same reasons, municipal and domestic uses—similar to industrial and commercial water right claims—should be considered separate and distinct categories of water right claims necessary to provide a homeland on the Reservation. The State alleges that domestic use may be subsumed in agricultural quantification. State Brf. at 46-47.[21] Such an assertion should be rejected because each category of DCMI water right claims is uniquely necessary to provide a homeland. Domestic and municipal water uses provide basic drinking and daily-use water for individual homes or those houses located in subdivisions served by a municipal system. Commercial and industrial uses provide the economic development necessary for Indian self-sufficiency. Collapsing any of these categories of claims into the agricultural quantification would deny the Coeur d'Alene Tribe's access to water for these water uses necessary to ensure a viable homeland Reservation in the 21st Century and beyond. *See Arizona I*, 373 U.S. at 600 (holding that Indian water rights must satisfy future as well as present needs of the Reservation).

V. THE UNITED STATES AND TRIBE HAVE A RESERVED WATER RIGHT IN COEUR D'ALENE LAKE.

[21] The United States agrees with the State's assertion that the places of use for DCMI claims should be limited to federal trust and tribal fee lands within the Reservation boundary, but notes that federal trust lands include federal trust for both the Tribe and trust allotments. *See* State Brf. at 47.

The State asserts that the United States' and Tribe's water right to the Lake is an improper attempt to control the entire Lake and its hydroelectric facilities, even though only a portion of the Lake is located within the Reservation boundary. State Brf. at 54-59. In essence, the State is arguing that there can be no *in situ* right to water without the Tribe owning the entirety of the submerged lands in Lake Coeur d'Alene and all hydroelectric facilities. *Id.* The State asserts that the Tribe lost any water right to the Lake because the Tribe ceded some northern waterways and a parcel at Post Falls from the 1873 Reservation. *Id.* This is incorrect.

The federal reserved water right does not seek to control the entire Lake but rather seeks to maintain an approximate natural Lake level. Even if such a Lake level has an effect on the portions of the Lake outside the Reservation boundary, the Lake level is necessary to fulfill the purposes of the Reservation (*see* Sec. I above) and is not defeated simply because the United States and Tribe do not own the underlying property rights to the northern portion of the Lake or Post Falls Dam (*see* Sec. II.A above). Moreover, *Idaho II* demonstrates that the Tribe maintained a vested interest in the Lake which was not somehow lost when the Tribe sold the property at the outlet of the Lake because the hydrogeology dictates a certain natural Lake level even if the Post Falls dam were not in operation. Nor is the water right speculative because it is ripe for consideration in this adjudication, particularly as a federal reserved water right that includes both present and future needs of the Tribe. Finally, the priority date for the Lake water right is time immemorial based on the continuation of the Tribe's aboriginal subsistence practices on and around the Lake.

A. **The federal reserved water right to maintain an approximate Lake level does not equate to Tribal control of the entire Lake.**

The State argues that Congress' 1891 ratification of the Tribe's 1889 cession of a portion of the waterways in the northern part of the Reservation means that Congress did not find Tribal

"control of the entire Lake" to be in the public interest. State Brf. at 55. The State characterizes the Tribe's claim for an *in situ* water right in the Lake (for water levels below current elevations part of the year) as an attempt to "control" the entire Lake. That is a red herring.

The State cites Senator Mitchell's concerns in 1889 over Tribal ownership of the Lake. *Id.* But the Senator's observations did not involve, by any stretch, concerns that the Tribe would want to keep water in the Lake. Rather, his objective was to open navigable waters as "highways of commerce" for steamboat use without being subject to trespass on Tribal lands. Smith 2015 Report at 92-99; *see also* USA-CDA00003947. Steamboats need water, so the Senator's navigation objectives were consistent with an *in situ* water right to maintain water in the Lake.

As a practical matter, the "control" red herring is without merit: the State and Tribe have long collaborated in achieving Lake conservation and restoration. The Tribe is committed to the Lake Coeur d'Alene Lake Management Plan ("LMP"), a multipart plan developed in cooperation with the State of Idaho. *See* JSF ¶ 97 (Our Gem Coeur d'Alene Lake Collaborative, www.ourgem.org (last visited Oct. 11, 2016)).

The State's control argument also fails because the *in situ* water right does not amount to Tribal control of the Lake as it leaves the current hydroelectric operations unchanged. It does not call for a higher lake elevation than presently occurs on Lake Coeur d'Alene and, in fact, would be satisfied with lower summer lake elevations. *See* United States' Opening Memo at 44. The United States and Tribe claim sufficient flows into Lake Coeur d'Alene "to maintain the natural monthly Lake elevations and outflows." United States' Claims Cover Letter, from Vanessa Boyd Willard, United States Department of Justice, to Gary Spackman, Director, Idaho Department of Water Resources, dated January 30, 2014, p. 4. The Lake claim seeks a non-consumptive water right to ensure an "*in situ*" water elevation based on the natural hydrograph, but does not "seek to

affect present [FERC] licensed operations at Post Falls." United States' Notice of Claim # 95-16704, p. 1-2. "Since the water rights claim must address the possibility that the dam will be removed or altered, the intent is to claim sufficient water to reflect the natural Lake processes prior to the Post Falls dam—consistent with the federal and tribal intent as it was understood in 1873." *Id.* at 2.

Further, this Lake water right is consistent with *Idaho II,* in which the Court concluded that it was the mutual intent of both the United States and the Tribe to preserve the existence of the Lake and related waterways as part of the reservation and to ensure the Tribe's continued right to use those waterways for "food, fiber, transportation, recreation, and cultural activities"—in other words, to preserve all of the essential activities the Tribe had relied upon to provide for its survival and protect its way of life in its ancestral homeland. *Idaho II*, 533 U.S. at 265-72; *see generally* United States' Opening Memo at 21-29. These uses remain important today. *See* JSF ¶¶ 85-89 (continuation of traditional activities after reservation creation); 94-96 (modern day efforts to protect and restore water resources); and 97-98 (continued Tribal connection to water resource).

The federal reserved water right is also complementary to longstanding State intent to maintain water in the Lake for the benefit of the public. Since 1928, the State has held a 1,000,000 AFA (acre feet annually) water right "to maintain the level of Coeur d'Alene Lake." *See* State Water Right 95-2067. In 1927, the Idaho legislature required this preservation of the Lake's levels since they were "desirable for all the inhabitants of the state." Idaho Code § 67-4304 (2016).

The State suggests that the Tribe cannot hold an *in situ* water right unless it owns every acre of submerged lands in the Lake and all fall within the boundary of the Reservation. State

Brf. at 54 (alleging that only 15-18% of the Lake is within the Reservation boundary). As an initial matter, the State's math is incorrect because the record demonstrates that the lower one third of the Lake, approximately 33%, is within the Reservation boundary. *Idaho II,* 533 U.S. at 269-70 ("[T]he Tribe and Government negotiators reached a new agreement under which the Tribe would cede the northern portion of the reservation, including approximately two-thirds of Lake Coeur d'Alene."). Regardless of the percentage, all parties agree that a significant portion of the Lake remains within the Reservation. Yet, the State's argument in effect would accord the Reservation portion of the Lake as having no associated *in situ* water right.

The State's 1928 Lake water right, however, extends over Tribal submerged lands in the Lake. Consequently, by the State's own practice, it recognizes that a government need not have ownership of all underlying lands in order to hold an *in situ* water right. In arguing that the Tribe (but not the State) must own all of the land underlying the Lake in order to hold an *in situ* water right, the State advances the same riparian theory that it so strenuously rejects elsewhere in its brief. *See* Sec. III. A above (explaining that ownership of underlying property is not necessary for a federal reserved water right).

B. The State's assertion that the Tribe does not have an interest in maintaining Lake levels ignores the natural hydrogeology of the Lake.

The State argues that the Tribe must not have cared about Lake levels due to the Tribe's conveyance of a parcel at Post Falls that could be used for hydroelectric facilities. State Brf. at 57-58. The State omits the fact that there is a "natural lake outlet channel restriction" that restricts Lake outflow and formed the Lake, even without control by hydroelectric facilities. *See* United States' Opening Memo at 44 (citing hydroelectric license proceedings). The hydroelectric control gates generally hold water at a higher level in the summer than would be typical under a natural hydrograph. *Id.* Thus, ownership of the control gates is not necessary for the *in situ* water

right to serve the purpose of keeping submerged lands in the Lake as truly submerged lands under a natural hydrograph. In light of the natural geologic restriction that forms Lake Coeur d'Alene, which the Tribe would have observed for millennia, it makes no sense that the Tribe would have understood that conveying land for water power production would result in another party draining the Lake. Thus, the land transfer does not defeat a Tribal *in situ* water right.

The State argues that the United States' and Tribe's interest in insuring that submerged lands remain submerged is not within the scope of the adjudication. State Brf. at 58-59. The State suggests no alternative and does not suggest that its 1,000,000 AFA water right "to maintain the level of Coeur d'Alene Lake" that accomplishes the same purpose is outside the scope of the adjudication. *See* State Water Right 95-2067.

The State asserts that another reason for denying the Lake level claim is that such a claim necessarily includes an outflow. State Brf. at 59. Due to the basin hydrology, the Lake will have some outflow. To quantify a certain amount of water to maintain a Lake level, it is necessary to include the associated outflow rate in the calculation. Whether such an amount of outflow is proper is a quantification issue that need not be determined at this time and does not serve as a basis to deny an *in situ* right.

C. The claim for Lake level maintenance is not based on speculative future needs.

The State argues that the need to maintain water in Lake Coeur d'Alene is speculative because the present hydroelectric facility may be relicensed and remain in place for a long period. State Brf. at 59. But the presence of a hydroelectric facility at the outflow does not ensure that enough water will flow *into* Lake Coeur d'Alene to keep all lands submerged or sufficiently protect the Lake from future *diversion* that the Lake will meet Reservation purposes. There are

several reasons that any water right in the Lake can and should be quantified now in this adjudication.

First, the State misses the point of the claim in asserting that conjecture is required to quantify the claim. The claim form quantifies the claim based on the natural hydrograph which is well-documented in the hydroelectric proceedings. *See* United States' Opening Memo at 44. This hydrograph is relevant today as a baseline amount of water that is required in the Lake to meet the Reservation purpose. The challenge in quantifying a lake water right has not stopped the State from asserting its own 1,000,000 AFA lake water right.

Second, while the *in situ* claim does not seek to disturb the existing "licensed operations at Post Falls" (since the licensed operations provide for Lake levels that meet or exceed the natural hydrograph), the water claim is indeed ripe for determination, even though any enforcement may be decades away. At a minimum, today it provides full notice of a senior *in situ* water right to the State and diverters against whom it may need to be enforced at some point in the future. United States' Notice of Claim # 95-16704, p. 1-2. Further, the expectation that licensed operations at Post Falls would not be affected is based on an assumption of "sufficient flow into the Lake to maintain those Lake levels found in Section 8 [of the claim form]." *Id.* at 2-3, section 10. The claim is ripe in light of the need to ensure that diversions do not impede the ability to maintain at least the minimum Lake levels specified in the claim. If the presence of a hydroelectric facility, alone, were sufficient to preclude the need for a Lake water right, then presumably the State of Idaho would not have seen fit to file, in 1928, its 1,000,000 AFA water right to maintain the level of Coeur d'Alene Lake. *See* State Water Right 95-2067. The need for water in Lake Coeur d'Alene, whether outflow is controlled by the hydroelectric facility or the natural channel constriction, is neither legally nor factually speculative.

Third, ownership of the hydroelectric facility is not necessary to have a Lake water right in light of the natural channel restriction forming the Lake. None of the cases cited by the State concerning ripeness pertain to water right adjudications, which are different because they are designed to resolve competing priorities to provide future certainty in water allocation. *Compare* Idaho Code § 42-1406 B(1) (" Effective management of the waters of northern Idaho requires that a comprehensive determination of the nature, extent and priority of the rights of users of surface and ground water be determined.") *with* State Brf. at 60, citing *Texas v. United States,* 523 U.S. 296, 300 (1998) (Voting Rights Act); *State v. Manley,* 142 Idaho 338, 342 (2005) (murder trial).

Moreover, even if the Lake water right only concerned future needs, it would still need to be recognized in this proceeding. The Idaho Supreme Court confirmed that speculation regarding future water rights may be necessary in the context of quantifying federal reserved water rights and that Idaho state law limiting speculation in water rights claims has been superseded by federal law. *Avondale Irrigation Dist. v. North Idaho Properties Inc.*, 523 P.2d 818, 822, 96 Idaho 1, 5, n.10 (1974) ("Since the [federal reserved water rights] doctrine is based upon the supremacy clause, it supersedes Idaho law on speculative water rights, since some speculation is necessarily required in a present quantification of reserved water rights.") (citations omitted). Indeed, a basic principle of federal Indian reserved water rights is that such water rights include not only present but also future needs in order to accomplish the purposes for which the reservation was established. *See Arizona I,* 373 U.S. at 598, 600-01; *Adair,* 723 F.2d at 1416; *Walton I,* 647 F.2d at 47. Because this Adjudication seeks a final determination of the water rights of not only the Tribes but also all other claimants, all present and future reserved water rights for the Tribe must be claimed, recognized, and confirmed now or be forever lost. *Nevada*

v. United States, 463 U.S. 110, 135, 143 (1983); *Arizona v. California,* 460 U.S. 605, 618-28 (1983) *("Arizona II")* (no reopening of proceedings to increase claims).

Finally, the terms of the United States' waiver of sovereign immunity (and by implication, the tribe's immunity) in the McCarran Amendment, 43 U.S.C. § 666(a),[22] is limited to those state proceedings that provide for the comprehensive adjudication of all water rights in a given basin. *Dugan v. Rank,* 372 U.S. 609, 618 (1963); *Gardner v. Stager,* 103 F.3d 886, 888 (9th Cir. 1996); *Metropolitan Water Dist. v. United States,* 830 F.2d 139, 144 (9th Cir. 1987) (emphasis added). The logical conclusion of the State's argument is that the Lake claim would never be considered as part of this adjudication. If that were accurate, this adjudication lacks the requisite comprehensiveness and therefore this Court lacks jurisdiction over the United States. The State cannot pick and choose the rights to adjudicate, particularly under the federal sovereign immunity waiver.

D. The same lands are submerged now as before the Post Falls Dam, albeit for different timeframes. Accordingly, the federal reserved water right to the Lake is not contingent on the Post Falls Dam.

The North Idaho Water Rights Group ("NIWRG") argues that Post Falls Dam construction in 1907 raised lake levels and submerged more lands which could not have been reserved to the Tribe in 1873 and that, accordingly, the Tribe's Lake level claims go too far. NIWRG Brf. at 5. This argument fails for several reasons. First, as discussed above, ownership of the entire lake is not necessary for an *in situ* water right. Second, the Tribal claim for water consistent with the natural hydrograph does not depend on any changes caused by Post Falls Dam because of the natural hydrogeology of the outlet of the Lake which would hold the Lake at

[22] *Colorado River Water Conserv. Dist. v. United States,* 424 U.S. 800, 807-13 (1976); *United States v. District Court for Eagle County,* 401 U.S. 520, 522-25 (1971).

natural levels even without the dam. The claim is intended "to reflect the natural Lake processes prior to the Post Falls dam—consistent with the federal and tribal intent as it was understood in 1873." United States' Claims Cover Letter, from Vanessa Boyd Willard, United States Department of Justice, to Gary Spackman, Director, Idaho Department of Water Resources, dated January 30, 2014, p.2 (emphasis added). Accordingly, Post Falls Dam holds water at a higher level in the *summer* today (May – October) than would be typical under a natural hydrograph but, due to the natural lake outlet channel restriction, the Lake elevations are similar during the remainder of the year before any dam (November – April). In other words, the same lands are submerged, but just for a different period of time because the low levels now seen in the November timeframe would have occurred around April. *See* United States' Opening Memo at 44 (explaining that the Lake levels are the same as historic Lake levels but with different timeframes because the Post Falls Project simply holds Lake levels at 2,128 feet [Natural full pool] through the summer when the natural hydrograph would start dropping from that elevation in late spring).

The NIWRG also misstates the findings from the cases concerning the Lake by including only one excerpt from *In re Sanders Beach,* but does not provide the full context in which the Court explained that the dam only holds water higher in the *summer*:

> The water collects in Lake Coeur d'Alene from various streams emptying into it during the winter and spring until the elevation is raised six or eight feet above the ordinary elevation of the water in the summer and fall. The purpose of this dam is to hold the water back from running off in the spring and summer so rapidly, and to hold the level thereof at an elevation of 2,128 feet, whereas, if the flow was not so retarded by this dam and bear trap, it would run off much more rapidly, and by the middle of the summer would be reduced to an elevation of about 2,121.5.

City of Coeur d'Alene v. Mackin (In re Ownership of Sanders Beach), 143 Idaho 443, 450 (Idaho 2006). Similarly, the *Deffenbaugh* case cited by NIWRG notes that "a bear-trap … is raised each

season for the purpose of holding the water above its ordinary height during the summer season." *Deffenbaugh v. Washington Water Power Co.*, 24 Idaho 514, 518 (Idaho 1913); *see also Erickson v. State*, 132 Idaho 208, 212 (Idaho 1998) (State of Idaho expert opinion that "the Lake level was between 2128 to 2129 feet 'certainly prior to 1890.'"). For these reasons, the NIWRG's opposition to the lake level claims is without merit.

E. The priority date for lake level maintenance is time immemorial.

For the reasons stated above, the State is incorrect in its assertion that the Lake *in situ* water right is only relevant if the hydroelectric project is terminated. Thus, the State's argument that the priority date can only be concurrent with dam removal since the water right allegedly only comes into effect at that time is also without merit. *See* State Brf. at 64. *Idaho II* confirmed the Tribe's use of the Lake on the Reservation for subsistence purposes since time immemorial. The State's argument is also inconsistent with its own assertion of a 1928 priority date for its Lake water right. The State's analogizing that a Lake *in situ* water right would have a priority date only as of the Tribe's reacquiring the Post Falls land, State Brf. at 65, is also without merit for the above reasons.

VI. OFF-RESERVATION INSTREAM FLOWS ARE LEGALLY PERMISSIBLE AND FACTUALLY NECESSARY TO PRESERVE FLOWS FOR ADFLUVIAL FISH HABITAT.

The Coeur d'Alene Tribe is entitled to instream flow water rights in off-reservation water sources where necessary to sustain the biological life cycles of the adfluvial fishery[23] that supports the subsistence fishing purpose of the Reservation. Neither the Mining Laws nor the Desert Lands Act preclude such off-reservation water rights.

[23] Adfluvial refers to fish that spend a portion of their life cycle in the Lake but return to tributary streams for spawning and rearing.

A. Federal law recognizes off-reservation water rights necessary to serve the fishing purpose of the Coeur d'Alene Reservation.

As explained in the United States' Opening Memo at 46-49, federal reserved water rights extend beyond the boundary of an Indian reservation if water is necessary to fulfill the purpose of the reservation. The State disagrees. The crux of the State's argument against off-reservation instream flows is that reserved water rights are premised on lands and, therefore, are limited to the lands reserved. *See e.g.*, State Brf. at 21 describing "appurtenance" and State Brf. at 22 stating that "outside the boundaries of a reservation, no land is reserved, and likewise no incidents of title are preserved."

As an initial matter, the State conflates the term "appurtenant" with adjacency or physically touching a water source. In the federal reserved water rights context, appurtenance is not the same as physically located upon. *See* GETCHES, supra, at 324-25 ("Judicial references to such rights being 'appurtenant' to reserved lands apparently refer not to some physical attachment of water to land, but to the legal doctrine that attaches water rights to land to the extent necessary to fulfill reservation purposes."). Indeed, the State misconstrues the federal reserved water rights doctrine by asserting an appurtenancy test rather than the well-established legal standard that water rights are reserved to serve the purpose of the reservation. *See* Sec. III.A above. While it is true that most reserved water rights apply to water resources located within a reservation, the basis for that fact is simply that those sources typically provide the water necessary to serve the purpose of the reservation. *See, e.g.,* COHEN'S HANDBOOK , § 19.03[2][a], at 1213 ("Although there is a strong preference for reservation-based sources of water, tribal reserved water rights may, when appropriate, be satisfied from any available source of water.").

The State asserts that legal commentators support the view that "Indian reserved water rights are limited to waters within or bordering the reservation." State Brf. at 20. On the contrary, several legal treatises recognize that reserved rights extend to off-reservation waters where necessary to fulfill the purpose of the reservation, including David E. Getches, one of the legal scholars cited by the State. *Id.* For example, according to a major water law treatise, "reserved rights do not appear to be limited to waters on or bordering reservations, a fact seemingly confirmed by the Supreme Court's Colorado River decree, which awarded reserved rights to the Cocopah Reservation located about two miles from the river." 2 WATERS AND WATER RIGHTS § 37.02(6); *see also* COHEN'S HANDBOOK, § 19.03[2][a], at 1213. The point is further explained that "[r]eserved waters therefore need not be physically connected to reservation lands, but extend to all waters reasonably necessary to fulfill the reservation purpose." *Id.* Notably, the basis for this conclusion includes a reference to GETCHES, at 348-50 (4th ed. 2009). *Id.* at n.287. Contrary to the State's citation, Professor Getches confirms that Indian reserved water rights may extend off reservation even though such rights may have historically often been found within reservation boundaries. *See* State Brf. at 20.

The State argues that these commentators' reliance on the Cocopah Reservation as an example of an off-reservation federal reserved water right is misplaced. *See* State Brf. at 19, n.9. The State relies on a reference to the "Colorado River" in the 1917 Executive Order establishing the Cocopah Reservation as alleged evidence that the Reservation boundary extended to the River, thus, the water right applied to an adjacent water supply. *Id.* It is the State's reliance on this language that is misplaced, however, because the historic record demonstrates that, in 1964, when the Supreme Court awarded the Cocopah Reservation water rights in the Colorado River, the United States had determined in a published DOI Solicitor's Opinion that the Cocopah

Reservation was not adjacent to the Colorado River. Solicitor's Opinion M-36275, *Title to Accretion Lands Adjacent to Cocopah Indian Reservation*, II Op. Sol. Indian Affairs 1663, 1955 DOINA LEXIS 186 (1955) (Attachment D).

The 1955 Solicitor's Opinion was necessary because the Colorado River had shifted its course between the 1874 public land survey and the 1917 Executive Order establishing the Cocopah Reservation, therefore, "it was recognized that the river channel had already shifted westward leaving a considerable area of accreted land between the river" and the Reservation at the time that the Reservation was established. *Id.* The Opinion concluded that the 1917 Executive Order's descriptions of certain section boundaries meant that any additional accreted lands beyond those boundaries, *e.g.*, between Cocopah and the River, was public land, not tribal land. *Id.*

The 1955 Solicitor's Opinion apparently caused the Cocopah Tribe concern because it retained counsel to seek Congressional assistance to add the accreted lands to its Reservation. *See* Letter from California Legal Services to Senator Barry Goldwater, dated Feb. 26, 1970 (Attachment E). In 1972, the DOI Solicitor's Office reversed its position and published a Solicitor's Opinion finding that the accreted lands were included and the Cocopah Reservation "extended to the Colorado River." Solicitor's Opinion M-36867, *Title to Accretion Lands*, II Op. Sol. Indian Affairs 2050, 1972 DOINA LEXIS 92 (1972) (Attachment F).

The important point of this historical analysis of the Cocopah Reservation is that the *Arizona v. California* litigation in the 1960s was premised on the understanding that the Reservation was not adjacent to the River because of the 1955 Solicitor's Opinion. Yet, the Supreme Court awarded Cocopah reserved water rights to the Colorado River anyway. *Arizona v. California*, 376 U.S. 340, 344 (1964) (Supreme Court's decree). The 1964 Decree is based on

the decision of Special Master Rifkind which described the reservations at issue as "Indian Reservations—On or Near the Colorado River." Special Master Rifkind's Report, Dec. 5, 1960, p. 83 (emphasis added) (Attachment G).[24] The Report continues to specifically describe the proximity of the reservations to the Colorado River: Hualapai Indian Reservation ("abut"); Chemechuevi Indian Reservation ("west bank"); Colorado River Indian Reservation ("both sides"); and Yuma Indian Reservation ("across the Colorado River from Yuma"). *Id.* at 83-88. For the Cocopah Indian Reservation, Special Master Rifkind provided no description of the relative position between the River and the Reservation because it was "near" the Colorado River. *Id.* at 83 & 88. In the end, the Supreme Court affirmed the Special Master's Report and inherently recognized that factual circumstances may exist to justify allocating water rights for an Indian reservation from off-reservation water sources if necessary to fulfill the reservation purpose.

B. The basis for the off-reservation instream flow water rights is the biological needs of the on-reservation adfluvial fishery, rather than a claim to any off-reservation fishing rights.

i. *General Analytical Principles.*

While the above discussion establishes that off-reservation water rights are legally permissible, certain steps are necessary to determine whether off-reservation instream flow water rights were reserved for the Coeur d'Alene Reservation. First, the purpose(s) of the Reservation must be determined in order to frame the inquiry into which water resources are necessary to serve that purpose(s). *See* Sec. II above. The State's extensive discussion of *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690 (1899) and *Winters*, 207 U.S. 564, does not support its proposition that reserved rights cannot extend beyond reservation boundaries. *See* State Brf. at

[24] Special Master Rifkind's Report is voluminous and only relevant excerpts are provided at Attachment G.

17-19. On the contrary, *Winters* is relied on in caselaw for the bedrock principle of the federal reserved water rights doctrine—that water rights are reserved to fulfill the reservation purpose. *See Cappaert v. United States*, 426 U.S. 128, 139 (1976) (explaining the *Winters* doctrine as reserving "a quantity of water sufficient to meet the purposes for which the [reservation] was established."); *Walton I*, 647 F.2d at 46 (relying on *Winters* to state that "[a]n implied reservation of water for an Indian reservation will be found where it is necessary to fulfill the purposes of the reservation."). The *Rio Grande* decision does not directly concern water rights but rather the United States' authority over navigable waters of the United States. 174 U.S. at 706-07. Neither case relied on by the State supports a departure from the well-established analysis of determining whether water was reserved by analyzing whether such water is necessary to fulfill the purpose of the reservation. As outlined in Section II above, the Coeur d'Alene Reservation was established as a homeland to serve two overall purposes: 1) continue traditional subsistence activities, including fishing; and 2) develop modern sustenance activities such as agriculture and industry.

The next step in the analysis is to consider on-reservation water sources and determine whether those sources can fulfill the purposes of the reservation. For most claim categories, they can. For example, the DCMI and PIA claims are limited to on-reservation water sources. By contrast, the on-reservation adfluvial fishery, which supports subsistence fishing activities, requires instream flows beyond those on-reservation due to the biological lifecycle of the fish. The fishery on the Coeur d'Alene Reservation consists primarily of Westslope Cutthroat Trout and Bulltrout—both adfluvial fish species that spend critical portions of their lifecycle, such as spawning and rearing, off the reservation in streams and Coeur d'Alene Lake. JSF ¶¶ 102, 104. If the flows in those streams are not sufficiently maintained, the fish could not complete these

portions of their lifecycle and would not survive. As a result, the fishing purpose of the Reservation would be entirely defeated. Even if the flows in these off-reservation streams are sufficient at this time (which may or may not be true depending on location), a federal reserved water right claim must include water to satisfy current and future needs. *Arizona I*, 373 U.S. at 600. Thus, the off-reservation instream flow claims are necessary to prevent future water withdrawals from dewatering the streams to the detriment of the adfluvial fishery. In short, the off-reservation flows are biologically necessary to the fish—the claims are based on the biological needs of the fish rather than on any off-reservation fishing rights.

ii. *Application of the Biological Necessity Principle.*

A number of cases recognize federal reserved water rights to support and protect the biological needs of fish. These cases are summarized below and demonstrate that the inquiry is not whether the water necessary to preserve fishing rights is located inside vs. outside the reservation boundary, but rather whether the water is necessary for the biological needs of the fishery to sustain the fishing purpose of the reservation.

In *Walton I*, the Ninth Circuit found a federal reserved water right to serve the fishing purpose of the Colville Reservation based on the spawning needs of the Tribe's trout replacement fishery. 647 F.2d at 48. As an initial matter, the *Walton I* court determined that the "broad" purposes of the Colville Reservation included both "a homeland for the Indians to maintain their agrarian society" as well as "preservation of the tribe's access to fishing grounds." *Id.* at 47-48. Since "[t]he Tribe's principal historic fishing grounds on the Columbia River have been destroyed by dams," the court recognized that the "Indians have established replacement fishing grounds in Omak Lake by planting a non-indigenous trout." *Id.* at 48. To determine the water necessary to maintain the trout replacement fishery, the court cited the trout life cycle by

noting that "[t]he species thrives in the lake's saline water, but needs fresh water to spawn." *Id.* at 45. The source of such fresh water for spawning was the "No Name hydrological system" which "is located entirely on the Colville Reservation." *Id.* The Ninth Circuit held that the "right to water to establish and maintain the Omak Lake Fishery includes the right to sufficient water to permit natural spawning of the trout." *Id.* at 48. There was no need to consider off-reservation water sources because the fresh water necessary for spawning in No Name Creek was fully available within the reservation boundaries.

The federal district court in *Anderson* determined one of the purposes for the Spokane Reservation was fishing. *Anderson*, 591 F. Supp. at 5. Based on that purpose, the court concluded that "under the *Winters* doctrine, the Tribe has the reserved right to sufficient water to preserve fishing in the Chamokane Creek." *Id.* The *Anderson* court found "the quantity of water needed to carry out the reserved fishing purposes is related to water temperature rather than to simply minimum flow." *Id.* Water temperature is directly related to the biological needs of the trout species in Chamokane Creek which require cold water to thrive. *See, e.g.*, JSF ¶ 106. To achieve a proper water temperature for the fish, the court awarded a federal reserved water right of 20 cfs in Chamokane Creek. *Anderson*, 591 F. Supp. at 5-6. Even though the headwaters of Chamokane Creek begin north of the Spokane Indian Reservation, the United States and Spokane Tribe did not assert claims to any off-reservation flows because the on-reservation flows appear sufficient in that case to serve the biological needs of the trout species. *Id.* at 8 (implied reservation for the "maintenance of trout in lower Chamokane"). In other words, there is no evidence in the *Anderson* case that the trout species in Chaomkane Creek required off-reservation waters for spawning or other critical portions of their life cycle.

Though not a water rights adjudication, the *Kittitas* court looked to the biological needs of Chinook salmon, subject to the treaty fishing rights of the Yakima Indian Nation, in upholding a decision to release water from a dam to ensure redds (nests of salmon eggs in stream gravel) had sufficient water to survive. *Kittitas Reclamation District v. Sunnyside Valley Irrigation*, 763 F.2d 1032, 1035 (9th Cir. 1985). The court described the issue in *Kittitas* as a "collision of two interests: the Yakima Nation's interest in preservation of their fishing rights, and the eastern Washington farmers' interest in preservation of water needed for crops." *Id.* at 1033. Regarding the redds, the court observed that the salmon returned for spawning too early in the fall of 1980 because "artificially high irrigation releases in the early fall of 1980 caused the salmon to misjudge." *Id.* at 1033-34. Unfortunately, the result was that "approximately 60 redds would have been exposed and destroyed" if the upstream dam was closed to start storing water for irrigation purposes. *Id.* at 1034. Based on the biological needs of salmon redds for sufficient water to cover the eggs while they gestate before hatching as juvenile salmon, the court ordered that water flows be maintained to prevent destruction of the redds. *Id.* at 1035. The basis for such a ruling was the Yakima Nation's treaty fishing rights. *Id.* at 1033. The flows were located outside the Yakima Reservation but were necessary for the tribal fishing right based on the biological needs of the post-spawning, gestation portion of the Chinook salmon life cycle.

In the state court adjudication of the Yakima Basin in Washington, the court has repeatedly relied on the biological needs of anadromous fish to adjudicate tribal instream flow water rights. In its *Memorandum Opinion: Treaty Reserved Water Rights at Usual and Accustomed Fishing Places*, the court found that off-reservation instream flows were necessary "to maintain fish life in the Yakima River" because "the anadromous fish life cycle" requires sufficient water in tributaries for fish to spawn. *Washington Dep't of Ecology v. Acquavella*, No.

77-2-01484-5, p.9 (Wash. Sup. Ct. Sept. 1, 1994) (Affidavit of Vanessa Boyd Willard, dated Oct. 20, 2016, Ex. 1). The court concluded that a water right existed throughout the Yakima River basin including "all Yakima River tributaries affecting fish availability at the [Yakama Nation's] 'usual and accustomed' fishing stations." *Id.* at 15 (emphasis in original). The opinion notes that the Yakama Nation's usual and accustomed places, identified in the Indian Claims Commission proceedings, are along the Yakima, Naches, Tieton, and Klikitat Rivers. The Naches and Tieton Rivers are tributaries to the Yakima River, entirely outside of the Yakama Reservation. Part of the Yakima River forms the eastern boundary of the Yakama Reservation, but most of it lies outside of the Reservation. The court continued by also recognizing an on-reservation instream flow in Ahtanum Creek to support the fish life cycle as well. *Id.* at 14.

In a later *Acquavella* opinion, the court confirmed the use of pulse flows where necessary to support the different phases of anadromous fish lifecycles. *Memorandum Opinion: Flushing Flows, slip op.*, p. 6 (Wash. Super. Ct. Dec. 22, 1994) (Affidavit of Vanessa Boyd Willard, dated Oct. 20, 2016, Ex. 2). In noting that the Yakima Field Officer Manager's task was not limited "to rescuing only adult fish," the court confirmed that water was necessary for the "protection of salmon redds" as well as for spawning. *Id.* In addition to flows for spawning and redds, the court referenced scientific testimony regarding other parts of the salmon life cycle that require water, such as flows "required by smolts to allow them to migrate out" as well as "upstream migration of adults" to spawn followed by "sufficient rearing flows for juveniles." *Id.* at 12. Altogether, these *Acquavella* decisions illustrate the detailed analysis of the water necessary for different biological life cycles of fish to determine the federal rights reserved.

The State improperly conflates the off-reservation water rights claimed in this case, which are based on biological necessity, with the express reservation of aboriginal hunting and

fishing rights in ceded territory outside the boundary of a reservation in other cases. *See* State Brf. at 21-22. The two are apples and oranges. The State cites two cases as the basis for its assertion that the cession of lands outside the Coeur d'Alene Reservation resulted in the extinguishing of any aboriginal rights to off-reservation fishing and hunting. *Id.* at 22, *citing* *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 768 (1985) ("*ODF&W*") and *Western Shoshone Nat'l Council v. Molini*, 951 F.2d 200, 203 (9th Cir. 1991).[25] Neither of these cases are relevant, however, because the off-reservation instream flows claimed are based on biological necessity rather than any assertion of fishing rights on off-reservation lands.

C. The Mining Laws did not deprive the United States of authority to reserve off-Reservation water rights where necessary to serve Reservation purposes.

The State argues that the President, due to various Mining Acts, had no authority to reserve flows in waterways on the public domain for the Coeur d'Alene Reservation. State Brf. at 27, *citing* Act of July 26, 1866, 14 Stat. 253, as amended by Act of July 9, 1870, 16 Stat. 218 (codified at 43 U.S.C. § 661). The Acts provide, in pertinent part, that "[w]henever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." *Id.* The State asserts that these Acts "required that all waters on public domain lands be available for private appropriation without restriction." State Brf. at 26. The State is correct that the Mining Acts made water available for individual

[25] The State neglects to mention that the Supreme Court in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 201-02 (1999), sharply limited the ruling in *ODF&W* to the facts of that case.

appropriations but is incorrect that this was "without restriction" or prohibited a reservation of water for an Indian Reservation. *Id.*

For example, in *Cappaert*, the United States Supreme Court held that "as of 1952 when the United States reserved Devil's Hole [national monument], it acquired by reservation water rights in unappropriated appurtenant water sufficient to maintain the level of the pool to preserve its scientific value." *Cappaert*, 426 U.S. at 147. The Supreme Court rejected the argument that the Mining Acts required the federal government to "perfect its implied water rights according to state law" and noted that the Mining Acts "provided that water rights vested under state law or custom are protected." *Id.* at 143 n.8. Because the Cappaerts, who were private appropriators, did not have any vested water rights when the Devil's Hole national monument was established, their groundwater pumping was subject to limitation to stabilize the water in the monument. *Id.* at 136-37.

The State's theory that the Mining Acts set aside the entirety of waterbodies on public lands for only private appropriation is entirely inconsistent with *Cappaert* and the plain language of the Acts that recognized pre-existing rights. In other circumstances, as well, courts have recognized that a prior appropriation under the Mining Acts would be recognized, but this would not preclude a subsequent federal reservation of water. *See Gardner v. Stager*, 892 F. Supp. 1301, 1304 (D. Nev. 1995) (if private party "acquired vested rights to some quantity of water by virtue of that use, before the land in question was withdrawn from the public domain, then those rights may well be valid even as against federal reserved rights"). Thus, while the Mining Acts made water available for appropriation under state law, the Acts did not preclude reservation of water for federal purposes such as a monument or Indian Reservation.

D. The Desert Lands Act does not preclude an off-Reservation instream flow right.

The State argues that the Desert Lands Act of March 3, 1877, 43 U.S.C. 321, "reserved all waters on the public domain for private appropriation." State Brf. at 33. The State then argues that the Coeur d'Alene Reservation was created in 1891, and not 1873, and that, accordingly, the 1877 Desert Lands Act made water unavailable for a federal reservation as of 1891. There are two major flaws with this argument. First, as discussed above, the Reservation was created in 1873, and not 1891, so the 1873 federal reservation of water preceded the Desert Lands Act of 1877 and the Act therefore has no effect on the reserved rights at issue here. Second, as with the Mining Laws, the Desert Lands Act did not make water unavailable for federal reservation. A federal reservation after the Act would be subject to existing appropriations, but the unappropriated water was still available for federal reservation. In any case, the Desert Lands Act only applies to nonnavigable waters; and the water bodies at issue, the Lake and St. Joe's River, are navigable waterways.

The Desert Lands Act allowed for individuals to enter public lands for purposes of reclaiming the land through irrigation and, upon proof of reclamation, to receive a patent to the land. The Act provides that "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." 43 U.S.C. § 321. Congress intended to "sever the land and water" such that patentees of federal lands would obtain no water rights other than those recognized by state law. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 162 (1935). But appropriations under the Desert Lands Act "are subject to, the 'existing rights' of the government and of the Indians on the reservation." *Winters v. United States*, 143 F. 740, 747 (9th Cir. 1906).

A leading water law treatise explains that under *Winters*, "when the federal government reserves a part of the public domain for a particular purpose, it impliedly also reserves sufficient unappropriated water to effectuate that purpose" and that "this water is no longer 'surplus water' available for appropriation by states under the Desert Lands Act but is instead federally reserved water." 2 WATERS AND WATER RIGHTS § 37.01. In other words, "when reserving lands from the public domain for specific purposes, the federal government revoked the authority granted states under the Desert Lands Act to create property rights in water." *Id.* at § 37.03(a.01). As the treatise notes, the Supreme Court observed in *California Oregon Power Co. v. Portland Beaver Cement Co.*, 295 U.S. 142, 158-59 (1935), that deference to state law was subject to two exceptions: 1) to protect federal beneficial use of government lands; and 2) to protect navigation. 2 WATERS AND WATER RIGHTS § 37.03 n.362.

Further, in *Cappaert*, the Supreme Court rejected the assertion that the Desert Lands Act applies to water rights on federally reserved land:

> Petitioners in both cases argue that the Federal Government must perfect its implied water rights according to state law. They contend that the Desert Land Act of 1877 and its predecessors severed nonnavigable water from public land, subjecting it to state law. That Act, however, provides that patentees of public land acquire only title to land through the patent and must acquire water rights in nonnavigable water in accordance with state law. This Court held in *FPC v. Oregon*, 349 U.S. 435, 448 (1955), that the Desert Land Act does not apply to water rights on federally reserved land. 426 U.S. 128, 143-144 (1976) (citations omitted).

426 U.S. at 147. In summary, the 1877 Desert Lands Act only made water available that had not already been reserved for the Reservation. The Federal government and Tribe reserved water for the 1873 Coeur d'Alene Reservation for ongoing subsistence uses with a priority date of time immemorial and, consequently, these waters were unavailable for appropriation under State laws.

Even if the Reservation had not been created until after the Desert Lands Act, the federal government could still reserve unappropriated waters.

The State argues that Congress, in 1891, failed to take action "explicitly" to reserve waters that were reserved under the Desert Lands Act. State Brf. at 34. As discussed above, the federal government reserved the water in 1873—prior to the Desert Lands Act. Further, the very point of the federal reserved rights doctrine is that water can be impliedly reserved and there need not be an "explicit" reservation. *See* Sec. II.A. at n. 9 *infra*.

CONCLUSION

Idaho II sets the stage for the federal reserved water rights in this case. The Supreme Court analyzed the intentions of the main actors in the historic drama—the United States and Tribe—the two parties who negotiated to establish the Reservation. *Idaho II* concluded that neither actor intended the Tribe to give up the subsistence activities that had defined its culture and identity for millennia. The very heart of these subsistence activities has always been Lake Coeur d'Alene and the connected rivers and streams. *Idaho II* also recognized that the Reservation must provide the resources necessary for the Tribe to develop a modern economy to achieve economic self-sufficiency through activities such as agriculture. The Reservation was created with all the characteristics necessary to provide a tribal homeland.

The State has also played a role in the drama on this stage. In *Idaho II*, it argued that the Reservation was not established until 1891 and then for only agricultural purposes. The Supreme Court rejected both arguments. The State seeks to make those same arguments once again here, adding several corollary arguments. One such corollary argument seeks to wholly defeat a federal reserved water right claim to the portion of the Lake that the Tribe bargained so forcefully to maintain within its Reservation. Another seeks to limit instream flows within the

Reservation boundary in such a manner as to render them meaningless. Yet another seeks to limit the Tribe's agriculture claims in a manner contrary to any previous PIA analysis. But once again, the Supreme Court in *Idaho II* provided the final curtain call; the State's arguments fail based on the law of the federal reserved water rights doctrine as applied to the historic record confirmed in *Idaho II*. For these reasons, the United States respectfully requests that the United States and Tribe's Joint Motion for Summary Judgment be granted and the State and Objectors' Motions denied.

DATED this 22nd day of February, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that original copies of the UNITED STATES' RESPONSE TO THE STATE OF IDAHO'S AND OBJECTORS' MOTIONS FOR SUMMARY JUDGMENT was sent via FedEx this 22nd day of February, 2017 to:

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I certify that true and correct copies of the documents listed above were sent via U.S. Post to the parties below on this 22nd day of February, 2017.

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2001 WL 76238 (U.S.) (Appellate Brief)
United States Supreme Court Petitioner's Brief.

STATE OF IDAHO, Petitioner,

v.

UNITED STATES OF AMERICA, et al., Respondents.

No. 00-189.
January 25, 2001.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER

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*i QUESTION PRESENTED

In *United States v. Alaska,* 521 U.S. 1 (1997), this Court held, in the context of a statehood act, that congressional ratification of an executive order reservation known to contain submerged lands may imply an affirmative intent to defeat state title to such submerged lands. The question presented here is whether a defeat of state title to submerged lands is implied when Congress, in a pre-statehood act, authorizes cession negotiations with an Indian tribe occupying an executive order reservation for the purchase of lands "not agricultural and valuable chiefly for minerals and timber," with the purpose of releasing submerged lands from the reservation.

*ii PARTIES

The parties to the proceedings before the Court of Appeals for the Ninth Circuit were the State of Idaho, as the appellant and cross-respondent, the United States of America, as respondent, and the Coeur d'Alene Tribe, as respondent and cross-appellant.

West Headnotes (1)

Water Law ⇐ Rights incident to state's admission to Union in general

Is a defeat of state title to submerged lands implied when Congress, in a pre-statehood act, authorizes cession negotiations with an Indian tribe occupying an executive order reservation for the purchase of lands "not agricultural and valuable chiefly for minerals and timber," with the purpose of releasing submerged lands from the reservation?

Cases that cite this headnote

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*1 OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals (Pet. App. 1-30) is reported at 210 F.3d 1067 (9th Cir. 2000). The decision of the district court (Pet. App. 31-86) is reported at 95 F.Supp.2d 1094 (D. Idaho 1998).

JURISDICTIONAL STATEMENT

The court of appeals entered its judgment on May 2, 2000. The petition for a writ of certiorari was filed with this Court on July 25, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The Indian Department Appropriations Act of May 15, 1886, 24 Stat. 29, provides in relevant part:

> To enable the Secretary of the Interior to negotiate with ... the Coeur d'Alene Indians for the cession of their lands outside the limits of the present Coeur d'Alene reservation to the United States, fifteen thousand dollars, or so much thereof as may be necessary, to be immediately available; but no agreement made shall take effect until ratified by Congress.

The Indian Department Appropriations Act of March 2, 1889, provides in relevant part:

> That the Secretary of the Interior be, and he is hereby, authorized and directed to negotiate with the Coeur d'Alene tribe of Indians 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, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of ***2** Indians, which purchase shall not be complete until ratified by Congress and for the purpose of such negotiation, the sum of two thousand dollars, or so much thereof as may be necessary, is hereby appropriated; the action of the Secretary of the Interior hereunder to be reported to Congress at the earliest practicable time.

Act of March 2, 1889, 25 Stat. 980, 1002.

The relevant portions of the Indian Department Appropriations Act of March 3, 1891, 26 Stat. 989, 1027, which ratified two cession agreements with the Coeur d'Alene Tribe, are set out in the Joint Appendix at 376-88. The Act of May 30, 1888, 25 Stat. 160, which granted a railroad right-of-way across the Coeur d'Alene Indian Reservation, is set out in the Joint Appendix at 137-40.

STATEMENT

At issue in this case are the beds and banks, or submerged lands, of those portions of Coeur d'Alene Lake and its tributary, the St. Joe River, that lie within the exterior boundaries of the Coeur d'Alene Indian Reservation. As this Court has previously remarked, Coeur d'Alene Lake is one of the nation's "most beautiful lakes." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 264 (1997). Although a portion of the Lake lies within the exterior boundaries of the Reservation, the land surrounding the Lake is owned predominately by non-Indians, as is most land within the Reservation. [1] Of the ***3** Reservation's 5,802 residents, only 749 are Native Americans. *Statistical Record of Native North Americans*, 1036 (M. Reddy. ed. 1993).

The State of Idaho has always had a special relationship to the Lake. In 1890, when Congress was debating Idaho's admission to the Union, one of the questions Congress addressed was whether the Idaho Territory had "the requisite population and resources to entitle [it] to statehood." H. R. Rep. No. 4053, 50th Cong., 2d Sess. 1 (1889). During these congressional debates, Coeur d'Alene Lake and its tributaries were frequently mentioned as important resources justifying Idaho's statehood. [2]

After statehood, early Idaho laws focused on the use of Coeur d'Alene Lake and its tributaries as commercial corridors for the transport of lumber. In 1903, the Idaho Legislature designated "Coeur d'Alene Lake and all of the streams tributary to and emptying into the same" as a lumber district. 1903 Idaho Sess. Laws 89. [3]

In later years, the State began addressing the need to preserve the Lake for public use. In 1927, the Idaho ***4** Legislature declared submerged lands under Coeur d'Alene Lake "to be devoted to a public use in connection with the preservation of said [lake] in [its] present condition as a health resort and recreation place for the inhabitants of the state. ..." Idaho Code § 67-4305 (Supp. 2000). The State also appropriated the waters of Coeur d'Alene Lake "in trust for the people of the state of Idaho," in order to preserve the water "for scenic beauty, health, recreation, transportation and commercial purposes. ..." Idaho Code § 67-4304 (1995). Recreational opportunities were also preserved through the establishment of two state parks along the shores of Coeur d'Alene Lake and the St. Joe River. Idaho Code §§ 67-4202, 4212 (1989 & Supp. 2000). Both parks are within the exterior boundaries of the Coeur d'Alene Reservation.

Idaho also acted to protect the public's rights to the Lake and its tributaries. In 1931, the Idaho Legislature created a commission to "study and investigate ways and means of eliminating from the Coeur d'Alene River and Coeur d'Alene Lake, so far as practicable, all industrial wastes which pollute or tend to pollute the same. ..." Idaho Code §§ 70-201, 204 (1999). Idaho prohibited dredge mining on "[t]he St. Joe River, including tributaries, from its origin to its confluence with Coeur d'Alene lake. ..." Idaho Code § 47-1323 (1997). Idaho regulated encroachments upon Coeur d'Alene Lake to protect "property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality. ..." Idaho Code § 58-1301 (1994).

State courts confirmed state title to the submerged lands of the Lake, including those portions within the boundaries of the Coeur d'Alene Indian Reservation. *West v. Smith,* 511 P.2d 1326, 1329-30 (Idaho 1973). The ***5** Idaho courts have also confirmed that the primary uses of the Lake are public in nature. *See Shephard v. Coeur d'Alene Lumber Co.*, 101 P. 591, 592 (Idaho 1909) (holding Coeur d'Alene Lake "is a public highway"); *Burrus v. Edward Rutledge Timber Co.*, 202 P. 1067, 1068 (Idaho 1921), quoting *Northern Pac. Ry. Co. v. Hirzel,* 161 P. 854 (Idaho 1916) (holding that State holds bed of Coeur d'Alene Lake "for the use and benefit of the whole people"); *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club,* 671 P.2d 1085, 1088 (Idaho 1983) (applying public trust doctrine to bed of Coeur d'Alene Lake). [4]

For reasons unknown to the State, the federal government waited over 100 years before challenging Idaho's assumption of sovereignty over the submerged lands of Coeur d'Alene Lake and its navigable tributaries. It was not until 1994 that the government brought an action to assert ownership of submerged lands within the current boundaries of the Coeur d'Alene Reservation, excluding ***6** submerged lands within Heyburn State Park, which lies within the Reservation boundaries. [5]

The government's action was filed in the Federal District Court for the District of Idaho, and the Coeur d'Alene Tribe intervened. In its ruling for the government and the Tribe, the district court made extensive factual findings in this case, which are not in dispute. As that court found, before the arrival of European settlers, the Coeur d'Alene Tribe occupied millions of acres in northern Idaho and northeastern Washington, centered on Coeur d'Alene Lake, the Coeur d'Alene River, the St. Joe River, and the Spokane River. Pet. App. 43. The Tribe's villages were located around the Lake and the rivers, which provided fish, game, and plants necessary to the Tribe's subsistence. Pet. App. 43-45.

In the 1840s, the Coeur d'Alenes, with the help of Jesuit missionaries, began to cultivate small garden plots. Pet. App. 46. When non-Indian settlers began to arrive in northern Idaho, concerns arose over potential conflicts between the Tribe's rights of occupancy and the land claims of the settlers. In response, President Johnson, in 1867, established a small reservation for the Tribe in the Hangman Valley, which lies some miles south of Coeur d'Alene Lake. Pet. App. 50. Only a small sliver of the ***7** Lake lay within the boundaries established by President Johnson. *Id.*

The Tribe was apparently unaware of the 1867 Reservation; in 1871 they sent a petition to the Commissioner of Indian Affairs requesting that the farmlands in the Hangman Valley be set aside for their use. *Id.* In 1872, they sent a second petition, requesting the addition of the valleys along the St. Joe and Coeur d'Alene Rivers. Pet. App. 50-51. In explaining their needs, the Tribe wrote:

> [W]e are not as yet quite up to living on farming: with the work of God we took labor too, we began tilling the ground and we like it: though perhaps slowly we are continually progressing; but our unaided industry is not as yet up to the white man's. We think it hard to leave at once old habits to embrace new ones: for a while yet we need have some hunting and fishing.

Pet. App. 51; App. 27.[6]

In 1873, the Commissioner of Indian Affairs directed a three member commission to visit non-treaty tribes within Idaho and induce them to settle upon designated reservations. Pet. App. 54. The commissioners met with ***8** representatives of the Coeur d'Alene Tribe, and, in four days of negotiations, agreed to establish a reservation that included the valleys of the St. Joe and Coeur d'Alene Rivers, and the lands surrounding all but the extreme northern portion of Coeur d'Alene Lake. Pet. App. 55-56; App. 32-37. The agreement provided that it was not binding until ratified by Congress. Pet. App. 56.

One member of the commission, Idaho Territorial Governor Thomas Bennett, explained in a letter to an Idaho newspaper that the Tribe had demanded an extension of their reservation to include fishing and mill privileges on the Spokane River. Pet. App. 56-57; App. 38-41. The official report to the Commissioner of Indian Affairs, however, written by commission member John Monteith, made no mention of such demands, but explained that the Reservation boundaries were drawn to include Indian farms and to exclude lands claimed by white settlers. Pet. App. 56. The boundary along the Spokane River was drawn to avoid the cost of building a steam mill for the Tribe by making use of readily available water power. *Id.*

Three months after the signing of the agreement, President Ulysses S. Grant, on November 8, 1873, set apart a reservation for the Tribe, incorporating the boundaries described in the agreement. Pet. App. 57. The executive order was the result of a request from the Commissioner of Indian Affairs, who informed the Secretary of Interior that the order was needed to protect the agreed-upon lands "from trespass by white persons pending the action of Congress upon said agreement." *Id.*

Although the Commissioner of Indian Affairs had requested the executive order as a temporary measure pending ratification, Congress never ratified the agreement. The lack of congressional action resulted in the ***9** executive order remaining in place through the next decade. This state of affairs was not satisfactory to the Tribe, and on March 23, 1885, they submitted a petition to the federal government requesting new negotiations, so that the Tribe would be "compensated for such portion of their lands not now reserved to them; [and] that their present reserve may be confirmed to them." Pet. App. 68, quoting H. R. Rep. No. 1109, 51st Cong., 1st Sess. 42 (1890).

The next year, Congress authorized negotiations with the Tribe for the cession of their lands outside the limits of the 1873 Reservation, and provided that any agreement reached would not take effect until ratified by Congress. Act of May 15, 1886, 24 Stat. 29, 44; App. 50. The authorized negotiations occurred in 1887, resulting in a proposed agreement that provided that "the Coeur d'Alene Reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians." App. 379. The agreement also provided that it would "not be binding on either party until ratified by Congress." App. 382.

Around this same time, however, concerns arose regarding the Department of Interior's policies restricting the use of Coeur d'Alene Lake by non-Indians. Around 1880, steamboats had begun using the Lake to transport people and goods between the city of Coeur d'Alene, which lay outside the Reservation, and a landing on the Coeur d'Alene River, which

lay within the Reservation. Pet. App. 69. From the landing, goods were transported overland to mining camps in the upper reaches of the Coeur d'Alene River. The steamboat operators transported liquor to the mines, and sold liquor to passengers while traveling over the Lake. *Id.*; App. 52-58. When this liquor trade was discovered in 1886, the Department of ***10** Interior moved quickly to quash the transportation of liquor across the Lake, citing statutes prohibiting the introduction of liquor into "Indian country." Pet. App. 69. Around this same time, government agents began ejecting non-Indians who were fishing and camping along the Lake and its tributaries. Pet. App. 70.[7]

Concerns over the restrictions on non-Indian use of the Lake prompted Congress to delay ratification of the 1887 agreement, in favor of investigating the situation. In 1888, the Senate passed the following resolution:
Whereas it is alleged that the present area of the Coeur D'Alene Indian Reservation, in the Territory of Idaho, embraces 480,000 acres of land; that there are, according to the statistics in the Indian Bureau, only about 476 Indians in the tribe now occupying such reservation, or more than 1,000 acres to each man, woman, and child; that Lake Coeur D'Alene, all the navigable waters of Coeur D'Alene River, and about 20 miles of the navigable part of Saint Joseph River, and part of Saint Mary's, a navigable tributary of the Saint Joseph, are embraced within this reservation, except a shore-line of about 3 1/2 miles at the north end of the lake, it being alleged that this lake and its rivers tributary constitute the most important highways of commerce in the Territory of Idaho, and are in fact the only navigable waters, except Snake River, now used for steam-boat navigation in the Territory; that all boats now entering such waters are ***11** subject to the laws governing the Indian country and all persons going on such lake or waters within the reservation lines are trespassers; and

Whereas it is further alleged that the Indians now on such reservation are located in the extreme southwest corner of the same around De Smedt Mission, near the town of Farmington, in Washington Territory, where the land is good for agriculture; and it being further alleged that all that part of such reservation lying between Lake Coeur D'Alene and Coeur D'Alene River and that part between the Coeur D'Alene River and Saint Joseph River is a territory rich in the precious metals and at the same time being of no real use or benefit to the Indians: Therefore,

Resolved, That the Secretary of the Interior be, and he is hereby, directed to inform the Senate as to the extent of the present area and boundaries of the Coeur D'Alene Indian Reservation in the Territory of Idaho; whether such area 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; about what proportion of said reservation is agricultural, grazing and mineral land respectively; also the number of Indians occupying such reservation; also on what portion of such reservation the Indians now thereon are located; also whether, in the opinion of the Secretary, it is advisable to throw any portion of such reservation open to occupation and settlement under the mineral laws of the United States, and, if so, precisely what portion; and also whether it is advisable to release any of the navigable waters aforesaid from the limits of such reservation.

***12** S. Misc. Doc. No. 36, 50th Cong., 1st Sess. (1888); App. 116-17.

Several weeks later, the Secretary of Interior responded by enclosing a report prepared by the Commissioner of Indian Affairs. The Commissioner's report concluded that "the reservation appears to embrace all the navigable waters of Lake Coeur d'Alene, except a very small fragment cut off by the north boundary of the reservation which runs 'in a direct line' from the Coeur d'Alene Mission to the head of the Spokane River." S. Ex. Doc. No. 76, 50th Cong., 1st Sess. 3 (1888); App. 123. The Commissioner then turned to the question of "whether it is desirable to release any of the navigable waters mentioned in the resolution from the limits of said reservation." App. 126. The Commissioner began by stating: "In approaching this question [of release of navigable waters], I deem it proper to refer briefly to the character and condition of the Indians occupying the reservation and the situation of affairs as existing amongst them." *Id.* He noted that members of the Tribe "cultivate the soil extensively, live in comfortable houses, dress like the whites, wear short hair, and in all other respects live and do as white people do. ... They own large bands of cattle and horses and an abundance of hogs and poultry." App. 127.

The Commissioner concluded that "[t]here are few Indians in the entire country, if we except the five civilized tribes, who are as far advanced. ..." App. 126. The Commissioner also noted that members of the Tribe did not reside by the Lake, stating his belief that "all, or nearly all" of the tribal members lived on farmlands in the Hangman's Creek area "lying south of the Lake Coeur d'Alene and St. Joseph River." *Id.* After reciting the above ***13** facts relating to the Tribe's needs, the Commissioner concluded that the Tribe retained its original Indian title to lands within the boundaries of the Reservation:

[M]y own opinion is that the reservation might be materially diminished without detriment to the Indians, and that changes could be made in the boundaries for the release of some or all of the navigable waters therefrom, which would be of very great benefit to the public; but this should be done, if done at all, with the full and free consent of the Indians, and they should, of course, receive proper compensation for any land so taken.

Just what portion of the reservation and navigable waters should be segregated from the reservation, I am unable to say. That, I think, should be determined by negotiations with the Indians.

. . . .

In conclusion I will state that in my opinion these Indians have all the original Indian rights in the soil they occupy. They claimed the country long before the lines of the reservation were defined by the executive order of 1873, and the present reservation embraces only a portion of the lands to which they laid claim.

. . . .

I think that when the present agreement [i.e., the 1887 agreement] shall have been ratified it will be an easy matter to negotiate with them for the cession of such portions of their reservation as they do not need, including all or a portion of the navigable waters, upon fair and very reasonable terms.

App. 129-32.

Congress rejected the Commissioner of Indian Affairs' recommendation to ratify the 1887 agreement. ***14** Instead, Congress inserted the following language in the Indian Department Appropriations Act of March 2, 1889:

> That the Secretary of the Interior be, and he is hereby, authorized and directed to negotiate with the Coeur d'Alene tribe of Indians 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, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress....

Act of March 2, 1889, 25 Stat. 980, 1002; App. 144.

The directive to seek diminishment of the Reservation was prompted by the desire to obtain a release of at least some of the navigable waters. Pet. App. 22, n.14. The specific directions to the Secretary of Interior, however, omitted any mention of submerged lands. Act of March 2, 1889, 25 Stat. at 1002; App. 144.

Significantly, the 1889 Act was the last action that Congress took with regard to the Coeur d'Alene Reservation during the territorial period. In the summer of 1889, a group of prominent Idaho politicians met in Boise, Idaho, to draft a constitution for submission to Congress, in the hope of gaining statehood for Idaho. Their action was unusual, since Congress had not passed enabling legislation authorizing the formation of a state constitution.[8] In the absence of

enabling legislation, the drafters ***15** looked to other enabling acts for guidance, and included standard language disclaiming title to public lands and lands owned or held by Indian tribes. Idaho Const., Art 21, § 19; App. 370-72.[9]

Despite the lack of enabling legislation, Congress approved the Idaho Constitution on July 3, 1890, and admitted Idaho into the Union as the 43rd State. Act of July 3, 1890, 26 Stat. 215. By this time, the negotiations with the Coeur d'Alene Tribe had been completed, and the results submitted to Congress for approval. The Tribe agreed to cede the northern portion of the Reservation. App. 384. The boundaries of the diminished Reservation bisected the Lake, with the southern third of the Lake remaining within the boundaries of the Reservation, while the northern two-thirds of the Lake, along with the surrounding uplands, were excluded from the Reservation. *Id.*

The 1889 agreement and the 1887 agreement were transmitted to Congress for ratification on December 18, 1889. H. R. Rep. No. 2988, 51st Cong., 1st Sess. 26 (1890); App. 373-75. The agreements were bundled as a package for consideration, partly because the Tribe had insisted on a provision stating that the 1889 agreement would not be binding on either party until ratification of the 1887 agreement. Pet. App. 8; App. 385.

Although the Senate passed a bill ratifying the 1887 and 1889 agreements on June 7, 1890, ***16** 21 Cong. Rec. 5769-70, App. 359-67, the House did not hold a vote on the bill that year, Pet. App. 8, and the agreements were not ratified until passage of the Indian Department's 1891 annual appropriation bill on March 3, 1891, eight months after Idaho's admission to the Union. 26 Stat. at 1027; App. 376-88.

The exterior boundaries of the Coeur d'Alene Reservation have remained the same since 1891, with one exception. In 1893, Congress authorized negotiations to purchase the townsite of Harrison, populated by non-Indians but located within the Reservation. Act of March 3, 1893, 27 Stat. 612, 616. Harrison stood on the shores of Coeur d'Alene Lake, immediately south of the mouth of the Coeur d'Alene River. The final description of the ceded lands, as negotiated with the Tribe, encompassed a one-mile rectangular strip of land that included a corner of Coeur d'Alene Lake, since the boundary of the cession descended one mile due south of the mouth of the Coeur d'Alene River, then proceeded east. Pet. App. 84-85; App. 392.

As previously discussed, the State exercised sovereignty over Coeur d'Alene Lake throughout the 20th century. It was not until 1994 that the United States sought to assert ownership of the submerged lands underlying the southern end of Coeur d'Alene Lake and the lower reaches of the St. Joe River. In its initial complaint, filed in the Federal District Court for the District of Idaho, the United States invoked federal court jurisdiction under 28 U.S.C. §§ 1331, 1345, and 2202. The Coeur d'Alene Tribe intervened, invoking federal court jurisdiction under 28 U.S.C. §§ 1331, 1345, 1346, 1362, and 1367. The State of Idaho counterclaimed, asserting sovereign title to the submerged lands put at issue by the United States. Pet. App. 32.

***17** Following a two week trial, the federal district court, based on the historic facts set out above, concluded that the President, in setting aside the 1873 Reservation, had clearly intended to include submerged lands within the Reservation. Pet. App. 66. The court then turned to the issue of congressional ratification. The court concluded that by "authorizing the federal government to negotiate with the Tribe for a release of the submerged lands, Congress acknowledged that the Executive Order of 1873 had effectively conveyed ownership of those lands to the Coeur d'Alenes." Pet. App. 78. The court decreed that the Tribe, and the United States as trustee, were "entitled to the exclusive use, occupancy and right to the quiet enjoyment of the bed and banks of all the navigable waters within the current boundaries of the Coeur d'Alene Indian Reservation," excluding submerged lands within Heyburn State Park. App. 8.

The State appealed, and the United States Court of Appeals for the Ninth Circuit affirmed the district court's decision.[10] Pet. App. 1-30. The court of appeals applied the two-pronged test from *United States v. Alaska*, 521 U.S. 1 (1997), to determine, first, whether the executive branch intended to include the submerged lands within the Reservation, and second, whether Congress affirmatively defeated state title to the submerged lands. Because the State conceded, for

purposes of appeal, that the executive branch had intended, or by 1888 had interpreted, the 1873 Executive Order Reservation to include submerged lands, ***18** the court focused on the second prong of the *Alaska* test. Pet. App. 13.

The court of appeals acknowledged that the issue under the second prong of the test is "whether the congressional action at issue showed an affirmative intent to defeat state title, that is, whether the 'intention was definitely declared or otherwise made very plain.' " Pet. App. 12. The court of appeals, however, did not identify specific statutory language plainly declaring an affirmative intent to defeat state sovereignty to submerged lands. Nor did it identify any statute conveying submerged lands to the Tribe. Rather, it concluded that "the affirmative course of action on which Congress embarked in 1889 — open-ended negotiations to purchase whatever non-agricultural land, particularly submerged lands, the Tribe was willing to cede — presupposes that beneficial ownership of all land within the 1873 reservation, including submerged lands, *had already passed to the Tribe.*" Pet. App. 23 (emphasis added).

The court of appeals also purported to adopt this Court's admonition in *Alaska* that "the purpose of a conveyance or reservation is a critical factor in determining federal intent." 521 U.S. at 39. The court of appeals, however, explicitly declined to determine the purpose of the Coeur d'Alene Reservation as understood by Congress. Pet. App. 18-19. Rather, it held that it was necessary to examine purpose only as it related to the government's goals at the time the executive branch reserved the submerged lands. *Id.*

The court of appeals issued its decision on May 2, 2000. The State of Idaho filed a petition for a writ of certiorari with this Court on July 25, 2000. The petition was granted on December 11, 2000.

*19 SUMMARY OF ARGUMENT

It is a rare and extraordinary thing for a sovereign government to abrogate the public's ownership of lands underlying navigable waters. Submerged lands are tied in a unique way to sovereignty, precisely because their natural and primary uses are public in nature. *Shively v. Bowlby,* 152 U.S. 1, 11 (1894). Only sovereign ownership assures that submerged lands will be maintained for the benefit of the whole people. If such lands are to be removed from common public use, it must be done with deliberation, and only after full consideration of the consequences. An intent to defeat sovereign title to submerged lands must also be plainly stated, because such an important decision would not be left for inference from ambiguous language. *Martin v. Waddell's Lessee,* 41 U.S. (16 Pet.) 367, 416 (1842).

For these reasons, the Court has carefully limited the circumstances under which it will infer an intent to sever submerged lands from sovereignty. While Congress, with its possession of national and municipal sovereignty over territories, may have the authority to sever submerged lands from sovereignty, and prevent their passage to future States, it has done so only in "the most unusual circumstances." *Utah Div. of State Lands v. United States,* 482 U.S. 193, 197 (1987). Within Indian reservations, an intent to defeat state sovereign title to submerged lands has been found only where Congress conveyed the lands in fee to the occupant tribe, and promised the tribe the lands would never be included within any future state. *Choctaw Nation v. Oklahoma,* 397 U.S. 620, 625 (1970). Where Congress has granted tribes rights other than full fee title, including rights of occupancy or exclusive use, ***20** the Court has not inferred an intent to defeat state sovereign title to submerged lands within Indian reservations. *United States v. Holt State Bank,* 270 U.S. 49, 58-59 (1926); *Montana v. United States,* 450 U.S. 544, 554 (1981).

Within other types of federal reservations, an intent to defeat state title to submerged lands has been found only where Congress made the determination that state ownership would thwart the purposes for which the reservation had been established, and expressly prevented the state from assuming sovereignty and ownership over the submerged lands. *See generally United States v. Alaska,* 521 U.S. 1 (1997). Notably, in both *Choctaw Nation* and *Alaska,* the statutes in question addressed explicitly how the assumption of statehood would affect both sovereignty and title within the federal reservations at issue.

In the case of the Coeur d'Alene Indian Reservation, Congress never addressed the question of whether the future State of Idaho would be denied sovereign title to submerged lands within the Reservation. Prior to statehood, there were two congressional actions relating to submerged lands within the Reservation. The first was a Senate inquiry into allegations that steamboats on Coeur d'Alene Lake were "subject to the laws governing the Indian country and [that] all persons going on such lake or waters within the reservation lines are trespassers." App. 116-17. After being informed by the Department of Interior that it interpreted the Coeur d'Alene Indian Reservation to embrace the submerged lands of Coeur d'Alene Lake, Congress ordered negotiations to diminish the Reservation, through the purchase of lands from the Coeur d'Alene Tribe. In ordering the negotiations, however, Congress did not convey the submerged lands to the Tribe; it did not affirm the Reservation boundaries that ***21** embraced the submerged lands; it did not direct that the public be denied access to the submerged lands or the overlying waters; and it did not address whether the submerged lands would later pass to the State as an incident of its sovereignty. Rather, Congress repudiated the Reservation as it then existed, directed its diminishment, and drafted its description of the lands to be purchased so as to avoid any implication that it was recognizing tribal title to the submerged lands. Act of March 2, 1889, 25 Stat. 980, 1002 (the "1889 Act").

In short, Congress did not "purport to defeat the entitlement of future States to any land reserved," and made "no mention of the States' entitlement to the beds of navigable rivers and lakes upon entry into statehood." *Utah Div. of State Lands*, 482 U.S. at 208. Further, neither the 1889 Act, nor its legislative history, suggest that Congress concluded that the future assumption of state sovereign title to submerged lands would thwart the purposes of the diminished Coeur d'Alene Indian Reservation. To the contrary, the language of the 1889 Act strongly implies that the primary purpose of the diminished Reservation was to provide lands to meet the agricultural needs of the Coeur d'Alene Tribe, and the legislative history described the Tribe's members as successful farmers. Thus, exclusive tribal control of submerged lands, and exclusion of the public uses associated with state sovereign title, were not necessary to fulfill the purposes of the diminished Reservation.

ARGUMENT

Submerged lands, are, by their nature, "incapable of ordinary and private occupation, cultivation, and improvement; and their natural and primary uses are ***22** public in their nature. ..." *Shively v. Bowlby*, 152 U.S. 1, 11 (1894). In ancient England, submerged lands were held by the King "for the benefit of the whole people." *Utah Div. of State Lands v. United States*, 482 U.S. 193, 196 (1987). Following the issuance of the Magna Carta, submerged lands became so identified with sovereignty that it was doubted whether "the king or any particular subject can gain a propriety exclusive of the common liberty." *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 412 (1842). If anything, American law ties submerged lands even more firmly to sovereignty. American law rejected the sovereign's rights of private property in submerged lands, *jus privatum*, that was recognized in England apart from the public's right to submerged lands, or *jus publicum*. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 286 (1997). These "developments in American law are a natural outgrowth of the perceived public character of submerged lands, a perception which underlies and informs the principle that these lands are tied in a unique way to sovereignty." *Id.*

Because submerged lands are so identified with sovereignty and public use, issues involving their ownership cannot be analogized to property transactions. "Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself." *United States v. Oregon*, 295 U.S. 1, 14 (1935). Ownership can be vested in someone other than the rightful sovereign only after affirmative steps are taken to sever the lands "from the prerogative powers of government." *Martin*, 41 U.S. (16 Pet.) at 410.

***23** The Constitution of the United States parcels sovereignty between the States and the federal government, and so this Court, in addressing title to submerged lands, was "called upon to draw the line that separates the sovereignty and jurisdiction of the government of the union, and the state governments...." *Pollard v. Hagan*, 44 U.S. (3 How.) 212,

220 (1845). It soon became established law that within the original thirteen states, sovereign title to submerged lands was vested in the states. *Shively*, 152 U.S. at 16. Because subsequently admitted States enter the Union on an equal footing with the original thirteen states, they too are vested with title and control to submerged lands. *Utah Div. of State Lands*, 482 U.S. at 197. Each state's ownership and control of submerged lands is "an inseparable attribute of the equal sovereignty guaranteed to it upon admission [to the Union]." *United States v. Louisiana*, 363 U.S. 1, 16 (1960).

Before gaining admission, however, most western States were originally territories under the plenary control of the federal government. When the United States acquired new territories, "they took upon themselves the trust to hold the municipal eminent domain for the new states, to invest them with it, to the same extent, in all respects, that it was held by the [original states]." *Pollard*, 44 U.S. at 222-23. This trust extends to submerged lands. *See Shively*, 152 U.S. at 49 (submerged lands are held "in trust" for future states); *Montana v. United States*, 450 U.S. 544, 551 (1981) ("the Federal Government holds [submerged] lands in trust for future States"). While this trust is derived from ancient principles defining the very nature of sovereignty, the Constitution does not prohibit the United States from breaching the trust. The United States "have the entire dominion and sovereignty, ***24** national and municipal, Federal and state, over all the territories, so long as they remain in a territorial condition." *Shively*, 152 U.S. at 48. The possession of both national and municipal sovereignty over a territory vests Congress with the authority to sever submerged lands from sovereignty, and prevent them from passing to future States formed out of the territory. *Id.*

While Congress can abrogate its responsibility to hold submerged lands in trust for future States, it has done so "only in the most unusual circumstances." *Utah Div. of State Lands*, 482 U.S. at 197. Firm congressional policy has been that submerged lands "shall not be granted away during the period of territorial government ... unless in case of some international duty or public exigency." *Shively*, 152 U.S. at 50. This policy has consistently informed this Court's interpretation of congressional actions alleged to defeat state title to submerged lands: "[D]isposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926).

Further, Congress' authority to defeat state title to submerged lands is strictly limited to the period during which Congress exercises municipal sovereignty over a territory. Upon a state's admission, "the title of the United States to lands underlying navigable waters within the State passes to it, as incident to the transfer to the State of local sovereignty...." *United States v. Oregon*, 295 U.S. at 14. Once vested, state title to submerged lands is absolute and cannot be defeated. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977).

***25** This Court's most recent cases have emphasized that defeats of state title to submerged lands are to be found only in exceptional circumstances. The court of appeals examined what it called this Court's "trilogy of decisions" in *United States v. Alaska*, 521 U.S. 1 (1997), *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987), and *Montana v. United States*, 450 U.S. 544 (1981). It is more revealing, however, to expand the analysis to include *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), wherein the Court found a defeat of state title. Together, the four decisions identify the factors that have led to a defeat of state title to submerged lands, and the factors, or lack thereof, that have led to the opposite conclusion.

In *Choctaw Nation*, the Court held that the United States had conveyed the bed of the Arkansas River to the Choctaw Nation. The factors the Court identified in its decision included the fact that the tribe was granted a fee simple patent to its lands. *Id.* at 625. The patent made an express reference to the "main channel of the Arkansas river" as a boundary. *Id.* at 630. Most importantly, the treaty pledged that the Nation would enjoy the "jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation ... and that no part of the land granted to them shall ever be embraced in any Territory or State." *Id.* at 625, quoting Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333-34.

In later submerged lands decisions, the Court described the decision in *Choctaw Nation* as a "singular exception," and traced the outcome in large part to "the Government's promise that the reserved lands would never become part of any State," and the fact that the ***26** Nation was promised "freedom from state jurisdiction." Montana, 450 U.S. at 555 n.5. The Court later stated that "indispensable to the holding [in *Choctaw Nation*] was a promise to the Indian Tribe that no part of the reservation would become part of a State." *Utah Div. of State Lands*, 482 U.S. at 198.

The next submerged lands case taken up by the Court was *Montana*, wherein the Crow Tribe claimed ownership of the beds and banks of the Big Horn River. There, as was the case in *Choctaw Nation*, the boundaries of the reservation were described by reference to the mid-channel of a navigable river. [11] The Crow Tribe, however, was not expressly promised that its lands would never be embraced within a future state. Rather, it was promised that its reservation was set apart "for the absolute and undisturbed use and occupation" of the Tribe. *Montana*, 450 U.S. at 548. Distinguishing *Choctaw Nation*, this Court held that:

The treaty in no way expressly referred to the riverbed, *Packer v. Bird*, 137 U.S., at 672, nor was an intention to convey the riverbed expressed in "clear and especial words," *Martin v. Waddell*, 16 Pet., at 411, or "definitely declared or otherwise made very plain," *United States v. Holt State Bank*, 270 U.S., at 55. Rather, as in *Holt*, "[t]he ***27** effect of what was done was to reserve in a general way for the continued occupation of the Indians of what remained of their aboriginal territory." *Id.*, at 58.

450 U.S. at 554. The Court also found that "the situation of the Crow Indians at the time of the treaties presented no 'public exigency' that would have required Congress to depart from its policy of reserving ownership of beds under navigable waters for the future States," because "at the time of the treaty the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life." *Id.* at 556.

Six years after *Montana*, the Court again addressed the issue of title to submerged lands within a federal reservation in *Utah Div. of State Lands*. The situation addressed in *Utah Div. of State Lands* was unique, since it involved a reservation set aside for the specific purpose of preserving a navigable lake as a potential reservoir site. 482 U.S. at 199. Further, no third party was involved, so the only issue was whether the reservation of submerged lands would defeat state title. To answer the question, the Court began by noting that when the federal government reserves submerged lands, it "may not also intend to defeat a future State's title to the land" because the "land remains in federal control, and therefore may still be held for the ultimate benefit of future States." *Id.* at 202. Thus, the Court held, "we would not infer an intent to defeat a State's equal footing entitlement from the mere act of reservation itself." *Id.* [12] Rather, ***28** the Court formulated a two prong test to address alleged defeats of state title arising from reservations of submerged lands. The Court held that "the United States would not merely be required to establish that Congress clearly intended to include land under navigable waters within the federal reservation; the United States would additionally have to establish that Congress affirmatively intended to defeat the future State's title to such land." *Id.*

While the Court went on to hold, under the first prong, that there was no intent to include the submerged lands within the reservation in question, it also applied the second prong, holding that "Congress did not clearly express an intention to defeat Utah's claim to the lakebed under the equal footing doctrine upon entry into statehood." *Id.* at 208. In support of its holding, the Court identified three factors. First, the Act in question did not "purport to defeat the entitlement of future States to any land reserved," but merely reserved land from sale, entry, settlement or occupation. *Id.* Second, the Act made "no mention of the States' entitlement to the beds of navigable rivers and lakes upon entry into statehood." *Id.* Third, the transfer of the lakebed to the State would not defeat the purpose of the reservation, which was to develop a reservoir or water reclamation project at the lake. *Id.*

In this Court's most recent submerged lands decision, *United States v. Alaska*, the Court turned once again to the question of state title to submerged lands within a federal reservation. This time, however, the submerged lands in question had originally been reserved or set aside by the executive branch, not Congress. The Court employed the two prong test used

in *Utah Div. of State Lands*, requiring a clear intent to include submerged lands ***29** within the federal reservation, and an affirmative expression of intent to defeat the future state's title to such land. *Alaska*, 521 U.S. at 41. For the two reservations in question, the Court concluded that the first prong of the test was met, since the executive branch had clearly intended to include submerged lands within the reservations. *Id.* at 39-40, 55. The decisive question presented to the Court was whether Congress had taken additional actions that affirmatively defeated state title to submerged lands within the two areas reserved or set aside by the executive branch.

The first reservation addressed in *Alaska* was a national petroleum reserve. After finding that the executive branch had intended to include submerged lands within the reserve, the Court turned to the question of whether Congress intended to defeat state title to the submerged lands. The Court found such intent in § 11(b) of the Alaska Statehood Act. *Alaska*, 521 U.S. at 44. Section 11(b) provided that the United States would have the "power of exclusive legislation ... as provided by [the Enclave Clause of the Constitution, Art. I, § 8, cl. 17] over such tracts or parcels of land as, immediately prior to the admission of said State, are owned by the United States and held for military ... purposes, including naval petroleum reserve numbered 4 [the National Petroleum Reserve]." *Alaska*, 521 U.S. at 41. The Court concluded that Section 11(b), "which noted that the United States owned the Reserve and which included a statement of exclusive legislative jurisdiction under the Enclave Clause, reflected Congress' intent to ratify the inclusion of submerged lands within the Reserve and to defeat the State's title to those lands." *Id.* at 46.

***30** In interpreting Section 11(b), the Court also relied heavily upon the purpose of the Reserve, which was to secure ownership of valuable oil deposits. *Id.* at 40. The Court noted that ownership of submerged lands was "necessary to prevent the Reserve's petroleum resources from being drained from beneath submerged lands." *Id.* at 42. In light of this fact, the Court concluded:

> [D]efeating state title to submerged lands was necessary to achieve the United States' objective — securing a supply of oil and gas that would necessarily exist beneath uplands and submerged lands. The transfer of submerged lands at statehood — and the loss of ownership rights to the oil deposits beneath those lands — would have thwarted that purpose.

Id. at 42-43. [13]

The second set of submerged lands addressed in *Alaska* was within the boundaries of an area withdrawn and set apart as a wildlife refuge, pursuant to an application submitted to the Secretary of Interior by the Bureau of Sport Fisheries and Wildlife. *Id.* at 46. [14] After finding that the withdrawal was intended to include submerged lands that served as wildlife habitat, the Court addressed whether Congress had affirmatively defeated state title to the submerged lands. The Court found such intent in § 6(e) of the Alaska Statehood Act. Section 6(e) addressed the circumstances under which Alaska would assume ***31** sovereignty over fish and wildlife management. It provided that the federal government would retain "administration and management of the fish and wildlife resources of Alaska" until the Secretary of Interior certified to Congress "that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest." Pub. L. 85-508, 72 Stat. 339, 340-41. The Act also provided that:

All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska ... shall be transferred and conveyed to the State of Alaska by the appropriate federal agency; Provided ... That such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife....

Id. at 340-41.

Based on this strong language, the Court inferred an intent to defeat state title to submerged lands. It held that "Section 6(e) of the Alaska Statehood Act expressly prevented land that has been 'set apart as [a] refug[e]' from passing to Alaska." 521 U.S. at 61. It further concluded that "[i]n § 6(e) of the Statehood Act, Congress clearly contemplated continued federal ownership of certain submerged lands ... so long as those submerged lands were among those 'withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife.' " *Id.* at 57. The only real issue was whether the refuge in question included submerged lands. Here, the Court turned to the purpose of the Reservation. It held that "waters within the boundaries of the Range were an ***32** essential part of the habitats of the species the Range was designed to protect, and [the] retention of lands underlying those waters was critical to the Government's goal of preserving these aquatic habitats." *Id.* at 52. Because "[t]he 1957 application to create the wildlife refuge clearly encompassed submerged lands," *id.* at 61, the Court concluded that "the operative provision of the Alaska Statehood Act, § 6(e), reflects a very clear intent to defeat state title." 521 U.S. at 57.

The common thread running through the cases where this Court has found a defeat of state title to submerged lands is an unmistakable expression of congressional intent that the lands in question would not be subject to state sovereignty. In *Choctaw*, the Tribe was expressly promised at the time of treaty-making that no part of the reservation would become part of a state. Twice, this Court has emphasized this promise was indispensable to the holding in *Choctaw. Utah Div. of State Lands*, 482 U.S. at 198, *Montana*, 450 U.S. at 555 n.5.

In *Alaska*, Congress asserted Enclave Clause jurisdiction over the petroleum reserve, establishing that it was not just reserving proprietary rights to itself, but was denying the assumption of state sovereignty over lands within the reserve. *Alaska*, 521 U.S. at 46. For the wildlife refuge, Congress expressly prevented all lands within the refuge from passing to the State upon its admission. Importantly, the provision was made in the context of § 6(e) of the Alaska Statehood Act, which addressed the general assumption of state sovereignty over fish and game resources and the lands and property related to the assumption of such sovereignty.

In short, a defeat of state title to submerged lands within federal reservations has been found only where it ***33** was clear, from the language and context of the statute in question, that Congress contemplated the effects of its action on the assumption of state sovereignty over submerged lands. Where the statute in question simply conveyed or reserved property rights, rather than allocating rights of sovereignty, no defeat of state title to submerged lands has been found. This principle is not new; in fact, it was applied in one of this Court's earliest submerged lands decisions, *Martin v. Waddell's Lessee.* There, the Court, describing the history of the State of New Jersey, found that during the colonial period, all sovereign and proprietary rights had been conveyed from King Charles II to the Duke of York, and then to the Proprietors of East New Jersey. 41 U.S. (16 Pet.) at 407. In 1702, the Proprietors of East New Jersey surrendered all rights of government and sovereignty to Queen Anne, explicitly retaining all rights of private property. *Id.* at 407, 415-16. The Court held that the surrender of sovereignty carried with it title to submerged lands, despite the express retention of all property rights. *Id.* at 416. The Court stated:

> [I]f the great right of dominion and ownership in the rivers, bays and arms of the sea, and the soils under them, were to have been severed from the sovereignty, and withheld from the crown; if the right of common fishery for the common people ... was intended to be withdrawn, the design to make this important change in this particular territory would have been clearly indicated by appropriate terms; and would not have been left for inference from ambiguous language.

41 U.S. (16 Pet.) at 416.

By the same token, in order to find that the federal government has defeated state title to submerged lands within a federal Indian reservation, the government must ***34** do more than retain property rights for itself or the occupant tribe. Congress must affirmatively intend to sever the submerged lands from future state sovereignty and dedicate the lands to federal or tribal uses which would be thwarted if the lands were subject to state sovereignty. An intent to defeat state title

must also be definitely declared or otherwise made plain: because of the importance of submerged lands to sovereignty, and their dedication to public use, an intent to sever submerged lands from sovereignty "would not have been left for inference from ambiguous language." *Martin*, 41 U.S. at 416.

In the case of the Coeur d'Alene Indian Reservation, there is no evidence that Congress exercised its municipal sovereignty over the Territory of Idaho to sever the submerged lands of Coeur d'Alene Lake and the St. Joe River from sovereignty and convey them to the Coeur d'Alene Tribe for its proprietary use. Nor is there any reason to conclude that Congress severed the submerged lands from state sovereignty and dedicated them to the exclusive use of the federal government.

Up to the point of Idaho's admission, Congress passed three acts specifically addressing property rights within the Coeur d'Alene Reservation. The first was the Act of May 15, 1886, 24 Stat. at 44, which authorized negotiations with the Coeur d'Alene Tribe for the purchase of its lands outside the limits of the 1873 Executive Order Reservation. The second was the Act of May 30, 1888, 25 Stat. 160, which authorized a railroad right-of-way across the 1873 Reservation. The third was the Act of March 2, 1889, 25 Stat. at 1002, which authorized the purchase of certain lands within the 1873 Reservation. The 1889 Act was the last action Congress took with ***35** respect to the Coeur d'Alene Reservation before passage of the Idaho Statehood Act, which accepted the terms of Idaho's constitution and admitted Idaho to the Union. Act of July 3, 1890, 26 Stat. 215. It is informative to review each of the above Acts in turn, comparing each to the congressional acts reviewed in this Court's submerged lands decisions.

The Act of May 15, 1886.

Little need be said about the 1886 Act, since neither the district court nor the court of appeals interpreted the 1886 Act as defeating state sovereign title to submerged lands. Indeed, the 1886 Act did nothing but authorize negotiations "with the Coeur d'Alene Indians for the cession of their lands outside the limits of the present Coeur d'Alene Reservation to the United States. ..." Act of May 15, 1886, 24 Stat. at 44; App. 50. Nothing on the face of the Act implies an intent to defeat, or even address, state sovereign title to submerged lands within the reservation. Additionally, Congress made plain its intent that the 1886 Act was not to be construed as taking any final action with regard to the Tribe's lands, by providing that "no agreement made shall take effect until ratified by Congress." App. 50.

The Act of May 30, 1888.

Likewise, little need be said about the 1888 Act, which granted an "extension of [a] railroad through the lands in Idaho Territory set apart for the use of the Coeur d'Alene Indians by executive order, commonly known as the Coeur d'Alene Indian Reservation. ..." Act of May 30, 1888, 25 Stat. 160; App. 137. The court of appeals did not specifically identify the 1888 Act as defeating state title to submerged lands, holding only that Congress' passage of the Act "supports congressional recognition of ***36** the 1873 reservation, which Congress by this point knew included submerged lands." Pet. App. 21 n.13. Beyond recognizing the existence of the 1873 reservation, however, the 1888 Act does not purport to defeat state title to submerged lands, or otherwise convey or reserve such lands. The Act does mention Coeur d'Alene Lake and the St. Joe River, but only as geographic points describing the location of the railroad right-of-way, which crossed the Lake.

The Act of March 2, 1889.

The congressional action that received the primary attention of the court of appeals was the 1889 Act, which authorized negotiations for a cession of a portion of the 1873 Reservation. The court paid particular attention to the Act's legislative history. The history of the 1889 Act started with Congress' consideration of the 1887 agreement, which would have confirmed the 1873 boundaries. Pet. App. 21. As part of its consideration of the 1887 agreement, Congress attempted to ascertain, through an inquiry to the Department of Interior, whether the Coeur d'Alene Reservation included submerged

lands. *Supra* at 10-12; App. 116. In response, the Department of Interior submitted a report to Congress stating that the Coeur d'Alene Reservation "appears to embrace all the navigable waters of Lake Coeur d'Alene," with the exception of a small fragment at the extreme north end of the Lake. App. 123. The court of appeals held that the report put Congress on notice that the executive branch construed the 1873 Reservation to include submerged lands. Pet. App. 21.

The court of appeals attached significance to the fact that "[a]lthough Congress had the opportunity and the power to repudiate the executive reservation and the ***37** 1887 agreement, it did not do so." Pet. App. 15. Instead, Congress authorized cession negotiations for the "purchase and release by said tribe of such portions of its reservation ... as such tribe shall consent to sell." Act of March 2, 1889, 25 Stat. at 1002, App. 144. The court of appeals held:
The express reference to the reservation as *the Tribe's reservation*, explicit recognition that the choice to sell was the Tribe's, and reference to *tribal release* of portions of *its reservation* all manifest an awareness and acceptance by Congress of the boundaries of the 1873 reservation — boundaries that included submerged lands.

. . . .

Although Congress may have been unhappy to learn that the executive reservation included submerged lands, its actions show recognition and acceptance of the passage of beneficial ownership to the Tribe, for it sought to *regain* as much submerged land as possible. The affirmative course of action on which Congress embarked in 1889 — open-ended negotiations to purchase whatever non-agricultural land, particularly submerged lands, the Tribe was willing to cede — presupposes that beneficial ownership of all land within the 1873 reservation, including submerged lands, had already passed to the Tribe.

Pet. App. 22-23 (emphasis in original).

1. The court of appeals, by holding that Congress did not "repudiate" the 1873 Executive Order Reservation, simply mischaracterized Congress' actions. Congress not only repudiated the 1873 Reservation, but such repudiation was the underlying purpose of the 1889 Act. The very reason that Congress required renewed negotiations ***38** was Congress' refusal to accept the Reservation boundaries established in the 1873 Executive Order and the 1887 agreement.

The court of appeals was correct in one respect: Congress had the authority to repeal the 1873 Executive Order if it chose to do so. Executive orders do not vest the occupant tribe with compensable title, but only a right of permissive occupancy akin to a tenancy at will. *Confederated Bands of Ute Indians v. United States,* 330 U.S. 169, 176 (1947). It is not surprising, however, that Congress chose not to repeal the 1873 Executive Order. An outright repeal of the Order would have left the Tribe's farmlands unprotected. A repeal also would not have resolved outstanding claims of aboriginal title within the boundaries of the Reservation. As the Commissioner of Indian Affairs noted in his 1888 Report, it was the Indian Department's position that "these Indians have all the original Indian rights in the soil they occupy" and that such rights predated the 1873 Executive Order. App. 131.

Given the above concerns, Congress chose to repudiate the 1873 Reservation, and its inclusion of submerged lands, by refusing to accept the existing Reservation boundaries, and directing further negotiations that would result in a radical diminishment of the Reservation. Congress' action can be characterized as an "acceptance" of the 1873 Reservation only through the most twisted application of logic.

2. The holding of the court of appeals cannot be reconciled with this Court's submerged lands decisions. As discussed above, this Court has inferred an intent to defeat state title to submerged lands only where Congress, by a definite declaration or plain statement of ***39** intent, severs submerged lands from future state sovereignty and dedicates them to specific federal or tribal uses. The 1889 Act simply has no comparison to the strong language that led to defeats of state title in *Choctaw Nation* and *Alaska.* Unlike *Choctaw Nation*, there is no language promising that Reservation lands

would never be part of a future state, or otherwise severing submerged lands within the Coeur d'Alene Reservation from future state sovereignty. The 1889 Act was a repudiation of the 1873 boundaries, and an authorization to negotiate new boundaries; nothing more. There is no basis for concluding that Congress intended to defeat future state sovereignty over submerged lands. Indeed, there is no indication on the face of the Act, or in its legislative history, to indicate that Congress gave any thought to the effect its actions may have on future state sovereign title to submerged lands.

The 1889 Act is also distinguished from the provisions reviewed in *Alaska.* In both of the provisions reviewed in *Alaska*, Congress plainly stated its intent to prevent the assumption of state sovereignty over the reservations at issue. *See Alaska*, 521 U.S at 41 (discussing assertion of exclusive Enclave Clause jurisdiction over petroleum reserve); Pub. L. 85-508, 72 Stat. at 340-41 (discussing state assumption of sovereignty over fish and wildlife management and ownership of associated properties). Nothing in the 1889 Act compares to the language reviewed in *Alaska.* No provision in the Act limits the future assumption of state sovereignty over the Coeur d'Alene Reservation. As such, the operative language is analogous to that reviewed in *Utah Div. of State Lands*, since it did not "purport to defeat the entitlement of ***40** future States to any land reserved," and made "no mention of the States' entitlement to the beds of navigable rivers and lakes upon entry into statehood." 482 U.S. at 208. In short, the 1889 Act lacks any indication that Congress intended to address the issue of whether submerged lands within the Reservation would be subject to future state sovereignty. In the absence of such evidence, it cannot be reliably concluded that Congress intended to defeat state sovereign title to submerged lands.

3. The court of appeals also failed to appreciate the significance of the fact that the 1889 Act lacked any express reference to submerged lands. The operative language of the Act merely directed the Secretary of Interior to "negotiate with the Coeur d'Alene tribe of Indians 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. ..." 25 Stat. at 1002; App. 144. The lack of an express reference to submerged lands is especially revealing. As the court of appeals noted, the Act was prompted by Congress' displeasure upon learning that the Department of Interior interpreted the Reservation to embrace submerged lands. Pet. App. 23. Yet, in the 1889 Act, Congress failed to list submerged lands among the lands to be purchased.

The omission of any mention of submerged lands in the 1889 Act could not be anything other than purposeful. The most natural reading of the omission is that Congress understood that the submerged lands were part of the regalia of sovereignty, and not subject to tribal ownership or disposal. Rather, Congress limited its express recognition of tribal property rights to the uplands adjacent to the Lake. Such a limitation reflects the understanding ***41** that the lake was a public highway whose use was limited by tribal ownership of the adjacent uplands, which were necessary to construct the landings and shore facilities needed to make the Lake useful as a highway of commerce. [15]

The fact that the language in the 1889 Act applied only to uplands is analogous to the situation addressed in *Utah Div. of State Lands.* There, the Court held that the language of withdrawal was necessarily limited to uplands otherwise open to settlement. 482 U.S. at 203. The intent to limit the withdrawal to uplands was only affirmed by the fact that the federal purpose of developing Utah Lake as a reservoir was fully met by the reservation of title to adjacent uplands, and did not require defeat of public title to the lakebed. 482 U.S. at 206-08. Here, Congress' purpose of securing public use of the Lake did not require recognizing tribal title to the lakebed, since its purpose was fully met by acquiring tribal title to adjacent uplands. Indeed, it would have been incongruous for Congress to affirmatively defeat public title to the Lake for the sole purpose of purchasing it back from the Tribe. Congress therefore declined to expressly recognize tribal title to the lakebed.

***42** Similar omissions of express references to submerged lands have figured prominently in this Court's past decisions. *See Montana*, 450 U.S. at 554 ("[t]he treaty in no way expressly referred to the riverbed"); *Utah Div. of State Lands*, 482 U.S. at 203 ("[t]he words of the 1888 Act did not necessarily refer to lands under navigable waters"). In short, an express reference to lands under navigable waters is crucial to the determination that Congress definitely declared or otherwise made plain its intent to defeat state title to the submerged lands. This rule is of especial application to the 1889

Act, where the executive branch had construed the Reservation boundaries to embrace submerged lands, and Congress' response was to order the purchase of certain uplands and the negotiation of new boundaries. If Congress had intended to recognize and affirm tribal title to the lakebed, it would have naturally included the Lake in the description of the lands to be acquired.

4. It is beyond question that the 1889 Act did not convey any lands to the Coeur d'Alene Tribe. At most, Congress recognized the Tribe's pre-existing rights of exclusive use and occupancy, and directed the purchase of those rights. *See Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 176 (1947) (holding that Indian reservations set aside by executive orders vest the occupant tribes with rights of permissive occupancy). In fact, this conclusion is implicit in the court of appeals' holding that Congress was directing the purchase of lands that "had already passed to the Tribe." Pet. App. 23.

Congress' recognition that the Tribe held an exclusive right of occupancy to lands within the Reservation, however, does not imply that Congress intended to sever submerged lands within the Reservation from future state ***43** sovereignty. In this Court's decisions addressing title to submerged lands within Indian reservations, a defeat of state title has been inferred only where Congress explicitly granted or conveyed the submerged lands to the occupant Tribe in fee. *Choctaw*, 397 U.S. at 635. Where the Act in question granted or recognized tribal rights of exclusive use or occupancy, no defeat of state title has been found.

For example, in *Holt State Bank*, the Court was asked to determine title to the submerged lands underlying Mud Lake on the Red Lake Indian Reservation. 270 U.S. at 52. The Court deemed it significant that lands within the Reservation had never been formally granted to the Tribe, nor had the rights of the Indians been affirmatively declared. *Id.* at 58. Rather, what had been done was to "reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory. ..." *Id.* The Court held that this recognition of the aboriginal right of occupancy was insufficient to deny the State sovereign title to the submerged lands of Mud Lake, since there was nothing in the recognition that "even approaches a grant of rights in lands underlying navigable waters. ..." *Id.* at 58-59.

In *Montana*, there was a ratified treaty setting apart lands for the exclusive use of the Tribe, but the Court analogized the Tribe's rights in reservation lands to those recognized in *Holt State Bank*: "[A]s in *Holt*, '[t]he effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory.' " 450 U.S. at 554, *quoting Holt State Bank*, 270 U.S. at 58. Again, the right of occupancy, even though permanent and exclusive, was held insufficient to defeat sovereign title to submerged lands, since it ***44** did not amount to a conveyance of the riverbed in clear and especial words. *Id.*

Together, *Holt State Bank* and *Montana* establish that the United States' recognition of a tribal right of exclusive use and occupancy does not imply an intent to defeat the future assumption of state sovereignty over submerged lands. There must be more. In the 1889 Act, however, there was nothing more. Congress conveyed no property rights to the Tribe; it simply authorized the purchase of the Tribe's existing rights of occupancy. Indeed, Congress took care to assure that its action would not be construed as granting the Tribe any recognizable rights until it had an opportunity to review and approve the results of the negotiations it authorized. *See* Act of May 15, 1886, 24 Stat. at 44 ("no agreement made shall take effect until ratified by Congress"); Act of March 2, 1889, 25 Stat. at 1002 ("which purchase shall not be complete until ratified by Congress"). App. 51, 144.

In short, the 1889 Act, at most, recognized existing tribal rights of occupancy within the Reservation, and then only until the completion of negotiations to purchase the timber and mineral lands. As in *Holt State Bank* and *Montana*, this recognition of the Tribe's continued occupation of what remained of their aboriginal territory did not amount to a grant or conveyance sufficient to infer an intent to defeat state title to submerged lands within the Reservation.

5. Because the 1889 Act contains no plain statement of intent to defeat state title to submerged lands, no further inquiry is needed. But, if the Court were to look beyond the plain language of the Act, as did the court of appeals, the purpose of the Reservation would be a critical factor ***45** in determining whether a defeat of state title is implied by the terms of the Act. *See Alaska*, 521 U.S. at 52 (noting that in prior submerged lands decisions, the Court "focused on the purpose of the conveyance or reservation as a critical factor in determining congressional intent"). Defeats of state title to submerged lands within federal reservations have been found only where the assumption of state title would have thwarted the purpose of the reservation.

For example, in *Choctaw Nation*, state title to submerged lands could not be reconciled with the stated purpose of the Treaty of Dancing Rabbit Creek, which was to guarantee the Nation exclusive sovereignty over its lands, and forbid the inclusion of those lands in any future state. *Choctaw Nation*, 397 U.S. at 625. In *Alaska*, state ownership would have thwarted the government objectives of retaining exclusive federal sovereignty over petroleum reserves and aquatic wildlife habitat. 521 U.S. at 43 ("[t]he transfer of submerged lands at statehood — and the loss of ownership rights to the oil deposits beneath those lands — would have thwarted that purpose [of securing a supply of oil and gas"]); *id.* at 52 ("waters within the boundaries of the Range were an essential part of the habitats of the species the Range was designed to protect, and ... retention of lands underlying those waters was critical to the Government's goal of preserving these aquatic habitats").

In the case of the Coeur d'Alene Indian Reservation, neither of the lower courts bothered to determine the purposes of the Reservation as understood by Congress, nor did they explain how the purposes of the Reservation would be thwarted by state ownership of submerged lands. The court of appeals determined there was no need ***46** "that Congress apprehend the purpose of the reservation at the time it takes action recognizing the executive reservation." Pet. App. 18 n.11. Thus, the court limited its discussion of purpose to the finding that when establishing the reservation by executive order, "the government's negotiators and agents were aware of the Tribe's dependence on fishing in 1873." Pet. App. 19.

The court of appeals' failure to explore the purposes of the Reservation, as understood by Congress, is indefensible. The 1889 Act was not an affirmation of the 1873 Executive Order Reservation or its purposes; it was a mandate to radically alter the Reservation to meet the changing needs of the Tribe. As such, examination of the purposes of the altered Reservation is required to fully understand congressional intent.

The purposes of the altered Reservation are easily discerned on the face of the 1889 Act. Although the language is directed toward the purchase of certain lands, Congress' objectives for the continuing Reservation are also evident. Congress directed the Secretary of Interior to negotiate with the Tribe for the purchase and release of "such portions of its reservation not agricultural and valuable chiefly for minerals and timber. ..." 25 Stat. at 1002; App. 144. The express language of the Act directs the Secretary of Interior to protect the Tribe's agricultural lands, reflecting the fact that the primary purpose of the continuing Reservation was to protect the Tribe's agricultural activities.

The fact that Congress' primary purpose for the new Reservation was to protect the Tribe's agricultural land is supported by the legislative history. The reports submitted to Congress in relation to the 1887 agreement uniformly portrayed the Coeur d'Alene Indians as farmers. ***47** The commission that negotiated the 1887 agreement reported that "[t]he reservation is one of the best we have visited ... [t]he Indians have good productive farms, good houses, barns, gardens, horses, hogs, cattle, domestic fowls, wagons, agricultural implements of the latest patterns, and indeed everything found on flourishing farms." S. Ex. Doc. No. 14, 51st Cong., 1st Sess. 50 (1889); App. 217.

In 1888, the Commissioner of Indian Affairs, in responding to the Senate's inquiry regarding Coeur d'Alene Lake, affirmed the Tribe's reliance on agriculture, and added that "[t]here are few Indians in the entire country, if we except the five civilized tribes, who are as far advanced. ..." S. Ex. Doc. No. 76, 50th Cong., 1st Sess. 5 (1888); App. 126. Given this legislative history, and the express language in the 1889 Act, Congress clearly anticipated that after the diminishment

of the Coeur d'Alene Reservation, the primary purpose of the Reservation would be to provide the lands necessary to sustain the Tribe's agricultural efforts.

Even assuming, for purposes of argument, that the purpose of the reduced Reservation was to provide fishing opportunities for the Coeur d'Alene Tribe, such a purpose is not necessarily incompatible with state sovereignty over submerged lands. Federal protection of tribal fishing rights does not imply the exclusion of state sovereignty over natural resources. Indian hunting and fishing rights "can coexist with state management of natural resources." *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 204 (1999). The Court has "repeatedly reaffirmed state authority to impose reasonable and ***48** necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation." *Id.* at 205. State authority over hunting and fishing by tribal members extends to lands within the boundaries of Indian reservations. *Puyallup Tribe, Inc. v. Washington Dept. of Game,* 433 U.S. 165, 175-77 (1977).

The recognition that States may regulate treaty hunting and fishing when necessary for conservation "accommodates both the State's interest in management of its natural resources and the [tribe's] federally guaranteed treaty rights." *Minnesota,* 526 U.S. at 205. By employing such a standard, "treaty rights are reconcilable with state sovereignty over natural resources." *Id.* Thus, state sovereignty over submerged lands and federal protection for tribal fisheries are not irreconcilable, distinguishing this case from *Alaska,* where state ownership of submerged lands would have thwarted the primary purposes of the reservations.

The Act of July 3, 1890.

The final action Congress took with regard to Indian reservations within the Idaho Territory was the Act admitting Idaho to the Union. Act of July 3, 1890, 26 Stat. 215. Although there was no specific mention of the Coeur d'Alene Reservation, the Act affirms the following provision in the Idaho Constitution:

> And the people of the state of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indians or Indian tribes; and until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian ***49** lands shall remain under the absolute jurisdiction and control of the congress of the United States....

Idaho Const., Art. 21, § 19.

The court of appeals did not read this provision as a defeat of state title to the submerged lands at dispute here, but it did cite the provision as "weigh [ing] in favor of the conclusion we have reached, for it disclaims title to land 'held by' Indians." Pet. App. 24.

The court of appeals' conclusion, however, presupposes that Congress had, prior to statehood, affirmatively acted to defeat state title to submerged lands. On its own, the provision cannot be read as a defeat of state title to submerged lands within the boundaries of the Coeur d'Alene Indian Reservation. As this Court has repeatedly recognized, during the territorial period, submerged lands within the boundaries of Indian reservations are held in trust for future States, unless Congress takes affirmative action to defeat state title to the submerged lands prior to the State's admission. *Montana,* 450 U.S. at 551.

The language of Article 21, Section 19 of the Idaho Constitution merely disclaims title to lands owned or held by Indian tribes. It does not alter tribal title or convey any interests not already held. Thus, in the absence of a pre-statehood act that defeated state title to submerged lands within the Coeur d'Alene Indian Reservation, those lands, at the point of

statehood, continued to be held by the United States in trust for the State of Idaho, and were not "held by any Indians or Indian tribes." Given that fundamental fact, the disclaimer provision in the Idaho Constitution does not affect the issues before the Court.

*50 CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Footnotes

FN

* Counsel of Record

1 By the Act of June 21, 1906, 34 Stat. 335, the Coeur d'Alene Reservation was allotted, and the surplus lands sold to non-Indians.

2 *See* Argument of F.T. Dubois, in H. R. Rep. No. 4053, 50th Cong., 2d Sess. 56 (1889) ("lakes whose waters are as clear as crystal are plentifully scattered throughout the Territory ... [t]he largest of these are Coeur d'Alene and Pend Oreille ... Lake Coeur d'Alene is about 30 miles long and 4 miles wide, on which a daily line of steamers runs"); Remarks of Mr. Dorsey, 21 Cong. Rec. 2929 (noting that Idaho's waterways included the Spokane River, the Coeur d'Alene River, and the St. Joe River); Remarks of Mr. Dubois, *id.* at 2938 (noting that Coeur d'Alene Lake was an "important lake" of Idaho).

3 Lumber districts were limited to certain designated waterways, referred to later in the same act as "waters of this State." 1903 Idaho Sess. Laws 89, 93.

4 Early Idaho court decisions created some confusion over proprietary rights to the submerged lands of the Lake and other navigable waters within Idaho. The Idaho Supreme Court mistakenly ruled that Idaho had adopted the English common law principle limiting sovereign title to those rivers or streams affected by the tide, with the beds of nontidal streams owned in fee by the riparian owner. *Johnson v. Johnson,* 95 P. 499, 502-03 (Idaho 1908). The Idaho Supreme Court later overruled its earlier decision, *Callahan v. Price,* 146 P. 732, 735 (Idaho 1915), and even repudiated it as "clearly a legislative act and not judicial." *Northern Pac. Ry. Co. v. Hirzel,* 161 P. 854, 859 (Idaho 1916). Thereafter, the Idaho courts have consistently recognized and confirmed state title to all submerged lands within the State, including Coeur d'Alene Lake. *E.g., Bowman v. McGoldrick Lumber Co.,* 219 P. 1063, 1065 (Idaho 1923); *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.,* 671 P.2d 1085, 1088 (Idaho 1983).

5 The federal government's action against the State followed on the heels of an unsuccessful action brought by the Coeur d'Alene Tribe. In 1991 the Tribe brought a quiet title action against the State of Idaho in federal district court, claiming ownership of submerged lands within both the current and former boundaries of the Coeur d'Alene Reservation. The Tribe's claims against the State were dismissed as a violation of the State's sovereign immunity. The dismissal was ultimately upheld by this Court in *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261 (1997).

6 Other correspondence from this time frame offered conflicting assessments of the Tribe's needs. Several reports emphasized the Tribe's commitment to farming, while other accounts noted a continued reliance on fishing. Pet. App. 52. The trial court concluded that the estimates of tribal reliance on farming were not necessarily based on personal knowledge, and were inflated by cultural and personal bias, and gave greater weight to the accounts depicting the Tribe as reliant on fishing. Pet. App. 52-53. One letter emphasized by the trial court was from surveyor David P. Thompson, who suggested enlarging the reservation to include fisheries on Coeur d'Alene Lake. Pet. App. 52; App. 30-31.

7 According to the report of a government inspector in 1886, the steamboats would stop at several landings within the Reservation for the purpose of "putting on and taking off ... fishing and excursionist parties, with their supplies." App. 53.

8 In the Act of February 22, 1889, Congress enabled North Dakota, South Dakota, Montana and Washington to form constitutions and state governments. 25 Stat. 676. The Act required the state constitutions to contain ordinances disclaiming title to "all lands ... owned or held by any Indian or Indian tribes." *Id.* at 677.

9 Although the district court cited this provision as supporting its decision, Pet. App. 81-82, the court of appeals, in reaching its conclusions, expressly disclaimed any reliance on this provision. Pet. App. 24.

10 The Tribe also filed a cross-appeal relating to the district court's refusal, on Eleventh Amendment grounds, to hear the Tribe's claims to submerged lands within Heyburn State Park, which were excluded from the United States' complaint. The court of appeals affirmed the district court. Pet. App. 27-30.

11 Article 2 of the Fort Laramie Treaty of May 7, 1868, 15 Stat. 649, described the boundary of the Crow Reservation as running up the 107th meridian "to the mid-channel of the Yellowstone River; thence up said mid-channel to the point where it crosses the said southern boundary of Montana...." 2 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 1008 (1904). This portion of the Yellowstone River has been found to be navigable. *Edwards v. Severin,* 785 P.2d 1022, 1023-24 (Mont. 1990).

12 Notably, in support of the proposition that an intent to allow the State obtain title to submerged lands within a federal reservation "would not be unusual," this Court cited decisions addressing submerged lands within Indian reservations, namely, *Montana* and *Holt State Bank.* 482 U.S. at 202.

13 The Court had earlier examined purpose as it related to the executive intent to include the submerged lands within the reservation. 521 U.S. at 39-40.

14 At the time of statehood, the application was still pending. Department of Interior regulations in force at that time set such lands apart pending final approval of the application. 521 U.S. at 57-58.

15 Congress' refusal to recognize tribal title to submerged lands was consistent with the fact that at this point in history, the prevailing law was this Court's decision in *Pollard v. Hagan,* which held that Congress could not defeat state title to submerged lands. *Pollard,* 44 U.S. (3 How.) at 28-29. It was not until the 1894 decision in *Shively v. Bowlby* that the Court confirmed the power of Congress to defeat future state title to submerged lands during the period of territorial government. 152 U.S. at 48.

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ATTORNEYS FOR STATE OF IDAHO

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

In re suit to quiet title to that portion of the bed and banks of Coeur d'Alene Lake and St. Joe River lying within the exterior boundaries of the 1873 Coeur d'Alene Reservation	
UNITED STATES OF AMERICA, Plaintiff, Counterdefendant and COEUR D'ALENE TRIBE, Plaintiff in Intervention Counterdefendant in Intervention vs. STATE OF IDAHO, Defendant.	Case No. CIV 94-0328-N-EJL STATE OF IDAHO'S TRIAL BRIEF

I. GENERAL DISCUSSION

A. Introduction

This Trial Brief discusses the issues as framed by the Court's Order of October 31, 1997. It does not address certain factual issues, such as federal actions following the establishment of the Coeur d'Alene Reservation in 1873, since the Court indicated in its order that such factual issues were not relevant to the questions presented. Nor does this Brief address many of the legal issues raised by the plaintiffs regarding ratification, such as whether the General Allotment Act ratified the 1873 Executive Order, since the Court did not identify those as genuine issues of material fact in its Order. Additionally, those issues were fully briefed as part of the summary judgment proceedings and it would serve no purpose to repeat the arguments here. To the extent that such issues remain to be decided as part of the trial in this matter, the State herein incorporates by reference the arguments contained in the State's opening and reply briefs in support of the State's motion for summary judgment.

B. Issues Presented

The overall issue to be decided is whether the United States at any time prior to Idaho statehood affirmatively acted to defeat the future State of Idaho's title to the beds and banks of navigable waterways within the present Coeur d'Alene Indian Reservation. As the Court noted in its Order of October 31, 1997, the specific factual issues to be decided are: (1) whether, in the time-period immediately preceding the events giving rise to the 1873 Executive Order creating the Coeur d'Alene Reservation, the Coeur d'Alenes depended on the disputed waterways for subsistence fishing; (2) if so, then whether, in the time-period immediately preceding the events

giving rise to the 1873 Executive Order, the government officials responsible for issuance of the Executive Order knew or perceived the Tribe to be dependent on the disputed waterways for subsistence fishing; (3) if so, did government officials intend to reserve the beds and banks of navigable waterways within the Reservation for the purpose of protecting fisheries; and (4) if so, was Congress aware of the reservation of the beds and banks and did it take the necessary steps to ratify the reservation prior to or at the point of Idaho's admission to the Union. An additional issue raised by the Coeur d'Alene Tribe is whether the Tribe possessed aboriginal title to the Lake and its associated rivers and, if so, did such title prevent the disputed submerged lands from passing to the State upon its admission to the Union.

C. Standard of Proof

In *United States v. Alaska*, 117 S. Ct. 1888 (1997), the Supreme Court re-emphasized the heavy burden plaintiffs bear in asserting title to submerged lands: "Under our equal footing cases, '[a] court deciding a question of title to the bed of navigable water . . . must begin with a strong presumption' against defeat of a State's title." 117 S. Ct. at 1906, quoting *Montana v. United States*, at 450 U.S. 544, 552 (1981). "We will not infer an intent to defeat a future State's title to inland submerged lands 'unless the intention was definitely declared or otherwise made very plain.'" *Id.*, quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926). "Under *Montana* and *Utah Div. of State Lands*, an intent to defeat state title to submerged lands must be clear." 117 S. Ct. at 1917.

When the United States alleges that it reserved submerged lands, intent to defeat state title to submerged lands cannot be inferred "from the mere act of reservation itself." *Utah Div. of State Lands v. United States*, 482 U.S. 193, 202 (1987). Instead, the United States must

establish that Congress clearly intended to include the submerged lands within the reservation and that Congress affirmatively intended to defeat the future State's title to those submerged lands. *Id.* Under *Alaska*, the Court held that "Congress could achieve the same result by explicitly recognizing, at the point of . . . statehood, an executive reservation that clearly included submerged lands." 117 S. Ct. at 1911.

Under *Alaska*, "the purpose of a conveyance or reservation is a critical factor in determining federal intent." 117 S. Ct. at 1908. Thus, in order to infer an intent to defeat state title, the nature of the reservation must be such that state ownership of submerged lands would "undermine" or defeat federal objectives as defined by the purpose of the reservation. 117 S. Ct. at 1908-09. As a corollary, federal ownership of submerged lands must be necessary to the purpose of the reservation. 117 S. Ct. at 1909-10.

The Ninth Circuit's decisions addressing alleged conveyances of submerged lands to Indian tribes provide more specific guidance. The court's most recent submerged lands case establishes four elements that must be met in order to infer that submerged lands were reserved as part of an Indian reservation. First, the tribe must be shown to have been dependent upon the submerged lands; second, the United States must have been aware of that dependence; third, it must be shown that the submerged lands were included in the reservation in response to tribal demands for their inclusion, and fourth, there must be exigent circumstances, such as the outbreak of hostilities as a result of tribal exclusion from submerged lands. *United States v. Pend Oreille Public Utility Dist. No. 1*, 926 F.2d 1502, 1509-11 (9th Cir. 1991). All four elements must be met. For example, in *Pend Oreille*, the court held that a showing of tribal dependence on submerged lands coupled with federal awareness of that dependence was

"insufficient as a matter of law to reserve the bed of the river to the Tribe." *Id.* at 1509. The claims in *Pend Oreille* also failed because there was no history of hostilities over access to the submerged lands.

Likewise, in *United States v. Aam*, 887 F.2d 190 (9th Cir. 1989), the court held that even where a "reservation was obviously designed to assure the Indian's access to water," there must still be proof that the United States perceived that the Tribe depended on those particular submerged lands for survival. In *Aam*, that element was not met because the Tribe had available to it "other food resources from traditional hunting, fishing, and food gathering locations away from the reservation." *Id.* Also, the Tribe failed to demonstrate that, unlike other tribes, they had resorted to violence "to assure that their respective reservations included a water resource." *Id.*

The stringent requirements of the Ninth Circuit's decisions are not altered or relaxed by the Supreme Court's decision in *Alaska*. Although there the Court did not focus on exigent circumstances, that was at least in part due to the fact that the submerged lands were reserved in public ownership, and did not have any resemblance to a typical conveyance. Here, however, regardless of whether a reservation or grant is alleged, the action strongly resembles a conveyance to a private party. When lands are reserved for the benefit of an Indian tribe, the federal government holds those lands under stringent trust requirements. It no longer manages those lands for the benefit of the general public, but must protect them for the exclusive use and benefit of the Tribe occupying the reservation. Thus, the public policy considerations underlying the usual requirements of exigent circumstances are applicable, as demonstrated by the fact that the Supreme Court has required exigent circumstances in other cases claiming submerged lands

within Indian reservations. See, e.g., *Montana v. United States*, 450 U.S. 544 (1981); *United States v. Holt State Bank*, 270 U.S. 49 (1926).[1]

D. Irrelevant Facts

The Court, in its Order of October 31, 1997, identified the relevant facts as those relating to the time period immediately preceding the events giving rise to the 1873 Executive Order. Events occurring in the years following the 1873 designation of the Coeur d'Alene Reservation, such as surveys of the Reservation's boundaries, have no relevance to determining the intent of federal officials in 1873. Certain post-executive order documents, however, such as the official reports of the Commissioner of Indian Affairs describing the reasons for the 1873 Executive Order, are relevant, since they relate to and describe events occurring before the issuance of the executive order. These documents provide the official explanation of the purposes of the reservation by the officials involved in the decision-making process, and help demonstrate the perceptions of the officers responsible for the Executive Order.

A second set of relevant facts are those relating to the issue of whether the Executive Branch made known to Congress that it had reserved the beds and banks of the disputed submerged lands, and whether Congress took action prior to the point of statehood "to ratify the inclusion of submerged lands within the Reserve and to defeat the State's title to those lands." *Alaska*, 117 S. Ct. at 1911-12 (emphasis added). The State submits that this is an extremely limited set of facts, consisting only of those facts contained in official reports to Congress. Other

[1] Congress has the authority to convey submerged lands for any public purpose. But, because control over the property underlying navigable waters is so strongly identified with the sovereign power of government, it is normally not held that the United States has conveyed such lands except when required by international duty or public exigency. *Montana*, 450 U.S. at 552.

facts from the time period of 1874-1890, unless demonstrated to have been made known to Congress, are irrelevant to the question of congressional ratification.

Federal actions taken after Idaho's admission to the Union on July 3, 1890, are also irrelevant to these proceedings, since such actions could not affect state title in any manner. Additionally, facts relating to ownership of submerged lands within Heyburn State Park are also irrelevant, since the United States has not claimed ownership of those lands as part of these proceedings.

II. ISSUES RELATING TO THE 1873 EXECUTIVE ORDER

A. Statement of Facts

The first set of facts relates to tribal subsistence patterns in the time frame immediately preceding the issuance of the 1873 Executive Order. The one constant in Coeur d'Alene subsistence patterns is that the patterns were constantly evolving as new methods of subsistence presented themselves. For example, with the acquisition of the horse, buffalo hunting became part of the Tribe's subsistence pattern. As they acquired more horses and cattle in the early 1800's, at least some of the Tribe became pastoralists, and moved away from traditional homes on the Lake and its associated waterways. U.S. Ex. 1437 at 11. The arrival of the Jesuit missionaries in the 1840s fostered the adoption of agriculture by the Tribe. Jesuits missionaries reported that in 1845 the Tribe harvested over 1,200 bags of potatoes. U.S. Ex. 34. By the 1850's, tribal members began to incorporate agriculture into their subsistence patterns, growing potatoes, peas, beans, cabbages and various grains, especially wheat. U.S. Ex. 1437 at 21-23. According to the memoirs of Chief Seltice, "[f]arming was going on in earnest among the Coeur

d'Alenes by 1860," although the farms were reportedly small, "no more than an acre or two." U.S. Ex. 101 at 158-59.

The 1870s were an especially critical time in the transition to agriculture, as boys taught the basics of agriculture by the Jesuit Missionaries began to mature and desire farms of their own. State Ex. 3010. At the same time, tribal leaders began to recognize the inevitability of white settlement, and began petitioning the federal government to set aside farmlands as a reservation for the Tribe. State Ex. 3066.

Sources close to the Tribe describe significant reliance on agriculture in the years 1870-1873. Andrew Seltice, Chief of the Tribe from 1865 to 1902, stated, in memoirs dictated to his son Joseph Seltice, that by 1870-71, over twenty families had staked out claims in the Hangman Creek Valley, and started the process of moving their stock, building homes, and breaking ground. U.S. Ex. 101 at 229–255. This was in addition to the families farming in the St. Joe Valley and around the Sacred Heart Mission on the Coeur d'Alene River. Father Cataldo, in an 1873 letter to the *Idaho Signal*, a Lewiston newspaper, stated that "there is no man now in the whole tribe who has not a farm." U.S. Ex. 878.

This is not to say that hunting and fishing were not going on, because undoubtedly they were. But, it was the Tribe's agricultural and pastoral activities that caught the eye of settlers and federal officials, for two reasons. First, it was the Tribe's occupation of farmlands in the Hangman Creek Valley that fostered conflicts with white settlers, who coveted the rich farmlands of the Valley. U.S. Ex. 872. Second, the leaders of the Tribe tended to be the among the most successful pastoralists and farmers. As early as the 1850's, Seltice had eight hundred cattle and eight hundred horses. U.S. Ex. 101 at 70. Quinmosee had a thousand head of each. *Id.* at 247.

It was the tribal leaders who dealt with officials and settlers. Thus, when federal officials had contact with tribal leaders, they saw rich, successful Indians. Modern-day historians may argue that this gave federal officials a distorted view of the Tribe's subsistence activities, but the perceptions of federal officers, and those they reported to, were framed by their experiences with these tribal leaders. Thus, reports to the Commissioner of Indian Affairs emphasized the agricultural achievements of the Tribe. U.S. Ex. 233 at 726.

There are also indications that the Tribe's emphasis on agriculture in the early 1870's was part of a deliberate effort to prevent settlers from laying claim to Coeur d'Alene lands. Seltice reports that in 1863 Father Joset, one of the Jesuit missionaries, warned the Tribe that with the end of the Civil War, settlers would be arriving by the thousands. U.S. Ex. 101 at 175. Joset urged the Tribe to take up lands in the Hangman Creek Valley.[2] *Id.* Apparently there was some initial resistance to the motion, but the Tribe eventually concluded that in order for white settlers to recognize and respect their rights, they must take up and improve their lands. Seltice summarized the situation as follows:

> At one time the Coeur d'Alenes had also been of the same opinion: why should they settle in just one place when this country is too big to remain in any one place for life? But most Coeur d'Alenes had to change their mind in later years, as the packers and settlers flocked into their country and started sizing everything in sight. This sudden shock was probably a good example for most Coeur d'Alenes, and quite a number of them went in seriously for building and farming.
>
> U.S. Ex. 101 at 239.

The influx of settlers into the Coeur d'Alene country began in the early 1870's. John Montieth, the Nez Perce Agent, reported in the spring of 1872 that a large emigration of settlers

was making its way toward the country of the Coeur d'Alenes. State Ex. 3035. Such emigration prompted the Tribe to take action. Joset described the following tribal meeting, which he placed as happening before the visit of the Shanks Commission:

> When the white immigration began to pour into the country, one of them, in a winter evening, called a meeting of his friends and said: What are we doing: The Whites will take possession of all the lands: there is no time to lose: let us move to the prairie, and be the first to occupy what we like best: all agreed, and decided to go in early spring: they sent to appraise the Chief of this resolution. He not only highly approved of it, but concluded to go himself and give the example . . . .

State Ex. 3010.

The General Land Office reported in January 1873 that as soon as surveys were begun in the Coeur d'Alenes' country, they commenced improvements in the area of Township 44 N. Ranges 4 & 5 W., and Township 45 N. Range 5 W.. State Ex. 3242. The legal description is approximately that of the Hangman Creek Valley. Settlers moving into the area west and north of the forks of Hangman Creek reported in September 1872 that the Coeur d'Alenes had recently taken up and made improvements to lands in the upper Hangman Creek Valley. U.S. Ex. 872.

Reports of the potential for conflict between settlers and the Coeur d'Alenes over the rich lands of the Hangman Creek Valley reached the Commissioner of Indian Affairs in early 1873. State Ex. 3072; State Ex. 3239; U.S. Ex. 1354. During this same time, Thomas Bennett, the Governor of Idaho Territory, was urging the Commissioner of Indian Affairs to send a commission to visit the Coeur d'Alenes to ascertain the cause of, and resolve their difficulties with white settlers. U.S. Exs. 311; 312.

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[2] In his memoirs, Seltice referred to the Hangman Creek Valley as the "Palouse Valley," but it is clear from his references to DeSmet and geographical landmarks that he is talking about the Hangman Creek Valley.

In response to the recommendations of the Governor, the Secretary of Interior ordered the Commissioner of Indian Affairs to send a commission to visit all Idaho tribes, examine their difficulties with white settlers, and settle them on reservations if one had not already been provided. U.S. Ex. 309. The commission, with Indian Agent John Monteith substituting for Henry Reed, met with the Coeur d'Alenes on July 28, 1873, and arrived at a negotiated settlement that called for a reservation with the following boundaries:

> Beginning at a point on the top of the dividing ridge between Pine and Latah (or Hangman) Creeks directly south of a point on said last named creek, six miles above the point where the trail from Lewiston to Spokane Bridge crosses said Creek; thence in an northeasterly direction in an 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 territory of Idaho and Washington as established by the Act of Congress organizing a territorial government for the territory of Idaho; thence south along said dividing line to the top of the dividing ridge between Pines and Latah (or Hangman) Creeks; thence along the top of said ridge to the place of beginning.

State Ex. 3084.

On August 6, 1873, the commission informed the Commissioner of Indian Affairs of the Agreement by telegram, and recommended that the survey of the 1867 Reservation be suspended. U.S. Ex. 314. That same day, John Monteith sent a copy of the Agreement to the Commissioner of Indian Affairs, along with a description of the negotiations. U.S. Ex. 315. Monteith's letter is the only official record of what was said during the negotiations. This report reflects two primary tribal concerns: retention of the Sacred Heart Mission and retention of farmlands. Monteith reported that when asked what would induce the Tribe to relinquish its aboriginal lands and retire to the Reservation, the response was that the Tribe wished the boundaries changed so as to include the Sacred Heart Mission. U.S. Ex. 315. Other changes in

the boundaries were intended to include Indian farms and exclude non-Indian farms. *Id.* The only reason given for placement of the boundary down the middle of the Spokane River was to employ inexpensive water power for the grist and saw mills described in the Agreement, rather than steam power. *Id.*

On November 4, the Commissioner of Indian Affairs wrote to the Secretary of Interior, recommending that the lands described in the 1873 Agreement be set aside to protect the tract from trespass pending congressional action on the Agreement. State Ex. 3240. On November 5, 1873, the Secretary of Interior approved the recommendation, and forwarded a copy of the Executive Order to President Grant for his signature. State Ex. 3248. On November 8, 1873, President Grant issued the executive order. State Ex. 3087.

B. Given the information available to them, federal officials would not have understood or perceived the Tribe to be dependent on fisheries.

In the time frame immediately preceding the issuance of the 1873 Executive Order, the Commissioner of Indian Affairs and Secretary of Interior had available a great deal of documentation regarding the Tribe's subsistence needs.

A number of government employees and contractors, writing to the Commissioner of Indian Affairs and Secretary of Interior, described the Tribe as primarily reliant on agriculture and pastoralism. Captain G.B. Sanford, in an 1872 report to the Commissioner of Indian Affairs, described the Tribe as "farming in earnest," and noted that the Coeur d'Alenes "have a great number of horses and cattle." U.S. Ex. No. 233. Deputy Surveyor D.P. Thompson stated that the Tribe "live wholly by agriculture and stock raising." State Ex. 3072. E.L. Applegate, who was apparently writing at the behest of Governor Bennett, described the Coeur d'Alenes as living

"mainly by the cultivation of the soil." State Ex. 3245. Applegate's letter prompted the Secretary of Interior to suggest further investigation. State Ex. 3245. In response, the Commissioner of Indian Affairs directed T.B. Odeneal, the Superintendent of Indian Affairs for Oregon, and John Monteith, Indian Agent for the Nez Perce to investigate. At the time, circumstances prevented either man from visiting the Tribe (U.S. Ex. 1343; State Ex. 3078), but Odeneal sent a report including information garnered from what he termed reliable sources, stating that the Tribe "subsist themselves almost wholly by agriculture." State Ex. 3239.

Around the same time that he received Odeneal's report, the Commissioner of Indian Affairs received a letter from Deputy Surveyor David P. Thompson, dated May 6, 1873, and forwarded to the Commissioner of Indian Affairs by the Commissioner of the General Land Office on May 31, 1873. In his letter, Thompson, who had recently been granted a contract to survey the 1867 Reservation boundaries (State Ex. 3250), recommended that the Reservation boundaries be altered to run to the Sacred Heart Mission. U.S. Ex. 305. He stated that the altered boundaries "will include the fisheries on the lake and on the St. Joseph's River." *Id.* He further stated that "[s]hould the fishing be excluded there will in my opinion be trouble with these Indians." *Id.*

Thompson's statements, however, must be placed in context. First, he admits in the letter that he had never seen the Lake, but was instead relying on Father Cataldo for information. It is unclear, however, whether Thompson's opinion that the Reservation should include fisheries was attributed to Cataldo, since he states that it is his own opinion. In fact, it is questionable that Thompson's opinion was based on Cataldo's representations, since Cataldo, one week later, stated in a public forum that the Tribe's only desire was to keep their Reservation and the

farmlands of the Hangman Creek Valley. U.S. Ex. 878. Additionally, Thompson's statements were in his own self-interest. Thompson's contract to survey the boundary called for him to be paid by the mile. State Ex. 3250. Any expansion of the Reservation would have resulted in additional payments to him. Also, Thompson did not repudiate his prior letter describing the Tribe as wholly reliant upon agriculture. State Ex. 3072.

Thompson's letter, although sure to figure prominently in the plaintiffs' case, was only one of many letters describing the subsistence practices of the Coeur d'Alenes. It is unlikely that the Commissioner of Indian Affairs gave it much weight, since Thompson was an unknown quantity. It is likely that he paid more attention to the reports of his own officers, and to that of Applegate, who had wide experience in Indian affairs and whose views had been endorsed and recommended by Governor Bennett.

Even if federal officers gave full weight to Thompson's letter, however, it is not enough to compel the conclusion that those officers believed it necessary to defeat state title to submerged lands. If government officers believed Thompson's letter, they still would have been in possession of the information from other sources describing extensive farming efforts by the Tribe. They also knew that the rich farmlands in the Hangman Creek Valley and other portions of the Reservation were more than sufficient to provide a substantial farm for every member of the Tribe. Given the Tribe's prowess in agriculture, as documented by Captain Sanborn and others, they had every reason to believe that the Tribe would make a quick and successful transition to an agricultural economy. Thus, the Tribe's need for fisheries (if any), would have been viewed as temporary, and easily fulfilled by the fact that the federal government would retain ownership and control of the submerged lands for many years to come. Because statehood

was far in the future, and the Tribe well on its way to becoming an agricultural success, the transfer of the submerged lands at the future date of statehood would not have been viewed as thwarting any federal objectives.

C. Although the Tribe sought an expansion of its reservation, its primary concerns were retention of farmlands and access to an important religious site.

The overall historic record going into the 1873 negotiations shows that the Tribe's primary concern was retention of lands suitable for farming. Father Cataldo, in a July 1, 1872 letter to Father Wijet, stated that "The Indians want to keep that Paradise Valley on Hang-man Creek by all means." State Ex. 3067. The Tribe itself, in an 1871 petition to the Commissioner of Indian Affairs, asked only that they be granted as a reservation the lands south of Lake Coeur d'Alene, including the Hangman Creek Valley. State Ex. 3066.

The Tribe's desire to keep the Hangman Creek Valley was widely known and reported. David P. Thompson reported in 1871 that the Tribe "only wish the country north of the south boundary of Township 44 North Range 4 & 5 West in Idaho Territory, and later in the same letter stated that the "Priest who controls these Indians . . . says they only want to be left alone in the four Townships I named and the St. James Mission on the Lake." State Ex. 3241. T.B. Odeneal, in his report to the Commissioner of Indian Affairs, stated that all difficulties with the Tribe would be resolved if the Hangman Creek Valley were included within their reservation if not already within it. State Ex. 3239. In a letter to the *Idaho Signal* dated May 17, 1873, Father Cataldo stated that "Their only aim is to keep their reservation and Hangman Creek by no other means but working and improving their lands." Hart Ex. No. 878.

Although the Tribe's primary concern was retention of the Hangman Creek Valley, it did seek additional lands. Charles Ewing, Catholic Commissioner of Indian Missions, stated that upon learning of the 1867 Reservation, the Tribe "at once said it is not large enough." U.S. Ex. 307. Ewing's reason for expansion of the reservation, however, was as follows: "The Coeur d'Alenes want to have a reservation set apart large enough for themselves & their Indian friends to settle among them. They want to have it secured to them before the whites have possessed themselves of the choice portions of it." *Id.* Again, the emphasis is on protection of agricultural lands.

Another document expressing a desire for expansion of the Reservation is the Tribe's petition of November 18, 1872, in which the Tribe stated that the Reservation should include the "two valleys of the S. Joseph and Coeur d'Alene Rivers." U.S. Ex. 300. The reasons given are threefold: first, the Tribe did not wish to abandon the Sacred Heart Mission on the Coeur d'Alene River; second, they had fenced in and cultivated the spots along the rivers "which usually escape being inundated;" and third, although they had begun tilling the soil and were "continually progressing," they were "not as yet quite up to living on farming." *Id.* Therefore, they stated that "for a while yet we need have some hunting and fishing." *Id.*

As with the other documents, the petition emphasized the Tribe's agricultural needs, although it differs from the other documents in mentioning that the Reservation should also include some hunting and fishing. Notably, the petition does not include a definitive demand for fisheries or beds and banks. Instead, it speaks in terms of uplands, by requesting inclusion of the "river valleys" and describing the Tribe's temporary need for "some hunting and fishing." The petition on its face, however, provides no information that would have led the reader to believe

that the Coeur d'Alenes were especially reliant on fish. Given its terms, and its description of the Tribe's farming efforts, it is unlikely that the Commissioner of Indian Affairs would have interpreted it as describing a reliance on fisheries of the magnitude requiring defeat of state title to submerged lands.

Later petitions filed by the Tribe seeking confirmation of the Reservation described in the 1873 Executive Order confirm that the Tribe's primary concern going into the 1873 negotiations was retention of farmlands. On November 10, 1874, the Tribe sent a petition to the House of Representatives in response to proposals to remove the Tribe to an expanded Colville Reservation that would have included a strip of Idaho five miles wide along the Washington border, reaching from Hangman's Creek north to the Canadian Border. Not once did the Tribe express concern over the proposal to exclude them from the Lake and its associated waterways. Instead, their only stated concern was that the proposed reservation did not contain sufficient arable land, and would leave their improvements outside the reservation. State Ex. 3090. A second petition was even more explicit. In it, the Tribe stated that: "Unlike our fellow Indians of this neighborhood, we have agriculture: every one of us is farming, each according to his means; but the state of uncertainty, in which we are kept, is not calculated to encourage us: once certain to keep the part of our lands, as it was agreed; all would set to work with new energy. . . . Should any white man be sent to inspect all the buildings we have put up, the land fenced in and under cultivation, he would understand why we so much desire, that the lands should be secured to us." U.S. Ex. 1246. Again, the only concern expressed by the Tribe is retention of its farmlands; no mention is made of fisheries or waterways.

D. The evidence fails to establish that the United States expanded the Reservation in order to protect tribal fisheries.

The officer with ultimate authority over Indian affairs was the Secretary of Interior. With regards to the Coeur d'Alene, the Commissioner of Indian Affairs did not authorize negotiations with the Tribe until he had forwarded the relevant facts to the Secretary of Interior for his consideration and approval. The Department of Interior carefully tracked all correspondence, noting when it was received, who it was forwarded to, and the action taken in response. Thus, it is easy to document the correspondence within the Department of Interior that raised concerns sufficient to cause the Secretary of Interior to order the Shanks Commission to visit the Coeur d'Alene Tribe.

The plaintiffs rely heavily on Thompson's letter of May 6, 1873, and the Tribe's petition of November 18, 1872, to demonstrate that federal officials understood the Tribe to be dependent on fisheries for subsistence, and expanded the Reservation in response to that understanding. There is no evidence in the historical record, however, indicating that the expansion of the reservation had any relation to the two documents mentioning fisheries. Department of Interior records do not show any action being taken in response to the Tribe's petition of November 18, 1872. The cover slip for the petition shows that it was received in the Secretary of Interior's Office on March 7, 1873, and forwarded without comment to the Acting Commissioner of Indian affairs on March 7, 1873. U.S. Ex. 300. Thompson's letter was received by the Commissioner of Indian Affairs on June 4, 1873. State Ex. 3073. No action was taken in response to the letter. In fact, the Commissioner of Indian Affairs seemed to discount the information in Thompson's letter, writing to the Commissioner of the General Land Office that the matter had already been

investigated by T.B. Odeneal and that Odeneal's report had that same day been forwarded to the Secretary of Interior. State Ex. 3238. There is no evidence that Thompson's letter was forwarded to the Secretary of Interior.

The records of the Secretary of Interior, however, do identify three specific documents that caused the Secretary to direct the Commissioner of Indian Affairs to instruct the Shanks Commission to visit the Coeur d'Alenes. The first was E.L. Applegate's letter of March 3, 1873, which stated that the Coeur d'Alenes lived mainly by cultivation of the soil, resided in a valley of about ten miles in extent, that the valley was being encroached upon by the whites, and that "the Indians will fight for this valley, as it is where their fields are." U.S. Ex. 1354. In response, the Secretary of Interior directed the Commissioner of Indian Affairs to have the matter investigated, "with a view, if necessary, of including the matter in the Commission which will soon be appointed to confer with the Shoshonees and Bannocks." U.S. Ex. 1353.

After receiving Applegate's letter, the Secretary of Interior received (through the Commissioner of Indian Affairs) several letters from Idaho Governor Thomas Bennett regarding Indian affairs in Idaho. Bennett's letter of May 21, 1873, recommended that the Shanks Commission "be authorized to see all the Tribes in the Territory, with power to confine the Indians on reservations, or rather to negotiate therefore, and to place all scattering Indians on reservation. It is very important that the Coeur d'Alene Indians be visited – a letter from there that I filed last February in your office will explain this subject." U.S. Ex. No. 311. The February letter to which Bennett referred cannot be identified with certainty. Bennett wrote to the Secretary of Interior in February of 1873, but he did not discuss the Coeur d'Alenes in that letter. *See* U.S. Ex. 1342. Bennett may have been referring to Applegate's letter of March 3,

1873, since in the February letter he stated that he was referring the Secretary "to Gen. E.L. Applegate of Oregon, who is fully acquainted with Indian Affairs from actual experience, and has himself consented to assist me in presenting this subject." U.S. Ex. No. 1346.

On June 4, 1873, Bennett again wrote to the Commissioner of Indian Affairs, explaining that the Shoshones and Bannocks would not be available to meet until October, and that in the meantime Shanks could visit other tribes. He stated that Shanks "could see the Coeur d'Alene Indians, and ascertain the cause of their difficulties with the whites, and make recommendations accordingly." U.S. Ex. No. 312.

On June 19, 1873, the Secretary of Interior wrote to the Commissioner of Indian Affairs, stating that he had received copies of Governor Bennett's letters of May 21 and June 3[3] and that he had "considered the communications of the Governor and in view of the facts therein, your recommendation that the instructions issued to the Commission above mentioned be enlarged, and extended, to include certain other duties connected with Indian matters in the region to be visited by them is approved." State Ex. 3247.

Thus, it can be ascertained with certainty what information led the Secretary of Interior to order the Shanks Commission to visit the Coeur d'Alenes: the Applegate letter describing trouble over white encroachment on Indian farmlands, and the Bennett letters describing undefined difficulties between the Coeur d'Alenes and white settlers. There is no indication in the historic record that the decision to send a Commission to the Coeur d'Alenes was in any way related to Thompson's letter stating his opinion that the Reservation should include the fisheries on Lake

[3] It is likely that the Secretary was referring to Bennett's letter of June 4, since there is no Bennett letter dated June 3 in the National Archive files.

Coeur d'Alene, or the Tribe's petition stating that they wanted the Reservation to include the Coeur d'Alene and St. Joe river valleys.

Pursuant to the Commissioner of Indian Affairs' instructions, the Shanks Commission, with John Monteith substituting for Henry Reed, visited the Coeur d'Alenes in late July, 1873, and reached an Agreement with them calling for expansion of the Reservation east to the Mission on the Coeur d'Alene River and north to the Spokane River. The Agreement was forwarded to the Commissioner of Indian Affairs on August 6, 1873, by Monteith, who included a short report of the negotiations with the Tribe. State Exs. 82, 84.

On November 4, 1873, as the Commissioner of Indian Affairs sat down to write out his recommendation that the President set apart the Coeur d'Alene Reservation pending congressional action, the only document that we know for certain that he had before him was the 1873 Agreement, along with Monteith's report, since the Agreement was an enclosure to the report. Reading Monteith's report, he would have understood that the boundaries were changed from those in the 1867 Executive Order in order to fulfill four purposes: (1) to include within the Reservation some additional Indian farmlands; (2) to include the Mission on the Coeur d'Alene River; (3) to provide access to inexpensive water power on the Spokane River for the saw and grist mill provided in the Agreement; and (4) to allow removal of the Indians from the Colville Reservation to the Coeur d'Alene Reservation. State Ex. 3082; State Ex. 3084.

Later statements from the Commissioner of Indian Affairs confirm that the Commissioner accepted and adopted as his own the reasons given by Montieth for expansion of the Reservation. In a letter to the Secretary of Interior dated December 4, 1873, the Commissioner of Indian Affairs stated that the Agreement was entered into to extinguish aboriginal title "and also for the

purpose of establishing for them a reservation suitable to their wants as an agricultural people." U.S. Ex. 662. In his Annual Report for 1873, the Commissioner of Indian Affairs stated that the purposes of the Agreement were to extinguish aboriginal title and to provide a reservation "suitable to their needs as an agricultural people." U.S. Ex. 233 at 392. In his annual report for 1874, the Commissioner of Indian Affairs stated that the Tribe agreed to remain upon the Reservation "provided that its boundaries should be changed so as to include the Coeur d'Alene mission and some farming-lands in the valley of the Lotoh or Hangman's Creek." State Ex. 3091 at 367-68.

Thus, there are a number of official documents expressly stating the reasons for the expanded boundaries and explaining the purposes and objectives of the expanded reservation. None of the documents mentions fisheries. The total lack of any mention of fisheries in any of the documents explaining the purposes of the Reservation is dispositive. The stated purposes of the expanded Reservation were to provide farmlands, fulfill the Tribe's agricultural needs, and provide access to the Mission. None of these purposes required federal ownership of submerged lands.

E. Even if it is assumed that the Tribe was dependent on fisheries, and that the United States perceived the Tribe to be so, there must still be additional evidence compelling the conclusion that the United States intended to reserve submerged lands.

Tribal dependence on navigable waterways, and the awareness of federal officials of that dependence, are important factors in resolving disputes over title to beds and banks within Indian reservations. Standing alone, however, they are insufficient to infer an intent to defeat state title. *United States v. Pend Oreille Public Utility Dist. No. 1*, 926 F.2d 1502, 1509 (9th Cir. 1991).

Federal policy was to promote the adoption of agriculture by tribes, and discourage tribal reliance on hunting and fishing, which were viewed as hindrances to the "civilization" of tribes. State Ex. 235 at 15-16. Thus, there must be additional factors compelling the conclusion that circumstances were such that federal officials had to forego that policy. For example, some of the coastal tribes that have been awarded ownership of beds and banks were placed on small reservations with insufficient arable land to support the tribe. Tribes knew that the only way they could survive would be to rely on fisheries, and threatened violence if their reservation did not include fisheries. In such circumstances, reservation of submerged lands was necessary to protect both the tribe and nearby settlers.

In its latest decision on beds and banks, the Ninth Circuit held that "mere reliance upon a river is not enough to overcome the 'strong presumption' against conveyance of a riverbed by the United States." *United States v. Pend Oreille Public Utility Dist. No. 1*, 926 F.2d 1502, 1511 n.9 (9th Cir. 1991). Instead, there must be "compelling evidence that the United States intended to include the disputed riverbed in the reservation, in addition to the tribe's historic dependence on the disputed river." *Id.* at 1510. The court noted that to date, such evidence had always been provided by the conjunction of two factors: expansion of the reservation in response to specific tribal insistence upon inclusion of submerged lands, and the "existence of hostilities between the [tribe] and non-Indian settlers relating to the dispute over access to the river." *Id.* (emphasis added).

This case fails for the exact same reason as the claims made in *Pend Oreille Public Utility Dist. No. 1:* there is no evidence of hostilities between the Coeur d'Alenes and non-Indians relating to access to Lake Coeur d'Alene or its associated waterways. There are various reports

of potential conflict and difficulties over non-Indian encroachment on farmlands claimed by the Tribe, but these documents merely reinforce the fact that the Tribe's primary concern was retention of its farmlands. For example, Thompson reported that settlers "are now preparing to go into Hangman Creek Valley where the Indians now live. The Indians say they will not allow this . . . ." State Ex. 3241. Applegate reported that the Indians would fight for an unnamed valley "about ten miles in extent" because "it is where their fields are." State Ex. 3245. Odeneal reported that the dispute between the Coeur d'Alenes and the whites "is in regard to 'Hangman Creek valley," and that "all difficulty between them and the whites can be avoided by including 'Hangman Creek' Valley within their reservation." State Ex. 3239. Charles Ewing stated that the Tribe wanted to have a reservation "secured to them before the whites have possessed themselves of the choice portions of it." U.S. Ex. 307.

The historical record fails to provide any evidence of conflicts over use of Lake Coeur d'Alene or the associated waterways in the time frame immediately preceding issuance of the 1873 Executive Order. Indeed, it confirms that fact the Tribe's primary concern was retention of its farms and agricultural lands. Thus, the plaintiffs' claims must fail, as did those in *Pend Oreille Public Utility Dist. No. 1.*

The plaintiffs' claims also fail for the reasons described in *United States v. Aam*, 887 F.2d 190 (9th Cir. 1989). There, the court held that "[a]lthough it is true that the reservation was obviously designed to assure the Indians' access to water, there was insufficient proof that the United States perceived that the tribe depended on those particular tidelands for survival." *Id.* at 197. In *Aam*, the Tribe used the disputed tidelands to gather shellfish, but also relied on a wide variety of food sources from hunting, fishing, and gathering locations away from the reservation.

This case presents a similar situation. While the Coeur d'Alenes fished in Lake Coeur d'Alene and its associated rivers, they also had a wide variety of food sources available to them. In addition to their crops, they had thousands of cattle, deer were so plentiful they could kill hundreds in a single hunt, they had elk, they had camas, they had berries, they had waterfowl, they had buffalo, and they annually migrated to Spokane Falls and the North Fork of the Clearwater to fish for salmon. U.S. Ex. 1437 at 4-25. Given the abundance of natural resources available to the Coeur d'Alenes, the United States would not have perceived them as dependent solely on the fisheries of the Lake and its rivers, even if the tribe's farming efforts were overstated by federal officers.

F. The fact that protection of fisheries was not the purpose of the Coeur d'Alene Reservation is demonstrated by fact that none of the executive orders, agreements, or statutes establishing and defining the Coeur d'Alene Reservation even mention fisheries.

If a central purpose of the Reservation was to protect the Tribe's fisheries, such language would have been included in the 1873 Agreement negotiated with the Tribe. In all other recent cases where Tribes have been awarded ownership of beds and banks, the relevant treaty or agreement contained a provision guaranteeing the occupant tribe the right of taking fish within the reservation.[4] Here, however, the 1873 Agreement was totally silent with regard to fisheries

[4] In *Confederated Salish and Kooenai Tribes v. Namen*, 665 F.2d 951, the Tribes were awarded beds and banks of the south half of Flathead Lake. Article 3 of the Treaty of Hell Gate, July 16, 1855, secured to the Tribes the "exclusive right of taking fish in all the streams running through or bordering said reservation." 12 Stat. 975. In *Muckleshoot Tribe v. Trans-Canada*, 713 F.2d 455 (9th Cir. 1983), the court noted that the subject tribes were parties to treaties which "secured to the tribes on- and off-reservation fishing rights." *See* Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132; Treaty of Point Elliot, January 22, 1855, 12 Stat. 927 (securing the "right of taking fish at usual and accustomed grounds and stations"). The Puyallup Tribe, granted beds and banks in *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1251), was also a party to the Treaty of Medicine Creek. Likewise, the

(as were the later 1887 and 1889 Agreements). State Ex. 84; State Ex. 255. Indeed, there is no mention of fisheries in the official records of any of the three negotiations with the Tribe. State Ex. 82; U.S. Ex. 215. Surely, if protection of fisheries was a purpose of the Reservation, it would have figured prominently in any negotiations to establish or reduce the Reservation.

The 1873 Agreement's failure to address fisheries is especially telling since the Shanks Commission, several weeks after meeting with the Coeur d'Alenes, held council with the Calispels, Pend Oreilles, Kootenais, and Spokanes, and as a result of that council recommended a reservation for the express purpose of protecting the fisheries of those tribes. U.S. Ex. No. 210. At the same time, they recommended disapproval of the agreement with the Coeur d'Alenes and removal of the Tribe from the lands surrounding Lake Coeur d'Alene, the Coeur d'Alene River, and the St. Joe River. Obviously, the Shanks Commission was knowledgeable enough to recognize tribal dependency on fisheries, and to act to protect those fisheries where necessary. The fact that they did not report such dependency by the Coeur d'Alenes, and in fact recommended removing the Tribe from the Lake and its two rivers, strongly suggests that the Commission did not view the Tribe's livelihood as dependent on ownership of Lake Coeur d'Alene and the two rivers. Likewise, the fact that the Commissioner of Indian Affairs and Secretary of Interior readily accepted General Shanks' recommendation to supersede the Reservation described in the 1873 Agreement (U.S. Ex. No. 210; U.S. Ex. 663) is a further indicator that those officers did not view the Coeur d'Alenes as being dependent on the beds and banks in dispute here.

Quinault Indian Nation, awarded bed and banks in *United States v. Washington*, 694 F.2d 188 (9th Cir. 1982), had express treaty fishing rights. Treaty with the Quinaielt, July 1, 1855, 12 Stat. 971.

G. The language of the Executive Order confirms that its purpose is limited to preserving uplands for the use of the Tribe.

On its face, the 1873 Executive Order does not definitely declare an intent to reserve submerged lands. The operative language of the 1873 Executive Order states that the tract of country is "withdrawn from sale and set apart as a reservation." Executive Order of November 8, 1873. In *Utah Division of State Lands* the Court held that reservations which merely withdrew lands from sale did not necessarily refer to lands under navigable waters because lands under navigable lakes and rivers . . . were *already* exempt from sale, entry, settlement, or occupation under the general land laws." *Id.* at 203.

Thus, the Executive Order, on its face, is insufficient to indicate an intent to reserve submerged lands, and in fact contains language indicating an intent to limit the withdrawal to lands otherwise available for sale. This should be dispositive; but if not, the language of the Order at the very least increases the burden placed on the plaintiffs. They must place into evidence not only facts sufficient to rebut the strong presumption of state ownership; they must also place into evidence facts sufficient to overcome the express language of the Executive order.

Despite the limiting language of the Executive Order, the plaintiffs allege that the 1873 Executive Order implies an intent to reserve submerged lands since one boundary goes down the middle channel of the Spokane River. This claim bears many similarities to the claims rejected by the Supreme Court in *United States v. Montana*, 450 U.S. 544 (1981). In *Montana*, the courts were addressing whether or not the Crow Tribe owned the beds and banks of the Big Horn River, which runs through the middle of the Crow Reservation. As here, the reservation was located within the Tribe's aboriginal territory. As here, one of the initial boundaries of the Reservation

was the "mid-channel" of a waterway.[5] As here, the Tribe claimed ownership of the beds and banks of a navigable waterway (the Big Horn River) included within the boundaries of the reservation and tributary to the waterway used as a boundary. As here, Montana was admitted into the Union upon the condition that it disclaimed all lands held by Indian Tribes. And finally, as here, the boundaries of the Reservation were modified after statehood so that one of the boundaries ran down the middle of the waterway at issue.[6]

Despite the use of the mid-channel of a navigable river as a boundary, the Supreme Court held that the treaty with the Crow Tribe did not embody an intent to convey the beds and banks of navigable waterways embraced within the Reservation. The decision in *Montana* demonstrates that an express reference to the bed of a navigable river does not infer any intent with regard to other navigable waterways within the reservation, even when they are tributary to the named waterway.

Additionally, extrinsic evidence suggests that if there was an intent to convey bedlands, such intent was necessarily limited to the Spokane River. Agent Monteith's report, which formed the basis of the Commissioner of Indian Affairs' recommendation for issuance of the executive order, stated that the boundary ran down the Spokane River so that a mill could be

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5 "[C]ommencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana Territory; thence north along said 107th meridian to the mid-channel of the Yellowstone River, thence up said mid-channel of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 45th degree of north latitude; and thence east along said parallel of latitude to the place of beginning . . . ." Second Treaty of Fort Laramie, May 7, 1868, Art. II, 15 Stat. 650.

6 On December 8, 1890, the United States and the Crow Tribe entered into an agreement for a cession of a portion of the Crow Reservation. One section of the outer boundaries of the cession was described as following "a parallel of latitude to a point where it intersects the mid-channel of the Big Horn River, thence following up the mid-channel of said river to a point where it crosses the Montana and Wyoming State line." The Crow agreement was approved in the same act approving the 1887 and

built at the upper falls, thereby saving the expense of building a steam mill. State Exhibit 82. Under *Alaska*, a reservation of submerged lands is implied only where necessary to fulfill federal objectives. The purpose expressed in Monteith's report, i.e., providing a mill site, was fulfilled by reservation of the Spokane River. A reservation of Lake Coeur d'Alene and the St. Joe River is not implied, since they were not necessary to the express purpose of providing a mill site.

H. The President lacked both the intent and the authority to expressly convey submerged lands to the Coeur d'Alenes.

The 1873 Executive Order cannot be construed as an express conveyance of submerged lands, for one simple reason: it was issued with the intent and knowledge that it was only a temporary set-aside of lands to prevent white settlement pending congressional ratification of the 1873 Agreement. There would appear to be no dispute on this issue. For example, In U.S. Exhibit 1189, Richard Hart, expert witness for the United States, admits that the 1873 Reservation was considered to be temporary. U.S. Ex. 1189 at 90. Because the Executive Order was issued with the intent that it would only be temporary, the President clearly did not intend that it be a permanent disposition of lands. Thus, as a matter of law, it could not act as an express conveyance or grant of permanent property rights to the Tribe. *See also Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942)(regardless of intent, President not authorized to convey permanent title to Indian tribes through executive order).

1889 Coeur d'Alene agreements. Act of March 3, 1891, ____ Stat. at ___. A map of Crow Reservation showing this boundary may be found at United States v. Finch, 395 F. Supp. 205, 219 (D. Mont. 1975).

III. ISSUES RELATING TO RATIFICATION

A. The 1888 Report by the Secretary of Interior did not provide notice to Congress that the Executive had clearly intended to reserve the beds and banks of navigable waters within the Coeur d'Alene Reservation.

The standard for a notice precedent to congressional ratification is an "instrument [that] placed Congress on notice that the President had construed his reservation authority to extend to submerged lands and had exercised that authority to set aside uplands and submerged lands . . . ." *Alaska*, 117 S. Ct. at 1911. The notice alleged here (the 1888 report of the Secretary of Interior) does not meet this standard for several reasons.

First, the Commissioner of Indian Affairs states that "[f]rom the official map of Idaho the reservation appears to embrace all the navigable waters of Lake Coeur d'Alene." U.S. Ex. 213 at 21 (emphasis added). The fact that the Lake Coeur d'Alene appears on maps as "embraced" within the boundaries of the Reservation is not in dispute. The term "embrace" merely means "to encircle or surround." *American Heritage Dictionary* 426 (1982). In other words, one possible meaning of the Commissioner's statement was that the reservation encircled Lake Coeur d'Alene. Regardless of his exact use of the term, however, it is clear from the context of the statement that he was merely relaying the fact that the Lake was within the mapped boundaries of the Reservation. The mere inclusion of submerged lands within a reservation, however, does not imply that the Tribe has title to the beds of the waterways. *Montana*, 450 U.S. at 554. [7]

[7] The same logic applies to the Commissioner of Indian Affairs' Annual Report for 1889, wherein he described the lands to be ceded in the 1889 Agreement as "embracing by far the greater portions of the navigable waters of the reservation." U.S. Ex. 250 at 22. Again, the Commissioner was simply recognizing that the waters were within the boundaries of the reservation.

Another factor that should be considered is that the Commissioner never traces the Tribe's property rights within the Reservation to the 1873 Executive Order. Instead, he states that "in my opinion these Indians have all the original Indian rights in the soil they occupy," and that they "claimed the country long before the lines of the reservation were defined by the executive order of 1873." U.S. Ex. 213 at 7. Thus, when he later speaks of negotiating with the Tribe for a cession of part of the reservation, "including all or a portion of the navigable waters," he is, at most, expressing his personal opinion that the Tribe had original Indian title to the Lake. It is also possible that the Commissioner was simply recognizing that the practical effect of any tribal cession of lands adjacent to the Lake would be to "release" the Lake by allowing the construction of landings and other facilities necessary for navigation. Thus, the document did not put Congress on notice that the President had construed his reservation authority to extend to submerged lands.

B. Congressional reports arising from the 1889 and 1889 Agreements did not provide notice to Congress that the Executive had clearly intended to reserve the beds and banks of navigable waters within the Coeur d'Alene Reservation

The plaintiffs also allege that by providing to Congress reports of the 1889 negotiations with the Coeur d'Alenes seeking a portion of the 1873 Reservation, the executive branch gave notice to Congress that it had reserved the beds and banks of Lake Coeur d'Alene and its associated rivers. Several reports were made to Congress about these negotiations: the only two to mention waterways, however, were House Report 1109, printed March 28, 1890, and Senate Executive Document 14, printed December 18, 1889. U.S. Ex. 206; U.S. Ex. 215. In House Report 1109, Rep. DuBois of the Committee on Indian Affairs explained that the 1887 Agreement had not yet been ratified because of the desire on the part of the United States to

acquire an additional area "on the northern end of said reservation." U.S. Ex. 206 at 4. DuBois described the northern portion of the Reservation, stating that it "contains a magnificent sheet of water, the Coeur d'Alene Lake, and its chief tributary, to wit, the Coeur d'Alene River, over the waters of which steamers now ply daily from the city of Coeur d'Alene to the old Coeur d'Alene Mission, there connecting with a railway system penetrating into the very heart of the Coeur d'Alene mineral belt." *Id.*

DuBois's report does nothing more than indicate the obvious; that Lake Coeur d'Alene and its associated rivers were within the boundaries of the 1873 Reservation. Moreover, DuBois' statement is not the type of notice contemplated by the *Alaska* decision. There, the Court was addressing notice that came from the executive branch, not statements written by a congressman. Moreover, DuBois' statement, if anything, indicates that Lake Coeur d'Alene was not reserved for the exclusive use of the Tribe. As DuBois notes, steamers plied Lake Coeur d'Alene and the Coeur d'Alene River daily. In other words, the Lake, despite being within the boundaries of the Reservation, was already open to non-Indian use.

House Report 1109 also contains further information which would indicate that the submerged lands within the Reservation had not been reserved for the use of the Tribe. Included with the Report was a copy of a petition written by the Tribe on March 23, 1885, complaining that its lands had "been taken possession of by the whites without remuneration or indemnity, except that portion now by them occupied as the present Coeur d'Alene Reservation." U.S. Ex. 206 at 40. It then went on to describe the lands outside the Reservation that had been occupied, including "Coeur d'Alene Lake and Coeur d'Alene River, upon which the waters of which

steamers now run." *Id.* The clear implication is that the Tribe itself did not view the Lake or River as reserved for its exclusive use.

Senate Executive Document 14 provides transcripts of the 1887 and 1889 negotiations with the Coeur d'Alenes. The plaintiffs rely primarily on the 1889 negotiations, which include a number of references to the Lake. If anything, these negotiations represent the understanding that the Tribe had no ownership interest in the Lake. General Simpson, lead negotiator for the United States, explained to Chief Seltice the principle of public ownership of submerged lands: "You understand that the lake belongs to you as well as to the whites---to all, every one who wants to travel on it." U.S. Ex. 164 at 9. Seltice did not dispute this statement. *Id.* Thus, when Simpson stated several minutes later that "if we buy this land you still have the St. Joseph River and the lower part of the lake and all the meadow and agricultural land along the St. Joseph River," *Id.*, he was not recognizing tribal ownership of submerged lands. It was simply a recognition that the Lake and River would remain within the boundaries of the Reservation, subject to the principles of public ownership Simpson had just explained.

C. Congress itself established the conditions for ratification of the actions taken by federal officers in 1887 and 1889, and did not act to fulfill those conditions and ratify the actions until 1891.

Even assuming for purposes of argument that the documents submitted to Congress provided notice that the President had intended to reserve submerged lands as part of the 1873 Reservation, Congress did not take action to ratify the inclusion of such submerged lands until after statehood. The authorizations for the 1887 and 1889 negotiations contained explicit provisions stating that any action the executive branch took to reach agreements with the Tribe

would not be valid until specifically ratified by Congress. State Ex 3253; State Ex. 3254. Each agreement contained a number of specific provisions that had to be carefully reviewed and approved by Congress. The record demonstrates that the Agreements were not ratified until March 3, 1891. State Ex. 3255.

The fact that Congress on March 3, 1891, undertook specific action to ratify the agreements is conclusive proof that it did not view the Idaho Admission Act as ratifying any of the executive branch's prior actions. Nonetheless, the plaintiffs allege that the negotiated agreements embody an intent to include submerged lands within the Reservation, and that Congress ratified that intent by accepting the disclaimer language of the Idaho Constitution. The intent underlying the Agreements simply cannot be so segregated. It is ludicrous to assert that Congress, by accepting the disclaimer language, reached into these agreements, pulled out the specific intent regarding inclusion of submerged lands, and somehow left the remainder of the Agreements for later review and ratification. Each provision of the Agreements is integral to the other provisions: they needed to be reviewed and approved in their entirety, and that is exactly what happened. Unfortunately for the plaintiffs, it occurred after statehood, and therefore can have no effect on the question of ownership of the disputed submerged lands.

D. The disclaimer language included in the Idaho Constitution is simply too general in nature to infer that Congress clearly contemplated continued federal ownership of Lake Coeur d'Alene and its associated rivers.

Even assuming that the Secretary of Interior provided notice to Congress of the fact that the President had construed his reservation authority to extend to submerged lands and had acted to reserve the submerged lands within the Coeur d'Alene Reservation, it must be proven that

Congress acted with specificity to ratify the reservation of submerged lands and defeat state title. Congress' acceptance of the disclaimer language in the Idaho Constitution fails to meet this standard for a number of reasons.

First, a similar argument based on disclaimer language in the Alaska Statehood Act was rejected by the Ninth Circuit in *Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989). There, the plaintiffs (United States and Alaskan Natives) argued that the United States had reserved the beds and banks of the Gulkana River, based on language in the Statehood Act providing that Alaska and her citizens: "Do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State . . . under the authority of this Act, the right or title to which is held by the United States . . . and to any lands or other property (including fishing rights) the right or Title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or held by the United States in trust for said natives . . . ." 891 F.2d at 1405, quoting 48 U.S.C. note 4 prec. § 21 (1982).

The Ninth Circuit held that the disclaimer language was too general to fulfill the two prong test described in *Utah Div. of State Lands v. United States*, 482 U.S. 193, 202 (1987), which requires the party seeking to defeat state title to show: (1) Congress clearly intended to include the submerged lands within the federal reservation, and (2) affirmatively intended to defeat state title to the submerged lands. Because the disclaimer language omitted any reference to the Gulkana River or to any submerged lands, the court held that it was "too general a statement from which we could 'infer an intent to defeat [Alaska's] equal footing entitlement.'" 891 F.2d at 1406.

Likewise, the disclaimer language in the Idaho Constitution lacks a reference to the disputed submerged lands, and lacks any specific reference to the Coeur d'Alene Reservation. In fact, the word "reservation" does not appear anywhere in the disclaimer clause. Idaho Const. Art 21, § 19. Because of the generic nature of the disclaimer clause, it is simply too general a statement from which to infer an intent to defeat state title.

The requirement that Congress make specific reference to the particular submerged lands alleged to be reserved was confirmed by the Supreme Court's recent decision in *United States v. Alaska*, 117 S. Ct. 1888 (1997). In *Alaska*, the Court was able to declare with confidence that in enacting certain provisions of the Statehood Act, "Congress clearly contemplated continued federal ownership of certain submerged lands," and that the operative provision in the Statehood Act "reflects a very clear intent to defeat state title." *Id.* at 1917. That was because the Statehood Act contained specific and express references demonstrating that Congress had contemplated and ratified the inclusion of submerged lands within specific reservations. It was these express references to the federal reservations at issue that fulfilled the specificity requirements of *Utah Div. of State Lands*. Interestingly, the Alaska Statehood Act also contained a general disclaimer to all lands "the right or title to which is held by the United States." 48 U.S.C. note 4 prec. § 21 (1982). Nowhere did the Court suggest that this general disclaimer had any relevance to the question of ownership of submerged lands.

An additional factor in *Alaska* was the fact that Congress not only had notice that the executive department had acted to set aside submerged lands, it also had notice that federal ownership of submerged lands was necessary to fulfill the purposes of the reservations. Congress acted to ratify the National Petroleum Reserve with the knowledge that federal

ownership of submerged lands was "necessary to prevent the Reserve's resources from being drained from beneath submerged lands." 117 S. Ct. at 1910. Congress acted to ratify the wildlife refuge with the knowledge that the refuge was set aside to provide habitat "for polar bears, Arctic foxes, seals, and whales," species which require submerged lands as habitat. *Id.* at 1913. From such necessity, the Court inferred congressional intent to defeat state title through ratification of previous executive actions.

Here, however, the documents which the plaintiffs allege provided notice of withdrawal to Congress failed to identify any reasons requiring the defeat of state title to submerged lands within the Reservation. In regard to Indian reservations, defeat of state title to submerged lands has been found only where such defeat was necessary to ensure tribal access to fisheries. None of the documents provided to Congress, however, even mention fisheries, not even in passing, although each document discusses the agricultural achievements and needs of the Tribe. *See* U.S. Exs. No. 213, 215, 216. Given the surprising lack of references to fisheries in the executive documents, Congress would not have been aware of any needs requiring defeat of state title. Thus, the necessity that drove the inference of intent to defeat state title in *Alaska* is lacking here.

E. The history of disclaimer clauses in general confirms that they were intended to address specific issues having no relation to the reservation of submerged lands within Indian reservations.

The history of the disclaimer provision indicates that it simply was not intended to address the question of ownership of submerged lands. The disclaimer in the Idaho Constitution is standard boilerplate language found in a number of state constitutions, intended to address concerns having nothing to do with submerged lands. The history of disclaimer clauses begins

with the United State Supreme Court's decision in *United States v. McBratney*, 104 U.S. 621 (1881), which held that when a state is admitted into the Union without reserving jurisdiction over Indian reservations therein, such reservations are "no longer within the sole and exclusive jurisdiction of the United States." Thus, the Court held that the State had jurisdiction over a crime committed by a non-Indian against another non-Indian within the Ute Reservation.

Sometime after the *McBratney* decision. Congress passed the General Allotment Act, which authorized the subdivision of Indian reservations, the granting of land titles to individual Indians, and the sale of the remaining reservation lands to non-Indians. The General Allotment Act "contemplated the gradual extinction of Indian reservations and Indian title by the allotment of such lands to Indians in severalty." *Draper v. United States*, 164 U.S. 240, 246 (1896).

The injection of disclaimer provisions in all state enabling acts or constitutions enacted after 1889 must be read in light of the General Allotment Act's provisions and policies. Lands were to be allotted in severalty to tribal members, and title vested in them, but restrictions were to be placed on the taxation, sale, and encumbrance of the allotted lands to ease the transition to citizenship. Because of the *McBratney* decision, there was a concern that states could "frustrate the limitations imposed by the laws of the United States upon the title of lands once in an Indian reservation, but which had become extinct by allotment in severalty, and in which contingency the Indians themselves would have passed under the authority and control of the state." *Draper*, 164 U.S. at 246.

Thus, the disclaimer provisions were enacted in order to address jurisdictional concerns arising from the allotment of lands in severalty to tribal members. This concern is reflected in the language of the disclaimer provision, which states that the people of the State of Idaho

"forever disclaim all right and title . . . to all lands lying within said limits owned or held by any Indians or Indian tribes . . . ." The disclaimer provision speaks in terms of lands owned or held by Indians, not lands reserved for the use of tribes. There is, in fact, no mention of the word "reservation" anywhere in the disclaimer provision.

Given the language of the disclaimer provision and its history, there is absolutely no basis for inferring from its terms that Congress, in approving the disclaimer, "clearly contemplated continued federal ownership of certain submerged lands." *Alaska*, 117 S. Ct. at 1917. Thus, as a matter of law, the presumption of state ownership must stand.

F. The legislative history of the Idaho Admission Act confirms that Lake Coeur d'Alene and its associated rivers were considered to be assets of the State of Idaho.

Throughout the legislative history of the Idaho Admission Act, it is clear that Congress considered Lake Coeur d'Alene and its associated waterways to be assets belonging to the State of Idaho. One of the criteria for statehood was that a Territory "have the requisite population and resources to entitle [it] to statehood." State Ex. 3251 at 1. In hearings regarding the admission of Idaho, F.T. Dubois, Idaho's delegate to Congress, emphasized Idaho's water resources, stating that "[t]he Territory abounds in hot and cold springs which can not be excelled, and lakes whose waters are as clear as crystal are plentifully scattered throughout the Territory. The largest of these are Coeur d'Alene and Pend Oreille. Lake Coeur d'Alene is about 30 miles long and 4 miles wide, on which a daily line of steamers runs." *Id.* at 56. Dubois also described the Lake's associated rivers as valuable assets justifying statehood: "No Western or coast State or Territory is so well watered as Idaho. The Snake River. Clarke's Fork, Spokane, Salmon, Boise, Payette,

Weiser, Big and Little Wood, Bruneau, Malad, Portneuf, Clearwater, Coeur d'Alene, St. Joseph, and Kootenai are all large rivers into which many smaller ones empty." *Id.* at 54-55.

During the debates over admission of Idaho, speakers again emphasized that Lake Coeur d'Alene and its associated rivers would be important assets of the State, thereby helping to justify Idaho's admission. It was noted several times throughout the debates that Idaho contained over 1,200,000 acres of lakes and rivers. State Ex. 3252 at 2929 (1890)(remarks of Rep. Dorsey); *Id.* at 6739 (1890)(conference committee report); *Id.* at 6753 (1890)(remarks of Sen. Cullom). Representatives remarked that Idaho's waterways included the Spokane River, the Coeur d'Alene River, and the St. Joe River. *Id.* at 2929 (remarks of Rep. Dorsey). Finally, it was noted that Lake Coeur d'Alene was an "important lake" of Idaho. *Id.* at 2938 (remarks of Rep. Dubois).

Given the remarks during the hearing and debates, it is clear that Congress contemplated that Lake Coeur d'Alene and its associated waterways would be assets freely available to the people of Idaho. There is nothing in the legislative history to indicate that Congress "clearly contemplated continued federal ownership" of Lake Coeur d'Alene and its associated rivers. Thus, the disclaimer clause does not meet the criteria for ratification as defined in *Alaska*, 117 S. Ct. at 1917.

IV. ISSUES RELATING TO ABORIGINAL TITLE

A. Normal concepts of aboriginal title have no application to submerged lands, which are tied in a unique way to sovereignty.

The Tribe asserts ownership to the disputed submerged lands under the theory that they possessed aboriginal or Indian title to the submerged lands, and that such title has never been extinguished. The Tribe's attempt to apply normal concepts of aboriginal title to submerged lands fails, however, as the Supreme Court has noted, submerged lands are "lands with a unique status in the law and infused with a public trust the State itself is bound to respect." *Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. 2028, 2041 (1997). Submerged lands "have historically been considered 'sovereign lands,'" and "uniquely implicate sovereign interests." *Id.* Ownership of submerged lands arises not from possession, but arises from the need for the sovereign government to control such lands in order to protect "the weighty public interest in submerged lands." *Id.* at 2042. The Court has noted that "these developments in American law are a natural outgrowth of the perceived public character of submerged lands, a perception which underlies and informs the principle that these lands are tied in a unique way to sovereignty." *Id.*

Because of their unique status, submerged lands have never been subject to the normal rules governing aboriginal title. From its earliest cases, the Supreme Court has confirmed that Indian rights of occupancy do not affect sovereign title to submerged lands. In *Martin v. Waddell's Lessee*, 41 U.S. 367 (1842), the Court described "the dominion and propriety in navigable waters, and the soils under them" as "a part of the prerogative rights annexed to the political powers" conferred on the original colonies and as "one of the royalties incident to the powers of government." 41 U.S. at 411, 413. It clarified that the Crown had the authority to confer such rights on the original colonies notwithstanding the presence of Indian tribes:

> The English possessions in American were not claimed by right of conquest, but by right of discovery. For according to the principles of international law, as then understood by the civilized powers of Europe, the Indian tribes in the new world

> were regarded as mere temporary occupants of the soil, and the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered.

41 U.S. at 409.

This principle was reaffirmed in the Supreme Court's recent decision in *Idaho v. Coeur d'Alene Tribe*. Under English common law, two aspects of title to submerged lands were recognized: *jus publicum*, which was the public interest in the use of navigable waters, and *jus privatum*, which could be held by the sovereign or by private individuals, through grant or by prescription or usage. *Shively v. Bowlby*, 152 U.S. 1, 11-13 (1894). In *Coeur d'Alene*, the Court noted that *jus privatum* is not recognized in American law, even when claimed by the sovereign. 117 S. Ct. at 2042. The Court called this "a natural outgrowth of the perceived public character of submerged lands." *Id.* In other words, in American law, the only recognizable title to submerged lands is that held by and on behalf of the general public, unless the controlling sovereign takes specific action to defeat that title by conveying it to a private party. *Shively*, 152 U.S. at 47-50.

Thus, for the last 150 years, the Supreme Court has held to the principle that the United States held the lands under navigable waters in the Territories 'in trust' for future States, even when those submerged lands were in the middle of Indian reservations to which the occupant tribe held undisputed aboriginal title. In *Montana*, the Court noted that the effect of the treaty with the Crow Tribe "was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory." 450 U.S. at 554. In *Holt State Bank*, the Court recognized that the Red Lake Reservation was composed of what remained after the Chippewas ceded "their aboriginal right to the surrounding lands," so that the reservation preserved for the

Tribe's occupation the remains of their aboriginal territory. 270 U.S. at 58. Despite the explicit recognition in *Montana* and *Holt State Bank* that the tribes possessed aboriginal title to the lands within their reservations, the Court held that there was "nothing evincing a purpose to depart from the established policy . . .of treating [submerged] lands as held for the benefit of the future state." *Id.* Thus, both cases confirm that the congressional policy of retaining submerged lands in trust for future states takes precedence over and supersedes the fact that the submerged lands were within the claimant tribe's aboriginal territory.

The fact that aboriginal title does not apply to submerged lands is further demonstrated by Justice Douglas' concurring opinion in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970). The majority had held that the Choctaw Nation held title to the bed of the Arkansas River, based primarily on the fact that the treaty took the unusual step of granting the Tribe fee title to all lands within their reservation. *Id.* at 634-35. Justice Douglas noted that the holding in *Holt State Bank* was distinguished, stating that "that case involved only the aboriginal Indian title of use and occupancy," while the title held by the Choctaws "was not the usual aboriginal Indian title of use and occupancy but a fee simple." *Id.* at 638 (emphasis added). Justice Douglas' opinion is an explicit recognition that the inclusion of submerged lands within a tribe's aboriginal territory is not sufficient to rebut the presumption of state title.

Additionally, the nature of aboriginal title prohibits its application to submerged lands. Aboriginal title is the right to occupy land "to the exclusion of others." *Masayesva v. Zah*, 65 F.3d 1445, 1452 (9th Cir. 1995). Submerged lands, however, "are incapable of ordinary and private occupation, cultivation, and improvement, and their primary uses are public in nature." *Shively*, 152 U.S. at 11. Thus, submerged lands have always been held to belong to governments who have not only the ability, but the responsibility of holding submerged lands in trust for the general public. Governments owning submerged lands have the "obligation to regulate, improve,

and secure submerged lands for the benefit of every individual." *Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. 2028, 2042 (1997). Since aboriginal title is held only for the benefit of tribal members, recognition of aboriginal title would be antithetical to long-held legal principles "recognizing the weighty public interest in submerged lands." *Id.*

The Ninth Circuit's decision in *United States v. Pend Oreille Public Utility Dist. No. 1*, 926 F.2d 1502 (9th Cir. 1991) does not suggest that tribes may claim aboriginal title to submerged lands, since it expressly acknowledges that it does not address the issue. Instead, it merely notes that "[f]or the purposes of this appeal, the parties have assumed the Tribe had aboriginal title to the area involved in this litigation, including the riverbed." *Id.* at 1507 (emphasis added). The court's acknowledgment of a position adopted by the parties for purposes of argument does not sanction the notion that aboriginal title extends to submerged lands, nor does it sanction the notion that aboriginal title, if extended to submerged lands, would defeat state sovereign title to those same lands.

DATED this 17th day of November, 1997.

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Documents of American Indian Diplomacy

Treaties, Agreements, and Conventions, 1775–1979

Volume Two

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and
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With a Foreword by Daniel K. Inouye

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called, to Camp Supply, crosses the said stream; thence due north to the middle of the main channel of the Red Fork of the Arkansas River; then down the said river, in the middle of the main channel thereof, to a point in said channel ten miles east of the 98th meridian of west longitude; thence south to the place of beginning.

Article third. The said Arapahoes agree to receive among them upon the reservation provided for by the preceding article the Pacer band of Apaches (now confederated with the Kiowas and Comanches), and agree that the members of this band shall be entitled to all the rights and privileges with the members of the Arapaho tribe.

In testimony whereof, the parties to this agreement hereunto subscribe their names and affix their seals on the day and year first above written, October 24, 1872.

F. A. WALKER,
Party of the First Part.

BIG MOUTH, his x mark.
LEFT HAND, his x mark.
HEAP O'BEARS, his x mark.
WHITE CROW, his x mark.
YELLOW HORSE, his x mark.
BLACK CROW, his x mark.
Chiefs and Head-men representing Arapaho Tribe, Party of the Second Part.

Witnesses:
HENRY E. ALVORD, *Special Commissioner.*
PHILIP MCCUSKER, *Interpreter.*
JOHN POISELL, his x mark, *Interpreter.*

SOURCE: 47th Cong., 2d sess., H. Ex. Doc. 54 (serial 2108): 11–12.

AGREEMENT WITH THE COEUR D'ALENE

July 28, 1873

Agreement made and entered into on this 28th day of July, A.D.1873, at Latah (or Hangman's) Creek, in the Territory of Idaho, by and between John P. C. Shanks, John B. Montieth, and Thomas W. Bennett, Special Commissioners on the part of the government of the United States, and the chiefs, and Head men of the Tribe of Couer de'Alene Indians.

Witnesseth:

Art. 1st That the Government of the United States agrees to set apart and secure as a Reservation for the exclusive use of the Couer de'Alene Indians, and to protect the same from settlement or occupancy by other persons, all and singular the lands and privileges lying and being within the following described limits, to-wit: 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, six miles above the point where the trails from Lewiston to Spokane Bridge crosses said Creek; thence in a North Easterly direction, in a direct line, to the Couer de'Alene Mission, on the Couer de'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 Couer de'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, as established by the act of Congress organizing a territorial government for the Territory of Idaho; thence South along said dividing line to the top of the dividing ridge between Pine and Latah (or Hangman's) Creeks; thence along the top of said ridge to the place of beginning.

Which said Reservation the government of the United States, upon the acceptance of this agreement by Congress

shall cause to be surveyed at its own expense, and the boundaries fully defined in accordance with this agreement. Provided that the said government reserves the right to establish in and across said Reservation mail routes, military roads, and public highways for the benefit of the citizens of the United States. And provided further that the waters running into said reservation shall not be turned from their natural channel where they enter said reservation.

2d And the said Tribe of Couer de'Alene Indians agree to relinquish to the government of the United States all their right and title in and to all the lands heretofore claimed by them, and lying and being outside of said described reservation, which said lands are bounded as follows, to wit: Beginning at the head of the upper Palouse or Monnasha river in the Territory of Idaho; thence Westerly across the ridge to Steptoe's Butte; thence Northerly to Antoine Plants, on the Spokane river; thence across [the] ridge to [the] foot of Pen de' Oreille Lake; thence up said lake to the summit of the Bitter Root mountains; thence along the summit of the Bitter Root Mountains to the place of beginning. And said Indians agree to locate and make their homes upon the reservation described in the first article of this agreement. Provided that when the dividing line between the Territories of Washington and Idaho shall have been established by actual survey, if it shall be found that any of said Indians shall have made improvements on lands situated in the Territory of Washington, the government of the United States agrees to pay the value of such improvements to the Indians who may be at the time the owners thereof. Said value to be ascertained, and said payments to be made as may be directed by the Secretary of the Interior.

3rd In consideration of the relinquishment of the title to all the lands described in article second of this agreement by said Indians, and in consideration of their removal within the reservation described in article first of this agreement, the government of the United States agrees, as soon after the approval of this agreement as practicable, to furnish to said Indians at said reservation the following articles, to wit:

10 wagons; 10 setts wagon harness; 50 sett plow harness; 50 ten inch plows; 10 span American mares; 10 whip saws; 10 cross cut saws; 2 mowers with reapers combined; 1 sett blacksmith tools; 2 horse rakes; 20 harrows; 10 grain cradles.

Also to furnish material and construct on said reservation, for the use of said Indians 1 grist and saw mill combined; 1 School House with apartments for male and female pupils; 1 boarding and lodging house for pupils; 1 smith shop.

And the United States further agrees to furnish in United States 5 per cent bonds the sum of One Hundred and Seventy thousand dollars, the interest to be paid annually first for the payment of the salaries of the millers and blacksmith hereinafter provided for, and the residue to be expended under the direction of the Presidents of the United States for schools, and for such articles of comfort and for the civilization of said Indians, as he may deem proper. *Provided,* the United States reserves the right to pay said principal sum to said Indians at any time after twenty years. And the United States agrees to furnish to said Indians 1 grist and 1 saw miller and 1 blacksmith to be paid out of [the] interest fund as above provided, until such time as said Indians shall determine to dispense with the services of such employees, said employees to teach the Indians to perform such labor.

4th It is expressly agreed by and between the said Commissioners, and the said Indians, that this agreement shall be submitted to the Congress of the United States, for its approval, and in case the same shall be approved, it shall thereafter be binding and of full force and effect, but if the same shall not be approved, then it shall be null and void and of no effect.

Done and signed on this 28th day of July A.D. 1873, in general council, at Latah (or Hangman's) Creek in the Territory of Idaho.

Witness
P. B. Whitman
J. M. Cataldo, P..S.

John P. C. Shanks
Jno B. Monteith
T. W. Bennett
Commissioners
Andrew Seltis, his x mark, Head Cheif
Vincent, his x mark, cho shi ni, Head Chif

Damas, his x mark
Edward, his x mark
Regis, his x mark
Pierre, his x mark
Veucils, his x mark
Bartholumin, his x mark

Interpreters were:
P. B. Whitman
Morris, a Nez Perce

SOURCE: OIA-LR, Idaho Superintendency, 1824–1880, M234, roll 341: 551–58.

AGREEMENT WITH THE CROW

August 16, 1873

Articles of convention made and concluded on the sixteenth day of August, in the year of our Lord one thousand eight hundred and seventy-three, at the Crow Agency, in the Territory of Montana, by and between Felix R. Brunot, E. Whittlesey, and James Wright, commissioners in behalf of the United States, and the chiefs, head-men, and men representing the tribe of Crow Indians, and constituting a majority of the adult male Indians belonging to said tribe.

Whereas a treaty was made and concluded at Fort Laramie, Dakota Territory, on the seventh day of May, in the year of our Lord one thousand eight hundred and sixty-eight, by and between commissioners on the part of the United States and the chiefs and head-men of and representing the Crow Indians, they being duly authorized to act in the premises;

And whereas by an act of Congress, approved March 3, 1873, it is provided, "That the Secretary of the Interior be, and he is hereby, authorized to negotiate with the chiefs and head-men of the Crow tribe of Indians in the Territory of Montana for the surrender of their reservation in said Territory, or of such part thereof as may be consistent with the welfare of said Indians: provided, that any such negotiation shall leave the remainder of said reservation in compact form, and in good locality for farming purposes, having within it a sufficiency of good land for farming, and a sufficiency for water and timber; and if there is upon said reservation a locality where fishing could be valuable to the Indians, to include the same if practicable; and the Secretary shall report his action, in pursuance of this act, to Congress at the next session thereof, for its confirmation or rejection."

And whereas in pursuance of said act of Congress commissioners were appointed by the Secretary of the Interior to conduct the negotiation therein contemplated:

The said commissioners on the part of the United States, and the chiefs, head-men, and men, constituting a majority of the adult males of the Crow tribe of Indians, in behalf of their tribe, do solemnly make and enter into the following agreement, subject to the confirmation or rejection of the Congress of the United States, at the next session thereof:

ARTICLE I.

The United States agrees that the following district of country, to wit, commencing at a point on the Missouri River opposite to the mouth of Shankin Creek; thence up said creek to its head, and thence along the summit of the divide between the waters of Arrow and Judith Rivers and the waters entering the Missouri River, to a point opposite to the divide between the head-waters of the Judith River and the waters of the Muscle-Shell River; thence along said divide to the Snowy Mountains, and along the summit of said Snowy Mountains, in a northeasterly direction, to a point nearest to the divide between the waters which run easterly to the Muscle-Shell River and the waters running to the Judith River; thence northwardly along said divide to the divide between the head-waters of Arnell's Creek and the head-waters of

2 of 2 DOCUMENTS

TITLE TO ACCRETION LANDS ADJACENT TO COCOPAH INDIAN RESERVATION,

M-36275

Department of Interior

2 DOINA 1663; 1955 DOINA LEXIS 186

April 15, 1955

HEADNOTES: [*1]

Indian Tribes: Reservations

Where an Executive Order establishing an Indian reservation of public lands of the United States, including an unsurveyed area of accreted lands, provides that a sector of the reservation boundary shall follow what will be a section line of the public survey when extended, the Indians have no right as riparian owners to the accreted lands found to lie between such projected section line, when established, and the waters of an adjacent river.

OPINIONBY: J. REUEL ARMSTRONG, Solicitor

MEMORANDUM

To: Commissioner of Indian Affairs

From: Solicitor

Subject: Title to accretion lands adjacent to the Cocopah Indian Reservation, Arizona

The Director of your Area Office at Phoenix has presented the question of the ownership of an area of accreted land lying between the Cocopah Indian Reservation, Arizona and the waters of the Colorado River. The reservation was created by an Executive Order on September 27, 1917 which reads:

"It is hereby ordered that the west half of the southeast quarter of section twelve and the west half of the northeast quarter of section thirteen, township ten south, lots two, four, five, and [*2] six, together with such vacant, unsurveyed, and unappropriated public lands adjacent to the foregoing-described subdivisions and between the same and the waters of the Colorado River as would, upon an extension of the lines of existing surveys, constitute fractional portions of the northeast quarter and the northwest quarter of section thirty, township nine south of range twenty-four west of the Gila and Salt River meridian, Arizona, be, and the same are hereby, withdrawn and set apart for the use and occupancy of the Cocopah Indians, subject to any valid prior existing rights of any person or persons thereto, and reserving a right of way thereon for ditches or canals constructed by the authority of the United States."

At that time, lots 2, 4, 5 and 6 were bordered on the west by the meander line of the Colorado River as shown by a public land survey made in 1874. Prior to the date of the order establishing the reservation, it was recognized that the river channel had already shifted westward leaving a considerable area of accreted land between the river and what would have been the western line of section 30 had the public survey lines been extended. [*3]

Part of the land covered by the Executive Order was within what was known as the Farmers Banco No. 501 claimed by General Higinio Alvarez, a Mexican citizen. His claim later came before the International Boundary Commission of the United States and Mexico in 1926 and it was determined that dominion and sovereign jurisdiction over the area had passed to the United States (IO File 8717-26). When creating the Cocopah Indian Reservation on a part of this unsurveyed area the United States could limit the reservation boundary to include all or any part of the area. (56 Am. Jur. Sec. 481). See also *Jones v. Johnston, 18 How. 150. Producers Oil Co. v. Hanzen, 238 U.S. 325.*

Had it been intended that the rights of the Cocopah Indians should extend all the way from the western boundary of surveyed lots 2, 4, 5 and 6 to the waters of the Colorado River there would have been no occasion for including in the Executive Order the restrictive language defining the western boundary of the reservation to include such land " as would, upon extension of the lines of existing surveys, constitute fractional portions of the northeast [*4] quarter and the northwest quarter of section thirty, township nine south of range twenty-four west of the Gila and Salt River meridian, Arizona." It being known that there was already a sizeable area of accreted land between the river and unsurveyed section 30, this language operated to exclude the accreted land found to be west of section 30 when the survey lines were protracted. To include in the reservation all of the accreted land between the 1874 meander line and the water of the river as it flowed when the reservation was created would be to hold as superfluous and without meaning the above-quoted part of the Executive Order. It must be concluded, therefore, that the Indians have no rights to accreted lands west of the boundary fixed by the Executive Order. See also *Houston Brothers v. Grant, 73 So. 284; Saulet v. Shepherd, 71 U.S. 502.*

J. REUEL ARMSTRONG, Solicitor

CALIFORNIA INDIAN LEGAL SERVICES
SCHOOL OF LAW
UNIVERSITY OF CALIFORNIA AT LOS ANGELES
405 HILGARD AVENUE
LOS ANGELES, CALIFORNIA 90024
(213) 825-1918

February 26, 1970

The Honorable Barry Goldwater
United States Senate
The Capitol
Washington DC 20001

Dear Senator Goldwater:

The Cocopah Tribal Council has requested us to look into the question of whether lands formed to the west of the West Cocopah Reservation by a gradual shift in the course of the Colorado River should be included within the boundaries of the Reservation.

The Solicitor of the Department of the Interior determined in 1955 that these lands should not be included within the reservation (Solicitor's Opinion M-36275, April 15, 1955). Our research indicates that this Opinion is erroneous in both its findings of fact and conclusions of law. We have obtained several official maps from the Interior Department which show the Colorado River to have run very close to or through the land set aside for the Cocopah at the time the reservation was established in 1917. The Solicitor's Opinion is based on the finding that a considerable amount of land existed between the river and the reservation when it was established. Even if this finding is correct, however, the legal effect of wording of the Executive Order establishing the reservation, according to the Interior Department's own interpretations and policies current at that time, was to set aside the existing accretions (along with subsequent accretions) to the land for the Cocopah.

Senator Barry Goldwater February 26, 1970

As I am sure you are aware, the Cocopah are desperately in need of additional land to maintain and develop the economic and social well-being of the tribe. The Tribal Council, after several years of considering the problem, is taking steps to allow several hundred unenrolled Cocopah to enroll and participate in the affairs of the tribe, and to become eligible for a number of federal programs which they urgently need. At present, the Reservation consists of only 446 acres, much of which is unsuitable for any form of development, and is incapable of supporting the additional enrollees.

The Tribe is very grateful for your efforts to obtain an additional 2,000 acres for their reservation, and we hope our research will be of some help to you staff in this regard. The Tribal Council has requested us to lend whatever support we can to you on their behalf and we would welcome any suggestions from you or your staff as to the best way for us to proceed. Litigation here might prove long, costly and, we would hope, unnecessary if you feel there is some likelihood that the Secretary of Interior or Congress might act to provide additional land for the Tribe.

The accretion land in question comprises over 900 acres, and is under the control of the Bureau of Reclamation in the Department of Interior. Except for about 100 acres being used by squatters, the land is entirely vacant. Until 1950 or thereabouts, the land was considered to be part of the Reservation by the Interior Department. Much of it is suitable for cultivation, and could be of enormous benefit to the Tribe if recovered for the reservation.

We hope that we will be able to assist you in obtaining this and other land for the Tribe, and any suggestions from you or members of your staff in this matter will be most welcome.

Sincerely yours,
CALIFORNIA INDIAN LEGAL SERVICES

Robert S. Pelcyger

RSP:FDG:mjs
cc: Mrs. Lena San Diego, Tribal Chairman
Cocopah Tribal Council
Somerton, Arizona

1 of 2 DOCUMENTS

TITLE TO ACCRETION LANDS

M-36867

Department of Interior

2 DOINA 2050; 1972 DOINA LEXIS 92

December 21, 1972

HEADNOTES: [*1]

Indian Tribes: Reservations

Where an Executive Order establishing an Indian reservation on public lands of the United States included a reference to unsurveyed and unappropriated public lands adjacent to specifically described subdivisions and between said specifically described subdivisions and the waters of an adajacent river as would, upon an extention of the lines of existing surveys, constitute fractional portions of specifically named quarter sections of a named section, the reference to portions of the section shall be deemed to be words of description and not words of limitation so that the Indians would have rights as riparian owners to the accreted lands found to lie between such projected section lines, when established, and the waters of the adjacent river.

OPINIONBY: RAYMOND C. COULTER, Acting Solicitor.

MEMORANDUM

To: Assistant Secretary for Public Land Management

From: Solicitor

Subject: Title to accretion lands adjacent to the Cocopah Indian Reservation, Arizona

This office has been requested to review an opinion of a former Solicitor, Solicitor's Opinion of April 15, 1955, M-36275, regarding title to accretion lands adjacent [*2] to the Cocopah Indian Reservation, Arizona.

The Cocopah Indian Reservation was created by an Executive Order on September 27, 1917, which reads:

It is hereby ordered that the west half of the south-east quarter of section twelve and the west half of the north-east quarter of section thirteen, township ten south, lots two, four, five and six, together with such vacant, unsurveyed and unappropriated public lands adjacent to the foregoing described subdivisions and between the same and the waters of the Colorado River as would, upon an extension of the lines of existing surveys, constitute fractional portions of the northwest quarter of Section thirty, township nine south of range twenty-four west of the Gila and Salt River Meridian,

Arizona, be, and the same are hereby withdrawn and set apart for the use and occupancy of the Cocopah Indians, subject to any valid prior existing rights of any person or persons thereto, and reserving a right of way thereon for ditches or canals constructed by the authority of the United States. (Emphasis added)

Over the years there have been considerable differences of opinion regarding interpretation of the [*3] Executive Order. One interpretation to which the Executive Order is susceptible is that the Executive Order gave everything to the Cocopah Indians between the Colorado River and the subdivisions mentioned. The second interpretation is that the reference to fractional portions of the northeast quarter and the northwest quarter of section 30 are words not merely of description but of limitation, and that therefore the Indians could not claim any land west of section 30. In the Solicitor's Opinion of April 15, 1955, the interpretation that was followed was that the reference to fractional portions of the northeast quarter and the northwest quarter of section 30 were not merely words of description, but words of limitation.

In the process of reviewing this matter I have been provided copies of numerous documents bearing on the intent of the original Executive Order, some of which documents the former Solicitor may not have had available to him at the time the 1955 opinion was rendered. One of these documents is a letter dated July 26, 1917, from the Commissioner of the General Land Office of this Department to the Commissioner of Indian Affairs. The significance [*4] of that letter arises from the fact that it contained the proposed wording of an Executive Order which in fact was used in the Executive Order of September 27, 1917. Thus the precise phraseology of the Executive Order that has resulted in differing interpretations over the years stems directly from the General Land Office letter.

The former Solicitor in his 1955 opinion indicates that prior to the date of the Executive Order establishing the reservation it was recognized that the river channel had already shifted westward leaving a considerable area of accreted land between the river and what would have been the western line of section 30 had the public survey lines been extended, and he therefore concluded that the reference to section 30 in the Executive Order operated to exclude the accreted land found to the west of section 30 from the reservation. My examination of the various documents and particularly the aforesaid letter of July 26, 1917, from the General Land Office, leads me to the opposite conclusion. While it seems clear that as a matter of fact prior to the date of the Executive Order the river channel had already shifted westward leaving a considerable [*5] area of accreted land between the river and what would have been the western line of section 30 had the public survey lines been extended, and it is also clear that the existence of accreted lands was known, it is not clear that the General Land Office in suggesting the wording of the Executive Order was aware that the river had shifted so far to the west that there were accreted lands between the river and what would have been the western line of section 30. As a matter of fact, there is some indication in the letter from the General Land Office that it was thought that the river was still at least partially within what would have been section 30. Even more significant, however, is the fact that the Commissioner of the General Land Office after discussing the existence of lands east of the river which were unsurveyed and contiguous to unapproved public lands of the United States which would in fact be the property of the United States if the lands were formed by accretion, then suggested:

If you should be of opinion that withdrawal should be ordered now to preserve public possession and right to possession of such public lands as may exist in the locality mentioned, [*6] then I recommend that the language of the proposed order be altered by striking out all following the word "six" in line four and inserted in the place thereof the following: (suggested language which was actually adopted in the Executive Order.)

A fair reading of the above indicates to me that the Commissioner of the General Land Office was referring to all those lands east of the river contiguous to the unappropriated public lands of the United States, and that the legal description that he proposed was intended to cover whatever vacant, unsurveyed and unappropriated public lands were in existence between the river and the specifically described subdivisions upon an extension of the lines of the existing surveys to the river.

I therefore conclude that the reference in the Executive Order to fractional portions of quarters of section 30 were words of description and not of limitation and that the resesvation as created by the Executive Order of September 27,

1917, extended to the Colorado River. The Solicitor's Opinion of April 15, 1955, M-36275, is therefore reversed.

RAYMOND C. COULTER, Acting Solicitor.

In the Supreme Court of the United States

OCTOBER TERM, 1960

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, DEFENDANTS

THE UNITED STATES OF AMERICA AND STATE OF NEVADA, INTERVENERS

STATE OF UTAH AND STATE OF NEW MEXICO, IMPLEADED DEFENDANTS

Simon H. Rifkind, *Special Master*

REPORT

December 5, 1960

canals for distribution. Apparently, irrigation on the Reservation is conducted by means of many small irrigation units, each with its separate source of supply.[43]

(b) *Hopi Reservation.* The Hopi Reservation is situated in the northeast portion of Arizona within the exterior boundaries of the Navajo Reservation and includes approximately 2,500,000 acres. Its topography and climate are similar to that of the Navajo Reservation. The Hopi Indians live in a number of small villages most of which are located on high mesas, although in recent years some of the younger Hopis have built homes in the valleys.[44]

Hopi population has grown at a moderate pace and, as of 1957, approximately 5,000 Indians were living on the Reservation. In general, there has been little movement away from the Reservation. Hopi economy is basically agricultural although some income is derived from trading, silver work and other handicraft.[45] As indicated above, the Hopi Reservation is included within the Hopi-Navajo Long Range Program. Irrigation systems in the Reservation are similar to those in the Navajo Reservation.[46]

(c) *Zuni Reservation.* Located in the State of New Mexico, on the boundary line between New Mexico and Arizona, the Zuni Indian Reservation is approximately thirty-two miles south of Gallup, New Mexico. It has an approximate area of 404,000 acres. Elevations in this high plateau country range from 5,900 to nearly 7,000 feet, and high mesas and small valleys spread throughout the Reservation create a broken terrain. Climate is extreme in each season and winter temperatures fall as low as 20

[43]See Tr. 12815-12856 (Keesee). See also U. S. Exs. 276-295.
[44]Tr. 12640-12642 (Head).
[45]Tr. 12642-12643 (Head).
[46]See Tr. 12795-12814 (Keesee). See also U. S. Exs. 293, 413-421.

Attachment G
Page 2 of 5

degrees below zero. Average rainfall is twelve inches annually, most of which falls within the months of July and August. Most of the Zunis live in small villages or in the Zuni Pueblo and during the farming season they move out to the irrigation projects.[47]

The population of the tribe, which has increased by about 1,000 in twenty years, is approximately 3,000 Indians, most of whom live on the Reservation. Although these Indians engage in silver work and seasonal labor off the Reservation, their economy is primarily based on subsistence farming and stock raising.[48]

Water for irrigation of Reservation land is obtained from the Zuni, Nutria and Pescado Rivers as well as from springs located throughout the Reservation. The irrigation system comprises a number of separate irrigation units which are serviced by various small diversion dams, reservoirs and canal distribution networks.[49]

2. *Indian Reservations—On or Near the Colorado River.*

(a) *Kaibab Reservation.* Inhabited by the Kaibab band of the Paiute Indians, this Reservation, with an approximate area of 120,000 acres, is located just south of, and adjacent to, the northern border of the State of Arizona, about half way between Lee Ferry and the northwest corner of Arizona. The Reservation, lying north of the Grand Canyon, has desert-type terrain. The population of the Kaibab tribe is approximately 100, but the number actually living on the Reservation is not in evidence. Gardening and wage earning in nearby towns constitute the basis of the economy.[50]

[47]Tr. 12628-12630 (Head).
[48]Tr. 12631-12632 (Head).
[49]Tr. 12795-12793 (Keesee). See also U. S. Exs. 119-147.
[50]Tr. 13760-13761 (Haverland).

Irrigation water for Reservation land is obtained from Moccasin Springs and a stream known as Two Mile Wash.[51] Water from these sources is diverted into several small storage reservoirs and, when enough has accumulated, it is distributed through a system of laterals.[52]

(b) *Havasupai Reservation.* Covering an approximate area of 3,000 acres, this Reservation is located south of the Kaibab Reservation and the Grand Canyon. A portion of its lands is situated at the bottom of the Canyon. The terrain is extremely rugged, desert-type country. No evidence was introduced as to the number of Indians living on the Reservation. The tribe has a population of approximately 250. Tribal economy consists of subsistence gardening in the bottom of the Grand Canyon and wage earning in surrounding communities.[53]

Water for irrigation purposes is diverted from Cataract Creek or Havasu Creek. Two diversion dams serve the two main canals of the distribution system.[54]

(c) *Hualapai Reservation.* The Hualapai Indian Reservation in Arizona consists of three sections, the largest of which abuts on the Colorado River and extends south to the town of Peach Springs, Arizona. The second section, known as the Hualapai School Reserve, is located directly south of the largest section. Finally, the Hualapai Indian Reserve is situated further south on the Big Sandy River. Total combined area is approximately 1,000,000 acres, most of which has a very arid climate and a desert-valley-type of topography. It is unclear how many of the 700 Hualapai Indians live on the Reservation. Although there are a few

[51] Tr. 14455-14456 (Fortier).
[52] Tr. 14005-14006 (Rupkey). See also U. S. Exs. 604-614.
[53] Tr. 13761-13762 (Haverland).
[54] Tr. 14011 (Rupkey). See also U. S. Exs. 704-717.

business enterprises, Hualapai economy is based primarily on the raising of livestock.[55]

Irrigation water for lands in the Big Sandy area comes from the Big Sandy River and Trout Creek. Water for the other areas comes from springs and wells and is distributed through a system of pipes and laterals.[56]

(d) *Moapa Reservation.* Situated in the southern portion of Nevada 40 to 50 miles northeast of Las Vegas, this Reservation contains about 1,200 acres—most of which are located in the bottom of a valley with desert-type topography. The Reservation is inhabited by the Moapa band of the Paiute Indians whose total population in 1957 was approximately 100. The actual number residing on the Reservation is unclear.[57] Moapa economy consists of subsistence gardening and wage earning in nearby towns.[58] Practically all irrigable land in the Moapa Indian Reservation has been leased to non-Indians.[59]

(e) *Fort Mohave Reservation.* This Reservation is situated in the States of Arizona, California and Nevada in the general area of their common borders. Embracing approximately 38,000 acres, the Reservation's climate and topography are that of an arid desert valley. The total number of the Fort Mohave tribe living on the Reservation is unknown. The tribe's total population in 1957 was approximately 450. The majority of these Indians work for the Santa Fe Railroad in the town of Needles, California.[60]

Irrigation on this Reservation is negligible. Plans have been proposed for a modern irrigation system using both

[55] Tr. 13762-13763 (Haverland).
[56] Tr. 14014-14015 (Rupkey). See also U. S. Exs. 811-818.
[57] Tr. 13787 (Haverland).
[58] Tr. 13763 (Haverland).
[59] Tr. 13788-13789 (Haverland).
[60] Tr. 13764-13787, 14069 (Haverland) (Rupkey).

surface water from the Colorado River and underground sources.[61]

(f) *Chemehuevi Reservation.* The Chemehuevi Indian Reservation is situated in an arid desert valley area in California, on the west bank of the Colorado River between Parker Dam and the Fort Mohave Indian Reservation. Its total area is approximately 28,000 acres. There are no Indians presently inhabiting the reservation.[62] Tribal population in 1957 approximated 300 Indians.[63]

As of 1957, irrigation was not practiced on the Reservation. However, the Bureau of Indian Affairs has tentatively planned to introduce irrigation systems on the Reservation.[64]

(g) *Colorado River Reservation.* This Reservation, situated on both sides of the Colorado River in Arizona and California, is bounded on the south by Ehrenburg, Arizona. Its approximately 260,000 acres, which extend to the mesas and mountains on the east and northwest, are primarily arid desert valley country. The inhabitants of the Reservation, the Colorado River Indian tribes, have an agricultural economy.[65] It is estimated that 1,100 or 1,200 of the 1957 tribal population of approximately 1,300 live on the Reservation.[66]

Irrigation water for the Arizona portion is diverted from the Colorado River at the northern part of the Reservation. The diversion dam, called Headgate Rock Dam, has been described at pages 34-35, *supra*. It creates a lake

[61]Tr. 14072-14078 (Rupkey). See also U. S. Exs. 258, 260, 1307-1314.
[62]Tr. 14030 (Rupkey).
[63]Tr. 13765 (Haverland).
[64]Tr. 14023-14031 (Rupkey). See also U. S. Exs. 516, 1204-1205.
[65]Tr. 13765-13766 (Haverland).
[66]Tr. 13792-13793 (Haverland).

which is used for recreational purposes. There is no power plant. Depth of the water in the canal intake is considerably less than the depth of the River so that only top water flows into the diversion works, thus minimizing the silt problem. The dam was completed in 1941 at a cost of approximately $5,000,000. The main canal for this part of the Reservation takes out at the diversion works and proceeds westerly and southwesterly, entering the valley just west of the town of Parker, Arizona. Its total length is approximately 17 miles and it has a capacity of 2,100 c.f.s. at the heading. The canal, which is partially lined, ends in a wasteway. Complete lining of the canal has been planned and the resulting increased capacity will be able to serve approximately 105,000 acres. Water is regulated by a complex distribution and drainage system.[67]

Construction of several irrigation systems on the California side of the Colorado River Indian Reservation has been planned,[68] and some surveying has been completed.[69] It is estimated that over 70,000 acres in the Reservation have been leased to non-Indians.[70]

(h) *Yuma Reservation.* The Yuma Reservation is located in California across the Colorado River from Yuma, Arizona. It also includes the so-called "Yuma Homesteads" situated south and west of Yuma, in Arizona. Its total area, including the "Yuma Homesteads" is approximately 9,000 acres. The topography is typical Colorado River desert land and the climate is arid. The Reservation is inhabited by the Quecham Indians. As of 1957, about 900 of the estimated

[67]Tr. 13981-14001 (Rupkey).
[68]Tr. 14054-14055 (Rupkey); see U. S. Exs. 558, 562.
[69]Tr. 14127 (Rupkey).
[70]Tr. 13776 (Haverland); see U. S. Ex. 568. See also U. S. Exs. 507-558. Leasing of lands on Indian Reservations is governed by 69 Stat. 539 (1955), U. S. Ex. 564; and 69 Stat. 725 (1955), U. S. Ex. 565.

total tribal population of 1200 lived on the Reservation. Most of these Indians are engaged in agriculture or wage earning.[71]

Irrigation water for these Indian lands was first diverted from the Colorado River at Laguna Dam. When Imperial Dam and the All-American Canal were completed, however, the Reservation was served by these facilities. Water delivered from the River is distributed through a system of canals and laterals.[72]

(i) *Cocopah Reservation.* The Cocopah Reservation is composed of two tracts of land located southwest of Yuma in Arizona. Total approximate area is 500 acres and the climate of this typical Colorado River Valley land is arid. The number of the Cocopah Indian tribe living on the Reservation is unclear. The 1957 tribal population was about 90 Indians. Primary sources of income are agriculture and wage earning.[73]

Both tracts of the Cocopah Reservation receive irrigation water from the Colorado River through the facilities of the Valley Division of the Yuma Project. One tract receives water from the Valley Division's east main canal and the other tract receives water from the west main canal. Reservation laterals distribute water directly to the irrigated lands.[74]

3. *Indian Reservations—Central Arizona Area.*

(a) *Gila Bend Reservation.* Situated on the Gila River about 40 miles southwest of Phoenix, Arizona, this Reservation has an approximate area of 10,000 acres of arid desert valley land and is inhabited by members of the Papago tribe. In 1957, approximately 250 of the total tribal population of 7,500 lived on the Reservation and sustained themselves by working for the railroad serving the area.[75]

Originally, irrigation water was diverted from the Gila River and distributed through the Papago Canal and Indian Lateral. Because of decreasing flows in the Gila these works were discontinued and wells were drilled to provide most of the water supply. Underground water so obtained is distributed through a system of laterals.[76]

(b) *Papago Reservation.* Located in the south central part of Arizona adjoining the Mexican border, this Reservation comprises roughly 2,800,000 acres. Approximately one-half of the Reservation, the northern portion, lies within the Colorado River Basin.[77] The Reservation's climate is arid and it lies in a desert area with rocky, rugged hills on the edge of the valley. It is inhabited by the Papago Indians, some 6,700 of whom live on the Reservation. Their economy is based primarily on cattle raising and wage earnings.[78]

Irrigation water for these Indian lands is provided primarily by wells. Water is discharged into a reservoir or directly into the distribution system which is composed of laterals and partially lined canals.[79]

(c) *San Xavier Reservation.* This Reservation is located on the southwestern edge of the City of Tucson and contains about 71,000 acres. In 1957, it was inhabited

[71]Tr. 13766-13767, 13791, 13821A (Haverland).
[72]U. S. Ex. 1116. See also U. S. Exs. 258, 510, 1105-1115, 1117.
[73]Tr. 13767-13768 (Haverland).
[74]Tr. 14020-14021 (Rupkey). See also U. S. Exs. 508, 511, 1002-1003, 1005.

[75]Tr. 14640-14641 (Haverland).
[76]Tr. 14713-14715 (Rupkey). See also U. S. Exs. 1403-1407.
[77]See Tr. 14540; U. S. Ex. 100.
[78]Tr. 14641-14642 (Haverland).
[79]Tr. 14717-14718 (Rupkey). See also U. S. Exs. 1504-1517.

Attachment G
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