3-20-2017

CDAT's Reply Brief to State and other Objectors

Howard Funke
Attorney, Howard Funke & Associates

Dylan R. Hedden-Nicely
Attorney, Howard Funke & Associates

ORIGINAL

Howard A. Funke, ISB No. 2720
Kinzo H. Mihara, ISB No. 7940
Dylan Hedden-Nicely, ISB No. 8856
HOWARD FUNKE & ASSOCIATES, P.C.
Attorneys at Law
424 Sherman Avenue, Suite 308
P. O. Box 969
Coeur d'Alene, Idaho 83816-0969
P (208) 667-5486
F (208) 667-4695

Counsel for the Coeur d'Alene Tribe

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

	) Consolidated Subcase No. 91-7755
	)
In re CSRBA	) COEUR D'ALENE TRIBE'S REPLY TO
	) THE STATE OF IDAHO'S AND
Case No. 49576	) OBJECTORS' RESPONSE TO SUMMARY
	) JUDGMENT MOTION
_____	)

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

TABLE OF CONTENTS

INTRODUCTION

This memorandum replies to the arguments made by the State of Idaho,[1] Hecla,[2] the North Idaho Water Rights Group,[3] and Potlatch et al.[4] The Objectors have provided to this Court a highly slanted and revisionist version of both the law and historical facts applicable in this case. The *Modus Operandi* seems to be plucking single statements from the body of both the historic record and the cases and then applying them in out-of-context ways in an effort to make arguments that the law and facts do not support.[5] The purpose of this memorandum is to expose these inconsistencies, set the

---

[1] *State of Idaho's Memorandum in Response to United States' and Coeur d'Alene Tribe's Joint Motion for Summary Judgment*, In Re CSRBA Case No. 49576, Consolidated Subcase No. 91-7755 (Feb. 22, 2017) (hereinafter "Idaho Response Brief").

[2] *Hecla's Memorandum in Opposition to The United States' and Coeur d'Alene Tribe's Joint Motion for Summary Judgment*, In Re CSRBA Case No. 49576, Consolidated Subcase No. 91-7755 (Feb. 23, 2017) (hereinafter "Hecla Response Brief").

[3] *North Idaho Water Right Group's Memorandum in Opposition to United States' and Coeur d'Alene Tribe's Joint Motion for Summary Judgment*, In Re CSRBA Case No. 49576, Consolidated Subcase No. 91-7755 (Feb. 23, 2017) (hereinafter "NIWRG Response Brief").

[4] *Potlatch's Consolidated Response to Motions for Summary Judgment*, In Re CSRBA Case No. 49576, Consolidated Subcase No. 91-7755 (Feb. 23, 2017).

[5] Perhaps the most glaring example of this is the State's so-called statement of additional "facts." It is worth mentioning that the State cites to its expert in that statement exactly three times. Rather than a comprehensive statement of the history that occurred between 1873 and 1910, this statement is actually a *conclusory* set of *arguments* made by the State based on its analysis of a highly selective and cherry-picked set of historical documents. However, the State's counsel is not qualified to offer the Court his opinion as to the meaning of those historical documents. In reviewing this statement of "facts," the Tribe respectfully request this Court compare the statements made therein with the historical reports submitted by the experts in this case and in particular Ch. 5-6 of Richard Hart's Report (Aff. Hart, Ex. 6, p. 111-150 (hereinafter "Hart 2015 Report")); Ch. 5 of Ian Smith's Report (Aff. Smith, Ex. 1, p. 83-107 (hereinafter "Smith 2015 Report)); Ch.4 of Richard Hart's Rebuttal Report (3d. Aff. Hart, Ex. 1, p.3-14; 34-53 (hereinafter "Hart Rebuttal Report")); and Ch. 2.2.3 of Ian Smith's Rebuttal Report (Aff. Smith, Ex. 2, p. 12-38 (hereinafter "Smith Rebuttal Report")).

historic record straight, and to explain the actual state of the law regarding reserved water rights, as well as Indian law as a general matter.

The crux of the Tribe's argument is that **(1)** the Coeur d'Alene Reservation was created on November 8, 1873; *see* section III, *infra*;[6] **(2)** the *Winters* doctrine demands that the Tribe is entitled to the water necessary to fulfill the purposes of the creation of the Reservation; *see* section IV, *infra*; **(3)** analysis of the purposes for the creation of the Coeur d'Alene Reservation demonstrates that the primary purpose of the Coeur d'Alene Reservation was to set aside for the benefit of the Coeur d'Alene Tribe a permanent homeland that included:

(A) Coeur d'Alene Lake and its related waterways; *see* section V(A), *infra*; Coeur d'Alene Response at 40-70, s. III(B);[7]

(B) non-consumptive water rights to allow the Tribe to continue hunting, fishing, gathering, and other traditional cultural, spiritual, and religious activities; *see* section V(B), *infra*; Coeur d'Alene Response at 70-101, s. III(C); and

(C) consumptive water that would allow the Tribe to engage in agriculture and DCMI uses into the future to adequately develop the economy of its homeland; *see* section V(C)-(D), *infra*. *See also*, Coeur d'Alene Response at. 101-05, s. IV.

---

[6] *See also, Coeur d'Alene Tribe's Response to the State of Idaho, Hecla, and the North Idaho Water Rights Group*, In Re CSRBA Case No. 49576, Consolidated Subcase No. 91-7755 at 5-23 (Feb. 22, 2017) (hereinafter "Coeur d'Alene Response").

[7] *See also, Coeur d'Alene Tribe's Memorandum In Support of Motion for Summary Judgment*, In Re CSRBA Case No. 49576, Consolidated Subcase No. 91-7755 at 8-35, s. II-III (Oct. 20, 2017) (hereinafter "Coeur d'Alene Opening").

The Tribe's water rights vested as "present perfected rights" on November 8, 1873, the date of the creation of the Reservation; *see* section VI, *infra*. Therefore, this Court need not, and should not, *reanalyze* the purposes of the Reservation based upon later agreements or acts of Congress. Those subsequent events are only relevant to the question of whether any water rights have subsequently been ceded by the Tribe or unilaterally taken by Congress. *See* section VI, *supra*. To find that the Tribe agreed to cede any water rights, this Court must find that the Tribe did so *expressly* not silently. *See* section VI(A)(1), *infra*. Further to find that Congress unilaterally took any of the Tribe's water rights this Court must find Congress did so *expressly* not through "unspoken operation of law." *See* Section VI(A)(2), *infra*. Although these principles are of general applicability in Indian law, they are even more compelling in this case because the Supreme Court has already analyzed the historic record from the operative time period and found that it was Congress' express "intent . . . that anything not consensually ceded by the Tribe would remain for the Tribe's benefit." *See* Section VI(B), *infra*. Application of these bedrock rules of federal Indian law conclusively demonstrates that the Tribe ceded absolutely none of its vested water rights after 1873.

Accordingly the Tribe is entitled as a matter of federal law to the water rights claimed in this adjudication.

FACTUAL BACKGROUND

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

STANDARD OF REVIEW

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

ARGUMENT

I. THE STATE AND HECLA GROSSLY MISCONSTRUE THE INDIAN LAW CANONS OF CONSTRUCTION: THE SUPREME COURT REQUIRES APPLICATION OF THE CANONS EVEN WHERE THERE IS ONLY "PLAUSABLE AMBIGUITY"

The State and Hecla go to considerable lengths to try and emasculate the Indian canons of construction. The path down which the State and Hecla travel is well worn by other non-Indian litigants seeking to convince courts that all they have to do is blindly declare a statute or agreement "plain" or "unambiguous" and a court can then proceed to entirely ignore the "eminently sound and vital" canons of construction the Supreme Court has consistently reaffirmed since at least 1832. *Worcester v. Georgia*, 31 U.S. 515, 552-53 (1832); *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) (quoting *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655, n. 7 (1976)). The Tribe respectfully suggests that this Court should not take these objectors up on their suggestion.

The Supreme Court has applied the canons of construction so many times that it would be excessive to list them all. Instead, the Tribe will simply quote to Cohen's Handbook of Federal Indian Law and allow the Court to reference that treatise for additional citations:

> The Supreme Court has stated: "[T]he standard principles of statutory interpretation do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). The basic Indian law canons of construction require that treaties, agreements, statutes, and executive orders be liberally construed in favor of Indians and that all ambiguities are to be resolved in their favor. In addition, treaties and agreements are to be construed as the Indians would have understood them, and tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous.

Aff. Counsel, Ex. 9, p. 113-14 (F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 2.02 (2012 ed.).

Cohen acknowledges that "[w]hen a statute is clear on its face . . . the canons of construction will not come into play." *Id.* However, The United States Supreme Court has been unrelenting that it will only forgo the canons where "'the face of the Act,' . . . 'surrounding circumstance' and 'legislative history' all point unmistakably to [a single] conclusion [regarding the agreement or statute]." *DeCoteau v. District Court*, 420 U.S. 425, 444 (1975).[8] In short, the Court demands application of the canons in any situation where either (1) the document at issue or (2) the circumstances surrounding the creation of that document cause any "plausible ambiguity." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999).

All of the cases cited by the State and Hecla actually support this approach. For example, in *South Carolina v. Catawba Indian Tribe, Inc.* the Court was asked to determine whether a state law statute of limitations applied to the Tribe. 476 U.S. 498 (1986). The Catawba Tribe had entered into an agreement with the United States that terminated federal protection for the Tribe. *Id.* at 507. The case turned on whether that termination agreement caused state law to become applicable to the

[8] The Court in *DeCoteau* found the Lake Traverse Reservation terminated based upon cession language where the Tribe agreed to "cede, sell, relinquish, and convey to the United States all their right, title, and interest to all . . . lands" in exchange for a lump sum payment ***and*** the negotiation history where tribal representatives said, among other things "We never thought to keep this reservation," and "We don't expect to keep reservation," and "we will be pleased with the opening." *Id.* at 433.

Tribe. *Id.* That agreement expressly stated that "the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction." *Id.* at 505. The Tribe argued that Court should apply the canons of construction to this language but the Supreme Court concluded "[t]he canon of construction regarding the resolution of ambiguities in favor of Indians . . . does not permit reliance on ambiguities that do not exist . . . ." *Id.* at 506.

The language at issue in *United States v. Choctaw Nation* was equally clear. 179 U.S. 494 (1900). There the Choctaws intervened in a claims case regarding a parcel of land owned by the Wichita and Affiliated Bands of Indians. *Id.* at 498. The Choctaws were claiming that the United States had given the Choctaws this land first (upon their removal from the southeast United States) and the Tribe had never ceded it but had instead simply leased the land "west of the 98°" to the United States so that the United States could temporarily settle the Wichitas on it. *Id.* According to the Choctaws, this entitled it, not the Wichitas to any compensation awarded. However, the Court found that in 1866 the Choctaws and the United States entered into a treaty wherein the "the Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98°of west longitude . . . ." *Id.* The Choctaws argued the canons should apply but the Supreme Court held "in no case has it been adjudged that the courts could by mere interpretation or in deference . . . incorporate into an Indian treaty something that was inconsistent with the clear import of its words." *Id.* at 532.

The Choctaw share their lands with the Chickasaw Nation, which was before the United States Supreme Court in 1943. *Choctaw Nation of Indians v. United States,* 318 U.S. 423 (1943). At issue in *Choctaw Nation* was the applicability of two agreements: one from 1897 called the "Atoka Agreement," and another from 1902 called simply the "1902 Agreement." *Id.* at 425-27. The

Chickasaws were arguing that the Supreme Court should apply the earlier Atoka Agreement rather than the 1902 Agreement. However, the 1902 Agreement had expressly stated that "[n]o act of Congress or treaty provision, nor any provision of the Atoka agreement . . . shall be in force . . . ." *Id.* at 427.[9] The Chickasaws argued that the Court should apply the canons to this language but the Court found "even Indian treaties cannot be re-written or expanded beyond their clear terms . . . ." *Id.* at 432.

In sum, each case cited by the State and Hecla involved a situation where "'the face of the Act,' . . . 'surrounding circumstance' and 'legislative history' all point[ed] unmistakably to [a single] conclusion." *DeCoteau*, 420 U.S. at 444. However, the Court requires application of the canons if either the document or the circumstances surrounding the document has any "plausible ambiguity." *Mille Lacs*, 526 U.S. at 200.

The Court in *Mille Lacs* was asked to determine whether the Chippewas had ceded off-reservation usufructuary rights in the State of Minnesota in a treaty in 1855 wherein it had agreed to

> hereby cede, sell, and convey to the United States all their right, title and interests in, and to, the lands now owned by them, in the Territory of Minnesota, and included within the following boundaries, viz: [describing territorial boundaries]. And the said Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they now have in, and to any other lands in the Territory of Minnesota or elsewhere.

---

[9] Incidentally, Congress' language in superseding the Atoka Agreement is an excellent example of how it typically would expressly abolish Indian rights: not through silent implication or "unspoken operation of law," but by expressing it on the face of the Act. *See* section III; VI, *infra.*

Id. at 184 (citing 10 Stat. 1165-66). The State of Minnesota argued, just as the State of Idaho and Hecla argue here, that "the Band unambiguously relinquished its usufructuary rights by agreeing to the . . . that Treaty." *Id.* at 195. However, in affirming the Tribe's off-reservation usufructuary rights, the Court looked beyond the bare language and "examined the historical record and considered the context of the treaty negotiations to discern what the parties intended by their choice of words." *Id.* at 202. Based upon the historical record present in *Mille Lacs*, the Court disagreed that "the 1855 Treaty 'unambiguously' abrogated the 1837 hunting, fishing, and gathering privileges." *Id.* at 200. It then applied the canons: "[g]iven this **plausible ambiguity**, we cannot agree with the State that the 1855 Treaty abrogated Chippewa usufructuary rights. We have held that Indian treaties are to be interpreted liberally in favor of the Indians . . . and that any ambiguities are to be resolved in their favor." *Id.* (internal citations omitted). Despite cession language that is stronger than the language used here in the 1887 and 1889 Agreements, the Supreme Court found the Tribe had indeed reserved its usufructuary rights. *Id.* Importantly, the Court cited *Winters* as support for its conclusion. *Id.*

Thus, when examining this case—the agreements, executive orders, and Congressional acts, as well as the circumstances surrounding those documents—any "plausible ambiguity" is "to be interpreted liberally in favor of the Indians," and this Court is duty-bound to resolve "any ambiguities in [the Tribe's] favor." *Id.*

II. THERE IS NO SUCH THING AS THE "LAST RESERVATION DOCTRINE"

The State and other objector's primary theory of the case is that this Court should analyze the purposes of the Coeur d'Alene Reservation as of 1891 rather than 1873. The reason for their argument is simple: they want to limit the purpose of the reservation to a dryland agricultural purpose so that the Tribe is awarded essentially no reserved water rights. This is not the first time the State has

made this "ag only" argument. Indeed, in *Idaho II* it argued that "[t]he stated purposes of the expanded [1873] Reservation were to provide farmlands, fulfill the Tribe's agricultural needs, and provide access to the Mission." Aff. Counsel, Ex. 2, pg. 22 (Idaho's Trial Brief *Idaho II*).[10] Having had that argument summarily rejected by the federal district court, Ninth Circuit, and the United States Supreme Court, Idaho's answer in this case is to attempt to try and move the goal posts from 1873 to 1891.

Their (incorrect) theory is that by 1891 the Tribe had all but abandoned their traditional lifestyle and had turned entirely to agricultural pursuits.[11] To put it bluntly, they know that if this Court finds the Reservation was created in 1873 they lose. The State actually admits that in *Idaho II* "[t]he [federal district] court, after reviewing the history that led to the 1873 Executive Order, concluded as follows:

> Th[e] evidence leads the Court to conclude that a purpose of the 1873 agreement was to provide the Tribe with a reservation that granted tribal members exclusive use of the water resource. Because an object of the

[10] To support its arguments, the State proffered the expert testimony of Dr. Kent Richards, who submitted an expert report strikingly similar to Dr. Stephen Wee's report submitted (but not relied upon) by the State in this case. *Idaho II*, 95 F.Supp.2d at 1101, n. 8. The State's argument was *summarily* rejected by Judge Lodge who found that in 1873 "while the Tribe's agricultural endeavors augmented its traditional lifestyle, it did not supplant the Tribe's dependence on the waterways for a steady source of fish, fowl and plants." *Id.* at 1101. To derive this finding, Judge Lodge relied upon "the expert testimony of Mr. Richard Hart, Dr. Roderick Sprague, Dr. Thomas Power and Dr. Thomas R. Cox." *Id.* Judge Lodge then made a point of *expressly* mentioning that "[t]he State introduced the expert testimony and report of Dr. Kent Richards to show that the Tribe was not dependent on the Lake and Rivers. However, Dr. Richards' opinions on this issue were significantly undermined on cross-examination and, in any event, the great weight of the evidence is to the contrary. *Id.* at 1101, n. 8 (emphasis added). Here, Idaho doesn't even pretend to rely upon the expert testimony of its historians, choosing instead to unilaterally treat itself an expert historical witness so that it can peddle its own revisionist theories regarding the history of the Coeur d'Alene Reservation.

[11] *But see*, Joint Statement of Facts at 24- 40; Aff. Hart, Ex. 6, p. 111-150 (hereinafter "Hart 2015 Report"); Aff. Smith, Ex. 1, p. 58-81 (hereinafter "Smith 2015 Report); 3d. Aff. Hart, Ex. 1, p.3-14; 34-53 (hereinafter "Hart Rebuttal Report"); Aff. Smith, Ex. 2, p. 12-38 (hereinafter "Smith Rebuttal Report").

> 1873 Executive Order was, in part, to create a reservation for the Coeur d'Alenes that mirrored the terms of the 1873 agreement, a purpose of the Executive Order was to reserve the submerged lands under federal control for the benefit of the Tribe.

State of Idaho's Memorandum in Support of Motion for Summary Judgment, In Re CSRBA Case No. 49576, Consolidated Subcase No. 91-7755 at 35 (Oct. 20, 2016) (hereinafter "Idaho Opening Brief") (quoting *Idaho II*, 95 F.Supp.2d at 1109).

Accordingly, the purpose of the 1873 Reservation, as found by Judge Lodge, is much more broad and requires water rights for more uses than objector's can stomach. Their only perceived solution is to try to find a way to convince this Court that the Coeur d'Alene Reservation was not actually created until 1891.

And so, they have conjured up the "last reservation doctrine." Their argument is nothing more than a desperate attempt to rewrite history and to sidestep the unambiguous findings of fact and law in *Idaho II* by inventing from whole cloth this "doctrine," which has no basis in the law of the United States. Indeed, a word search for "last reservation doctrine" in Westlaw's online database produces exactly zero search results. No court has cited the "last reservation doctrine," nor has any legal scholar discussed, analyzed, or suggested its existence in a law review article. No treatise or hornbook has outlined the contours of the "last reservation doctrine." Cohen makes no mention of this doctrine, nor does the *American Indian Law Deskbook*, published by the Conference of Western [state] Attorneys General.[12]

[12] In fact, these treatises barely mention *British-American Oil* at all. *See* 2d. Aff. Counsel, Ex. 1, Tbl. of Cases 11 (Table of Cases, American Indian Law Deskbook); Ex. 3, TC-9 (Table of Cases, Cohen's Handbook of Federal Indian Law). What is discussed has absolutely nothing to do with a "last reservation doctrine" but instead deals with specific questions of statutory interpretation of specific

Simply put, the State has made up the "last reservation doctrine." It does not exist and is actually contrary to the blackletter law of the Supreme Court that "when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose . . . the United States acquires a reserved right in unappropriated water which vests on the date of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138 (1976).

III. CONGRESS HAS PLENARY AUTHORITY OVER FEDERAL LANDS, IS FREE TO RATIFY AN EXECUTIVE RESERVATION, AND IT RATIFIED THE 1873 COEUR D'ALENE EXECUTIVE RESERVATION

The State of Idaho's "last reservation doctrine" is entirely premised upon the notion that, unlike reservations set aside by treaty or statute, executive orders reservations were categorically "temporary" and "as a matter of law a congressional act establishing a permanent reservation within the bounds of an earlier, executive order reservation, supersedes the earlier executive order." Idaho Opening Brief at 10. In other words, Idaho argues that "as a matter of law" Congress cannot ratify or confirm an executive reservation. Instead, any Congressional action regarding an executive reservation acts to legally repudiate the executive order. Aside from a single out-of-context paragraph in *British-American Oil* dealing with a specific series of executive orders at issue in that case, *see* section IV(C), *infra*, the State can provide absolutely no precedent to support its argument.

The reason for the State's scant legal support is that there is none. The Supreme Court long ago upheld the power of the executive to set aside reservations by executive order. *United States v. Midwest Oil Co.*, 236 U.S. 459, 469 (1915). And although Congress has the authority to reject those

---

Congressional acts regarding the leasing of tribal lands. *See* 2d. Aff. Counsel, Ex. 1, p. 182-83 (American Indian Law Deskbook); Ex. 3, p. 1108-09; 1123-24 (Cohen's Handbook of Federal Indian Law). In sum, *British-American Oil* cannot hold the weight the State places upon it. *See*, section IV(C), *infra*.

executive reservations, it certainly also has the authority to ratify an executive reservation either in whole or in part. In fact, the Supreme Court has repeatedly found that Congress has plenary authority to ratify executive reservations in any way it sees fit:

> [f]or it must be borne in mind that Congress not only has a legislative power over the public domain, but it also exercises the powers of the proprietor therein. Congress 'may deal with such lands precisely as an ordinary individual may deal with farming property. It may sell or withhold them from sale.' Like any other owner it may provide when, how, and to whom its lands can be sold. It can permit it to be withdrawn from sale. Like any other owner, it can waive its strict rights . . . .

Id. at 474-75 (internal quotations omitted).

In fact, *Midwest Oil* specifically discusses Congress' authority to ratify executive order reservations, finding that "[a] subsequent ratification," of an 1851 executive reservation "related back to 1851." *Id.* at 477 (citing *Bullard v. Des Moines & Ft. D. R. Co.*, 122 U.S. 167, 170 (1887)).

Numerous decisions recognize that Congress can ratify all or just part of an executive order reservation while simultaneously changing either the geographic scope or some of the terms of the reservation. *See*, e.g., *United States v. Alaska*, 521 U.S. 1, 44 (1997) ("We conclude that Congress ratified the terms of the 1923 Executive Order . . . ."); *United States v. Pelican*, 232 U.S. 442, 445 (1914) (finding that, despite an 1892 cession of approximately 1.5 million acres from the 1872 Colville executive reservation "[t]here can be no doubt that the Colville Reservation, set apart by Executive order on July 2, 1872, and repeatedly recognized by acts of Congress, was a legally constituted reservation."); *Parravano v. Babbitt*, 70 F.3d 539 (9th Cir. 1995) (finding that executive orders issued in 1876 and 1891 setting aside the Klamath River Reservation reserved treaty fishing rights and that Congress, through the 1988 Hoopa-Yurok Settlement Act, confirmed the reservation despite splitting the Klamath River Reservation into two separate reservations.); *Fort Berthold*

Reservation v. United States, 390 F.2d 686, 689 (Ct. Cl. 1968) (finding that Congressionally ratified agreement to cede part of an executive order reservation confirmed the portion of the executive order reservation not ceded). *See also*, 2d. Aff. Counsel, Ex. 3, p. 1013, n. 105 (Ch. 15, Cohen's Handbook of Federal Indian Law, citing *Idaho II* as an example of "a number of executive orders creating reservations implemented by treaty or statutory provisions.").

This precedent demonstrates that there is no question that (1) Congress has plenary authority to ratify or reject an executive reservation; (2) that Congress can ratify some or all of an executive reservation; and (3) the portion confirmed relates back to the original date of withdrawal by the executive.

In this case, the United States Supreme Court has specifically found that "Congress recognized the **full extent** of the [Coeur d'Alene] Executive Order reservation lying within the stated boundaries it ultimately confirmed," and objectors are precluded from arguing otherwise. *Idaho v. United States*, 533 U.S. 262, 281 ("*Idaho II*"); Coeur d'Alene Tribe's Response Brief at 4-22. Without belaboring the point, a brief recap of the Tribe's arguments are appropriate here.

Before the federal district court in *Idaho II*, the State of Idaho articulated one of the issues to be decided was whether Congress took "the necessary steps to ratify the reservation . . . ." Aff. Counsel, Ex. 2, pg. 2-3 (Idaho's Trial Brief *Idaho II*). There, as here, Idaho's primary argument was that the 1873 executive order was "only a temporary set-aside," which was eventually rejected by Congress in 1891. *Id.* at 29. The district court rejected the State's argument and instead concluded

that "Congress ratified the 1873 Executive reservation of submerged lands . . . ." *United States and Coeur d'Alene Tribe v. Idaho*, 95 F.Supp.2d 1094, 1109 (D. Idaho 1998) ("*Idaho II*").[13]

On appeal, the Ninth Circuit held that "Congress's actions prior to statehood clearly indicate its acknowledgement, express recognition, and acceptance of the executive reservation . . . ." *United States v. Idaho*, 210 F.3d 1067, 1073 (9th Cir. 2000) ("*Idaho II*").

The Ninth Circuit's conclusion entirely rebuffs the State's argument before this Court that "as a matter of law," "a congressional act establishing a permanent reservation within the bounds of an earlier, executive order reservation, supersedes the earlier executive order." Idaho Opening Brief at 10. To the contrary, the Ninth Circuit expressly found that "Congress, fully aware of the boundaries of the 1873 reservation . . . sought to modify the boundaries . . . via purchase rather than the simpler expedient of rejecting the executive reservation." *Idaho II*, 210 F.3d at 1078. This, for the Ninth Circuit, demonstrated "that beneficial ownership of all land within the 1873 reservation . . . had already passed to the Tribe." *Id.*

Just as it does here, Idaho continued to argue that "Congress chose to repudiate the 1873 Reservation . . . by refusing to accept the existing Reservation boundaries, and directing further negotiations," before the Supreme Court. Aff. Counsel, Ex. 1, pg. 37-38 (Idaho's Supreme Court Brief in *Idaho II*). Just as it does here, Idaho argued that "Congress not only repudiated the 1873 Reservation, but such repudiation was the underlying purpose of the 1889 Act." *Id.* It concluded that

[13] Although the specific portion of the Tribe's reservation that was at issue in *Idaho II* were the submerged lands within the Reservation, the Court's analysis and rationale was not limited to only those submerged lands. Indeed, as highlighted by the Ninth Circuit, the courts concluded "that beneficial ownership of *all land within the 1873 reservation*, including submerged lands, had already passed to the Tribe." *Idaho II*, 210 F.3d at 1078 (emphasis added).

"Congress' action can be characterized as an 'acceptance' of the 1873 Reservation only through the most twisted application of logic." *Id.*

The Supreme Court rejected the State's argument. In so doing, it also rejected the argument Idaho presents to this Court. Far from "a matter of law," that "a congressional act establishing a permanent reservation within the bounds of an earlier, executive order reservation, supersedes the earlier executive order," the Supreme Court found "*Congress was free to define the reservation boundaries however it saw fit . . . .*" *Idaho II*, 533 U.S. at 277 (emphasis added).

The Supreme Court concluded that "[t]he intent, in other words, was that anything not consensually ceded by the Tribe would remain for the Tribe's benefit." *Id.* at 278. This, as well as other evidence, led the Supreme Court to find that "the negotiating history, not to mention subsequent events, 'ma[k]e [it] very plain,' that Congress recognized the full extent of the Executive Order reservation lying within the stated boundaries it ultimately confirmed . . . ." *Id.* at 281 (changes in original).

In a feeble attempt to distinguish *Idaho II*, the State argues that "[i]n *Idaho v. United States*, the critical issue was whether the submerged lands at issue had been reserved . . . on or before the date of Idaho's statehood on July 3, 1890." Idaho Opening Brief at 12. It goes on to argue that "the only relevant actions were the 1873 Executive Order, and the pre-statehood acts of Congress . . . the Court never fully examined the purposes of the Act of March 3, 1891." *Id.* at 13.[14] Accordingly,

---

[14] Specifically, the State argues that "the Court never fully examined the purposes of the [1891] Act . . . other than to note that the Act contained no cession by the Tribe of submerged lands within the boundaries of the [current] reservation . . . ." *Id.* In other words, the State argues that the 1891 Act somehow (1) entirely rejected the 1873 executive reservation; but (2) somehow reserved submerged lands; while (3) simultaneously effecting a complete abrogation of all other treaty rights the Tribe had

Idaho argues, that "nothing in *Idaho v. United States* suggests that the purpose of the 1873 Executive Order were not superseded when Congress established, in the 1891 Act, a new Reservation within the bounds of the Old . . . ." *Id.*

In other words, Idaho argues that despite the findings of the federal district court, Ninth Circuit, and the Supreme Court of the United States that Congress confirmed the 1873 Reservation before Idaho's statehood in 1890, just eight months later Congress turned around and silently abolished that reservation through "unspoken operation of law" simply by **ratifying** the very agreements that the federal courts found demonstrated confirmation of the 1873 executive reservation in the first place. *Id. See also, Idaho II*, 533 U.S. at 279.

Undeniably, this argument fails because the 1891 Act did not reject but instead "accepted, ratified, and confirmed" the 1887 and 1889 Agreements, both of which expressly recognized and confirmed the 1873 executive reservation. 26 Stat. 1027, 1029. That 1891 Act, ratified the 1887 Agreement, wherein the Tribe ceded aboriginal title to its land "**except** the portion of land within the boundaries of their present reservation . . . known as the Coeur d'Alene Reservation." Aff. R. Hart, Ex. 4, pg. 67-70 (Art. II, 1887 Agreement). *See also, Idaho II*, 210 F.3d at 1077 (noting that the "1887 agreement . . . referenced the Tribes 'present [1873] reservation' . . . ." (changes in original)). Further, the 1891 Act ratified the 1889 Agreement, which refers to the "Coeur d'Alene Reservation" on at least three separate instances. Aff. R. Hart, Ex. 4, p. 13-14. In 1891 the only "Coeur d'Alene

---

in the 1873 executive reservation. The State fails to explain how such an extraordinary set of events could take place given the fact that submerged lands are almost never found to be part of a reservation whereas reserved treaty rights for hunting, fishing, gathering, and water to support those rights are routinely found on Indian reservations.

Reservation" that was in existence was the 1873 executive reservation. Accordingly, there can be no question the 1891 Act confirmed the 1873 executive reservation.

The Supreme Court's unambiguous holding in *Idaho II* was that Congress understood the Tribe to be "entitled beneficially to the reservation as then defined [by the 1873 executive order]" *Idaho II*, 533 U.S. at 269. The State's has admitted this fact.[15] Given that Congress intended for the Tribe to gain beneficial title to the 1873 executive reservation before statehood, federal law dictates that the Tribe cannot be stripped of the benefit of that title without express action from Congress. *See* section VI(A)(2) *infra*. With the understanding that silence isn't sufficient to imply such congressional intent, it is simply inconceivable to impute such intent from a Congressional Act that **ratifies** agreements that expressly recognize the 1873 executive reservation.

This is precisely why Idaho's argument that the Court must look to the purpose of the 1891 Act makes no sense. The Purpose of the 1891 Act is singular: to ratify the 1887 and 1889 Agreements. Indeed, outside of adding the language that the agreements "[are] hereby accepted, ratified, and confirmed," the Act does nothing more than recite the language of the agreements themselves. 26 Stat. 989, 1028.

The only place that Idaho can find in the 1891 Act to support its "ag only purpose" is that, according to Idaho, it contained the following provision: "promote the progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians." Idaho Response Brief at 9.

---

[15] Idaho Response Brief at 9 ("the boundaries of the Reservation were 'redrawn so as to ensure that the Tribe still had beneficial ownership of the southern third of the Lake as well as the portion of the St. Joe River within the 1873 reservation . . . .").

Notwithstanding the fact that this language doesn't even mention agriculture,[16] those words actually come directly from the 1887 Agreement. Indeed, all of the evidence cited by the State for its "ag only" purpose is from the time leading up to and during the negotiation of the 1887 and 1889 Agreements. The purpose of and circumstances surrounding those agreements *were analyzed* in *Idaho II*. And thus, despite Idaho's attempt to convince this Court that the 1891 Act somehow did something different that was not analyzed by the Supreme Court, the fact is that the 1891 Act was simply the culmination and ratification of events that were thoroughly analyzed in *Idaho II*.

Further, contrary to Idaho's assertion, the Supreme Court *did analyze the 1891 Act*. The Supreme Court concluded that "[e]ight months after passing the Statehood Act, Congress **ratified** the 1887 and 1889 agreements in their entireties (including language in the 1887 agreement that "the Coeur d'Alene Reservation shall be held forever as Indian land"), with no signal that some of the land over which the parties to those agreements had negotiated had passed in the interim to Idaho." *Idaho II*, 533 U.S. at 279. *See also*, *Idaho II*, 95 F.Supp.2d at 1114 ("Shortly after Idaho secured statehood, Congress, on March 3, 1891, ratified the 1887 and 1889 agreements. Taken together, these events establish that Congress ratified the Executive reservation . . . .").

In sum, the Supreme Court rejected the State's argument that the 1891 Act repudiated the 1873 executive reservation:

> The facts, including the provisions of the Acts of Congress in 1886, 1888, and 1889, thus demonstrate that Congress understood its objective as turning on the Tribe's agreement to the abrogation of any land claim it

[16] It is interesting that the State and Hecla both demand that "[t]he law does not allow the Court to rewrite the Agreements," while simultaneously pointing to this language as conclusive proof that the sole purpose of the 1891 Act was agriculture. As a matter of fact, they can point to exactly zero places in that Act where the word "agriculture" is even mentioned.

> might have and to any reduction of the 1873 reservation's boundaries. The explicit statutory provisions requiring agreement of the Tribe were unchanged right through to the points of Congress's final 1891 ratification of the reservation.

Idaho II, 533 U.S. at 277-78 (emphasis added). In other words, the Court concluded that the 1891 Act further confirmed Congress' prior ratification of the Tribe's 1873 executive reservation and that "[t]here is no indication that Congress ever modified its objective of negotiated consensual transfer . . . ." *Id.* at 280-81.

Idaho's argument must also be rejected because it imputes bad faith upon Congress. Indeed, its argument is essentially that even though Congress confirmed the 1873 executive reservation before statehood, it unilaterally and silently abolished the reservation just eight months later in 1891.[17] Idaho's argument requires this Court to further conclude that Congress did this by passing an 1891 Act **ratifying in their entirety** the 1887 and 1889 Agreements, the authorization of which the Supreme Court relied upon in determining Congressional ratification of the 1873 executive reservation in the first place. In other words, Idaho argues that despite consistent and repeated congressional action that demonstrated that "anything not consensually ceded by the Tribe would remain for the Tribe's benefit," Congress, just eight months after statehood entirely rejected "its express objective of consensual dealing with the Tribe" and abolished the Tribe's reservation in favor of a "new" reservation. Idaho made a similar argument before the Supreme Court and the Court rejected "Idaho's view . . . in what would have amounted to an act of bad faith accomplished by unspoken operation of law." *Id.* at 278-79. The Court found such an argument "at odds . . . with

---

[17] *See* section VI(A)(2), *infra*: the Supreme Court will not imply congressional abrogation of treaty rights through silence.

evidence of congressional intent," both before and after statehood. *Id.* at 279. Ultimately, the Court found

> [i]n sum, Congress undertook to negotiate with the Coeur d'Alene Tribe for reduction in the territory of an Executive Order reservation . . . . Congress . . . clearly intended to redefine the area of the reservation . . . only by consensual transfer, in exchange for the guarantee that the Tribe would retain the remainder. There is no indication that Congress **ever** modified its objective of negotiated consensual transfer . . . . Any imputation to Congress either of bad faith or of secrecy in dropping its express objective of consensual dealing with the Tribe is at odds with the evidence. We therefore think the negotiating history, **not to mention subsequent events**, "ma[k]e [it] very plain," that **Congress recognized the full extent of the Executive Order reservation** lying within the stated boundaries it ultimately confirmed . . . .

Id. at 280-81 (emphasis added). *See also*, Hart Rebuttal Report at 53-60; Smith Rebuttal Report at 3-12.

The decision of the Supreme Court is binding and the State of Idaho and other objectors are precluded from relitigating this question in the CSRBA. *See*, Coeur d'Alene Tribe's Response Brief at 5-23.

IV. THE *WINTERS* DOCTRINE DIRECTS THAT RESERVED WATER RIGHTS TRACE TO THE CREATION OF THE RESERVATION, NOT THE "LAST RESERVATION" AND VEST AT THE TIME OF THE CREATION OF THE RESERVATION FOR ALL WATER NECESSARY TO ACCOMPLISH THE PURPOSE OF THE CREATION OF THE RESERVATION

A. Unlike Cases Dealing with Submerged Lands, the Supreme Court Does Not Require Congressional Ratification of Executive Reservations of Water Rights

Idaho's argument regarding its made up "last reservation doctrine" also reflects its apparent confusion that we are litigating reserved water rights pursuant to the *Winters* Doctrine in this case and not *relitigating* title to the submerged lands underlying Coeur d'Alene Lake and its related waterways

within the Coeur d'Alene Reservation. Unlike the line of cases regarding title to submerged lands underlying navigable waters, the Supreme Court has not required Congress confirm an executive reservation of water rights. *See Arizona v. California*, 373 U.S. 546, 597-98 (1963). (distinguishing between submerged lands cases and reserved water right cases).

Because ownership of submerged lands is so "strongly identified with the sovereign power of government," "a court deciding a question of title . . . must . . . begin with a strong presumption against defeat of a State's title." *Idaho II*, 533 U.S. at 272-73 (citing *Alaska*, 521 U.S. at 34). As a result, where the executive has set aside submerged lands, the Supreme Court requires "Congress recognize[] the [executive] reservation . . . ." *Id.* at 273 (citing *Alaska*, 521 U.S. at 41-46).

In contrast, the Supreme Court does not require Congress confirm an executive reservation of water rights. Instead, it has prescribed that reservations set aside by executive order "like those created directly by Congress, were not limited to land, but included waters as well." *Arizona v. California*, 373 U.S. at 598. This led the Court to find that water rights reserved pursuant to executive order are "present perfected rights" as of the date the President sets aside the reservation. *Id.* at 600. The Ninth Circuit has likewise found the water rights may be reserved by executive order. *United States v. Walker River Irr. Dist.*, 104 F.2d 334, 336 (9th Cir. 1939). There, the Court found that "the basic question was one of intent—whether the waters of the stream were intended to be reserved for the use of the Indians . . . ." *Id.* The court concluded that "[a] statute or an executive order setting apart a reservation may be equally indicative of the intent," to reserve water rights." *Id.*

The Supreme Court and Ninth Circuit are clear: water rights reserved pursuant to executive order are treated in the exact same manner as rights reserved pursuant to treaty or statute. Ultimately, the Court concluded "[w]e can give but short shrift at this late date to the argument that the

reservations either of *land or water* are invalid because they were originally set apart by the Executive." *Arizona v. California*, 373 U.S. at 598 (emphasis added).[18]

B. The Supreme Court Requires the Purposes of the Reservation be Determined Based Upon the Creation of the Reservation, Not the "Last Reservation"

Despite Idaho's insistence that this Court look to the "last reservation," the United States Supreme Court has unambiguously stated that "the United States did reserve the water rights for the Indians effective *as of the time the Indian Reservations were created.*" *Arizona v. California*, 373 U.S. at 600 (emphasis added). It went on to determine that—upon the creation of the reservation—reserved water rights are "'present perfected rights.'" *Id.* Just a few years later, the Supreme Court reaffirmed reserved water rights vest "when the Federal Government *withdraws* its land from the public domain . . . ." *Cappaert*, 426 U.S. at 138 (emphasis added). The Court likewise reaffirmed that the United States is entitled to "water then unappropriated to the extent needed to accomplish the purpose of the reservation . . . which *vests on the date of the reservation.*" *Id.* (emphasis added)

---

[18] More generally, no court, particularly the Supreme Court, has distinguished between reservations created through executive order, treaty, or statute for other reserved rights such as hunting, fishing, or gathering. The Supreme Court has consistently upheld that executive reservations include the same reserved rights as reservations created by treaty or Congress. *United States v. Dion*, 476 U.S. 734, 745 n. 8 (1986) (citing Cohen's Handbook of Federal Indian Law and *Antoine v. Washington*, 420 U.S. 194 (1975) to hold that "Indian reservations created by statute, agreement, or executive order normally carry with them the same implicit hunting rights as those created by treaty."). Likewise, the Ninth Circuit, in *Parravano v. Babbitt*, "emphasize[d] that Indian rights arising from executive orders are entitled to the same protection against non-federal interests as Indian rights arising from treaties." 70 F.3d 539, 547 (9th Cir. 1995). The Court went onto conclude "there are no broad distinctions between Indian reservations created before 1871 [when treaty making ended] and those created after. Although their manner of creation is different, they are substantively the same . . . ." *Id.* at 545.

The language of the Supreme Court demonstrates that the operative time period is the time the land is first "withdrawn," not the time when any subsequent changes are made to the reservation. *United States v. New Mexico* clearly demonstrates this principle. Two Congressional Acts were at issue in that case: the Organic Act of 1897 ("1897 Organic Act"), which provided the original Congressional authorization to set aside national forests, and the Multiple-Use Sustained-Yield Act of 1960 ("1960 Multiple Use Act"), which broadened the purposes for which national forests were to be administered. 438 U.S. 696. If the United States' water rights were predicated upon the "last reservation, then the United States would have been entitled to water rights based upon the purposes of the 1960 Multiple Use Act. The Supreme Court, however, found that determination of the United States' water rights turned upon "[a]n examination of the . . . purposes for . . . the creation of the National Forests." *Id.* Accordingly, the Court derived the purposes of the national forests, based upon the 1897 Organic Act, not upon the later 1960 Multiple Use Act.

The Ninth Circuit made this point even more expressly in *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981). *Walton* was a reserved water rights case on the Colville Reservation, which has a strikingly similar history as the Coeur d'Alene Reservation, making *Walton* directly on point in this case. Just as the Coeur d'Alene Reservation was originally set aside by an executive order by President Grant in 1873, the Colville Reservation was created through an executive order by President Grant in 1872. *Id.* at 44. Just as the boundaries of the Coeur d'Alene Reservation were changed in 1889, "the northern half of the [Colville] reservation was taken from the

Indians and [approximately 1.5 million acres were returned to the public domain and] opened for entry and settlement [in 1892]." *Id.* at 44-45, n. 3 (citing Act of July 1, 1892, 27 Stat. 62).[19]

According to Idaho's "last reservation doctrine," the Ninth Circuit should have determined that the Colville Reservation was created in 1892, not 1872 and the purposes of the Reservation should have been analyzed pursuant to that date. Idaho Opening Brief at 11. Similar to the 1887 Coeur d'Alene Agreement, which provided for "the progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians," the 1892 Colville Act provided for the "promotion of education, civilization, and self-support among said Indians." 27 Stat. 62 (1892). However, the Ninth Circuit never considered this language because it found that "President Grant created the Colville Reservation," pursuant to the 1872 executive order, *Walton*, 647 F.2d. The Ninth Circuit went on to reaffirm that "[t]he United States acquires a water right vesting on the date the reservation was created," for a sufficient amount of water "to fulfill the very purposes for which [the] federal reservation was created." *Id.* at 47. The Court proceeded to analyze the 1872 executive order, not the 1892 Congressional Act, in order to find water rights for both irrigation and instream flows to fulfill the "[t]he general purpose [of Indian reservations], to provide a home for the Indians . . . ." *Id.* at 47-48.

The conclusion is that regardless of whether water rights are set aside by executive order, statute, or treaty, courts have consistently determined the scope of reserved water rights based upon the purpose of the creation of the reservation rather than the "last reservation." *See* e.g., *Arizona v.*

---

[19] Also like the Coeur d'Alene, the Colville Reservation was allotted in 1906. *Walton*, 647 F.2d at 45. However, unlike the Coeur d'Alene, which unanimously rejected allotment, the Colville Reservation was allotted pursuant to Congressionally ratified agreement with the Tribe. *Id.* Further, the Court did not find that the allotment act abrogated the Tribe's water rights for fish. *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 404 (1985). *See also*, section V(B), *infra.*

California, 373 U.S. at 546 (affirming the finding of the special master that the Yuma Reservation was created by executive order on January 9, 1884 despite Congressional action setting aside a permanent reservation on August 15, 1894. 28 Stat. 286); *United States v. Adair*, 723 F.2d 1394, 1408 (9th Cir. 1984) (finding reservation was created by 1864 Treaty despite 1901 cession agreement ratified by Congress in 1906. 34 Stat. 325, 367); *Big Horn I*, 753 P.2d 76, 83-84; 94-95 (Wyo. 1988) (finding the Wind River Reservation was created by treaty in 1868 and analyzing the purpose of the Wind River Reservation pursuant to that treaty despite Congressionally approved land cessions in 1872, 1897, and 1905).[20]

Despite the State's assertions to the contrary, the Supreme Court's holding in *Winters* is wholly consistent with this approach.

---

[20] The Idaho Attorney General's office has also entered into at least two water rights agreements that include priority dates as the *creation* of the reservation. *See* 1990 Fort Halls Water Rights Agreement (July 5, 1990) *available at*: http://www.srba.state.Id. us/FORMS/1990%20Ft%20Hall.pdf (last visited March 27, 2017); Nez Perce Tribe Mediator's Term Sheet (April 20, 2004), *available at*: http://www.srba.state.Id. us/Images/2008-09/0310022xx02531.TIF (last visited March 27, 2017). In the Fort Hall Water Rights Agreement the parties, including the State of Idaho acknowledged that the Fort Hall Reservation was "originally established under the Second Treaty of Fort Bridger of July 3, 1868, 15 Stat. 673, *and* companion executive orders of June 14, 1867 . . . ." 1990 Fort Hall Agreement at 8. The priority date for the Tribes' water rights is June 14, 1867, the date of the original executive order setting aside the reservation. *See e.g. Id.* at 18. The Agreement also notes that many subsequent cession agreements took place at Fort Hall. *Id.* at 8. However, the State did not insist, apparently, that the Reservation was created from the "last reservation."

C. The Unique Circumstances Surrounding the Creation of the Fort Belknap Reservation Demonstrates the Court in *Winters* Based its Decision Upon the Creation of the Fort Belknap Reservation

Despite the State's vague and misleading assertion that the United States and the Tribe "urg[e] the Court to discard *Winters*" and that *Winters* supports its invented "last reservation doctrine," the actual history of the Fort Belknap Reservation tells a different story. Instead, of supporting the State's argument that "as a matter of law," any time "a congressional act establishing a permanent reservation within the bounds of an earlier, executive order reservation, supersedes the earlier executive order," the Court's holding in *Winters* was actually based upon the unique circumstances surrounding the creation of the Fort Belknap Reservations. That complex history establishes that until 1888, the only right set aside for these tribes "was the bare right of the use and occupation thereof at the will and sufferance of the government of the United States." *Winters*, 207 U.S. at 567. It was not until the Congressionally ratified agreement of 1888 that the Tribes reserved as their "permanent homes," the newly created Fort Belknap Reservations.[21]

In 1851, the United States and several tribes reached a treaty at Fort Laramie. That was a treaty of peace and friendship wherein "[t]he aforesaid Indian nations do hereby recognize and acknowledge the following tracts of country . . . as their respective territories."[22] No reservations were created pursuant to this treaty. In 1855, the United States entered into a treaty with the

---

[21] Art. II, Act of May 1, 1888 to ratify and confirm an agreement with the Gros Ventre, Piegan Blood, Blackfeet, and River Crow Indians in Montana, and for other purposes, 25 Stat. 113, *available at*: 1 C. Kapler, Indian Affairs: Laws and Treaties 213 (1902).

[22] 1851 Treaty of Fort Laramie with Sioux, Etc., 11 Stat. 749 (Sept. 17, 1851), *available at*: 2 C. Kapler, Indian Affairs: Laws and Treaties 595 (1904). *Available at*: http://digital.library.okstate.edu/kappler/Vol2/treaties/sio0594.htm#mn5 (last visited March 9, 2017).

Blackfeet and other tribes that (1) set aside "the territory of the Blackfoot Nation, over which said nation shall exercise exclusive control," and (2) agreed that certain other portions of the Blackfeet's territory would be "a common hunting-ground for ninety-nine years where all nations, tribes and bands of Indians, parties to this treaty, may enjoy equal and uninterrupted privileges of hunting, fishing, [etc.]."[23] However, the Supreme Court has found that the purpose of both of these treaties was "to establish peace and amity between warring Indian tribes . . . and the United States," the "treaties did not create technical reservations as have many other treaties and acts of Congress." *United States v. Northern Pac. Ry. Co.*, 311 U.S. 317, 348-39 (1940).

In an 1873 executive order President Grant set aside "a reservation for the Gros Ventre, Piegan, Blood, Blackfeet, River Crow, and other Indians . . . ."[24] Like the Coeur d'Alene executive order reservation, this reservation was subject to ratification by Congress. However, unlike the Coeur d'Alene reservation, the 1873 Blackfeet reservation was repudiated by Congress just one year later in 1874. In that Act, Congress refused to set aside a permanent reservation but instead set apart the described lands "for the use and occupation of the Gros Ventre, Piegan, Blood, Blackfoot, River Crow, and such other Indians . . . ."*Id. See also*, *Winters*, 207 U.S. at 567 (finding that the 1874

---

[23] 1855 Treaty with the Blackfeet, 11 Stat. 657 (Oct. 17, 1855), *available at*: 2 C. Kapler, Indian Affairs: Laws and Treaties 736-37 (1904). *Available at*: http://digital.library.okstate.edu/kappler/Vol2/treaties/bla0736.htm#mn6 (last visited March 9, 2017).

[24] July 5, 1873 Executive Order regarding the Blackfeet Reserve, *available at*: 1 C. Kapler, Indian Affairs: Laws and Treaties 855 (1904). *Available at*: http://digital.library.okstate.edu/kappler/Vol1/HTML_files/MON0854.html (last visited March 9, 2017).

Reservation "was the bare right of the use and occupation thereof at the will and sufferance of the government of the United States.").[25]

Shortly after the 1874 Act, the President signed another executive order that removed from the Blackfeet Reservation any lands in the earlier 1873 executive order "not embraced within the tract set apart by act of Congress, approved April 15, 1874." *See*, n. 24, *supra*, at 856. In so doing, the executive sought to match the terms of the 1874 Act. Then, in two later executive orders, the President added lands to the "present reservation for the Gros Ventre, Piegan, Blood, Blackfoot, Crow Indians" and then subsequently restored to the public domain those exact same lands. *See*, *Id.* at 857. In each of these three executive orders, the President was careful to set aside only those rights in the land actually approved by Congress. In other words, the executive set aside nothing more than a "bare right of the use and occupation thereof at the will and sufferance of the government of the United States." *Winters*, 207 U.S. at 567.

This was the status of the Reservation, a bare right of use and occupation, moving into the 1888 Agreement with the Tribes. In that agreement, the various tribes agreed to "cede and relinquish to the United States all their right, title, and interest in and to all lands . . . not herein specifically set apart and reserved as separate reservations for them."[26] In exchange, the Tribes reserved as their

---

[25] Act of April 15, 1874 to establish a reservation for certain Indians in the Territory of Montana, 18 Stat. 28 (1874) *available at*: 1 C. Kapler, Indian Affairs: Laws and Treaties 149 (1902) (hereinafter "1874 Act"). *Available at*: http://digital.library.okstate.edu/kappler/Vol1/HTML_files/SES0149A.html (last visited March 10, 2017).

[26] Art. II, Act of May 1, 1888 to ratify and confirm an agreement with the Gros Ventre, Piegan Blood, Blackfeet, and River Crow Indians in Montana, and for other purposes, 25 Stat. 113, *available at*: 1 C. Kapler, Indian Affairs: Laws and Treaties 213 (1902) (hereinafter "1888 Agreement"). *Available at*: http://digital.library.okstate.edu/KAPPLER/Vol1/HTML_files/SES0261.html (last visited March 10, 2017).

"permanent homes," the newly created Blackfeet, Fort Peck, and Fort Belknap Reservations. *Id.* at Art. I. The change in the language is dispositive. The Tribes went from a right of "use and occupation" in 1874, to reserving for themselves "permanent homes" in 1888.

This history explains why the Supreme Court looked to the 1888 Agreement in *Winters*.[27] Unlike the Coeur d'Alene Reservation—which was confirmed by Congress—the 1873 Blackfeet reservation was repudiated by Congress in 1874. Rather than set aside a permanent reservation, Congress only set aside "a bare right of the use and occupation thereof at the will and sufferance of the government of the United States." 1874 Blackfeet Act; *Winters*, 207 U.S. at 567. Further, the President, by express reference to "the present reservation" in the executive orders subsequent to the

---

[27] This history likewise explains the Court's holding in *British-American Oil*. 299 U.S. 159 (1936). Importantly, this case involved questions regarding the taxation of mineral leases within the reservation; the Supreme Court did not determine when the Blackfeet Reservation was set aside or the date to which the Blackfeet's treaty rights were established. *See* 2d. Aff. Counsel, Ex. 1, p. 182-83 (American Indian Law Deskbook); Ex. 3, p. 1108-09; 1123-24 (Cohen's Handbook of Federal Indian Law). Instead, the case turned on the narrow question of whether the reservation *as it currently existed* was created by legislation or by executive order. *Id.* at 161-62. After briefly outlining the history of the creation of the reservation, the Supreme Court ultimately concluded that the Blackfeet Reservation "rests entirely on the agreements or conventions which were ratified and given effect by Congress," because "[t]he Executive Orders *before mentioned, evidently designed* to be temporary, have been superseded . . . ." *Id.* at 163 (emphasis added). The Court's language exposes several critical points that highlight—contrary to Idaho's argument—that the Court was not setting out a rule of general applicability that all executive orders with subsequent congressional action are repudiated. First, the Court was specifically analyzing the "Executive Orders *before mentioned*," and not executive orders as a general matter. *Id.* Second, Contrary to Idaho's argument, the Court's analysis had nothing to do with the reduction in the geographic size of the reservation. Instead, the Court looked to the specific terms of those specific executive orders "before mentioned," and concluded they were "evidently designed to be temporary." The Supreme Court did not find that *all* executive orders were designed to be temporary, but instead—based upon the plain language of the 1874 Act and executive orders—that *these specific* executive orders were designed to be temporary. That holding is entirely consistent with the history of that specific reservation at issue in that case, which was merely "a bare right of the use and occupation thereof at the will and sufferance of the government of the United States," until a reservation designed to create "permanent homes" was set aside in 1888. *Winters*, 207 U.S. at 567.

1874 Act, was careful to set aside only those rights expressly authorized by Congress in 1874, to wit: a bare right of use and occupancy. *See* Post 1874 Blackfeet Executive Orders. Accordingly, the very first time the Fort Belknap Reservation was set aside as the "permanent homes" of the tribes living thereon was in 1888 through the 1888 Agreement.

Simply put, *Winters* provides absolutely no support for the State's made up "last reservation doctrine." Just the opposite, these cases demonstrate that we look to the creation of the reservation because "when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert*, 426 U.S. at 138.

In short, the Supreme Court requires that the Coeur d'Alene Tribe's entitlement to water rights turns upon the purposes for the creation of the 1873 Reservation.

V. THE PURPOSE OF THE COEUR D'ALENE RESERVATION WOULD BE DEFEATED WITHOUT WATER FOR THE LAKE, TRADITIONAL SUBSISTANCE PRACTICES, AS WELL AS CONSUMPTIVE USES SUCH AS AGRICULTURE AND DCMI

The Tribe's reserved water rights are "'present perfected rights'" that vest upon the creation of the Coeur d'Alene Reservation, which occurred on November 8, 1873. *Arizona v. California*, 373 U.S. at 600. Further, the Tribe is entitled to those water rights "then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert*, 426 U.S. at 138.[28] Accordingly,

[28] Hecla argues that "neither the Tribe nor the United States can point to any express language in any of the Agreements establishing the Reservation to support their demands." Hecla Opening Brief at 5. Hecla's demand that there be express language turns the entire *Winters* doctrine on its head. The basis of the doctrine is one of *implied* water rights based upon the circumstances surrounding the creation of the reservation. The non-Indian appropriators in *Winters* made this exact argument. *Winters*, 207 U.S. at 576. ("[I]t is contended, the means of irrigation were deliberately given up by

despite the State and Hecla's unsupported assertions to the contrary, the determination of the Tribe's entitlement turns, not upon the purposes of agreements or acts that occurred subsequent to the creation of the reservation,[29] but upon the water rights necessary to fulfil the purposes of the creation of the Tribe's 1873 executive reservation.

The State and objectors make much of the so called "primary-secondary" purposes test from *New Mexico*. This test, like the State's and Hecla's argument regarding the canons of construction, is another red herring that non-Indian litigants like to employ against tribal water rights hoping courts will construe the Tribe's water rights as narrowly as humanly possible. Although the Tribe has already thoroughly demonstrated the inapplicability of this test, new precedent has become available since the Tribe filed its response brief.

On March 7, 2017 the Ninth Circuit rendered its decision in *Agua Caliente Band v. Coachella Valley Water Dist.*, Case No. 15-55896 (9th Cir. 2017). 2d. Aff. Counsel, Ex. 2. There, the Ninth Circuit analyzed the applicability of *New Mexico* to the Agua Caliente Band's executive order reservation. *Id.* The Court recognized that "[w]e have previously noted that *New Mexico* is 'not directly applicable to *Winters* doctrine rights on Indian reservations,'" but also that "it clearly 'establish[es] several useful guidelines.'" *Id.* at 13, n. 6 (quoting *Adair*, 723 F.3d at 1408).

The first critical factor the Ninth Circuit clarifies is that New Mexico's primary-secondary test only applies to the *quantification* of the reserved right, not to the question of entitlement. *Id.* at 15.

---

the Indians and deliberately accepted by the Government."). As this Court well knows, the Supreme Court summarily rejected that argument, as this Court should reject Hecla's argument here.

[29] As Idaho points out, "[p]ost-reservation actions are only relevant if they resulted in a loss of rights on particular lands or waterways . . . ." Idaho Opening Brief at 6. Accordingly, we don't look to the purposes of the 1889 Agreement to derive the Tribe's entitlement to water rights but only to determine whether any water rights that vested in 1873 were lost. *See* section VI, *infra*.

The Court concluded that the test under *Winters* for entitlement to reserved water rights continues to "turn[] on the purpose [rather than "primary" purpose] underlying the formation of the . . . Reservation." The Court found that "*New Mexico's* primary-secondary use distinction did not alter the test envisioned by *Winters*. Rather, it added an important inquiry related to the question *of how much* water is reserved." *Id.* at 15 (emphasis in original). *See also*, *New Mexico*, 438 U.S. at 698 ("The question posed in this case [is] what quantity of water, if any, the United States reserved out of the Rio Membres when it set aside the Gila National Forest in 1899 . . . ."). Accordingly, despite the State and Objector's incorrect assertions to the contrary, even if *New Mexico* were applicable in this case, it would not be applicable to the Tribe's entitlement but only in the quantification phase of this case. Here, the relevant question remains whether "previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created." *Cappaert*, 426 U.S. at 139.

The Court then defined a purpose as a "primary," rather than a "secondary," purpose if "the purpose underlying the reservation envisions water use." *Id.* at 14. To make this determination, the Court reiterated its holding from *Walton* that "we consider 'the document and circumstances surrounding [the reservation's] creation, and the history of the Indians for whom it was created.'" *Id.* at 16 (quoting *Walton*, 647 F.2d at 47) (changes in original). The Court also reiterated its finding from *Walton* that "'[t]he specific purposes of an Indian reservation . . . [are] often unarticulated. The general purpose, to provide a home for the Indians, is a broad one and must be liberally construed.'" *Id.* (quoting *Walton*, 647 F.2d at 47) (changes and emphasis in original). The Court then concluded that "the primary purpose underlying the establishment of the reservation was to create a home for the Tribe, and water was necessarily implicated in that purpose" *Id.* at 17 (emphasis added).

In short, the Ninth Circuit has conclusively found against the State and Hecla's argument that there cannot be a homeland purpose for the reservation. Just the opposite, the Court concluded, based upon the "the document and circumstances surrounding [the reservation's] creation, and the history of the Indians for whom it was created," that the underlying primary purpose of the reservation was to set aside a permanent homeland for the Tribe.

That analysis is equally compelling on the Coeur d'Alene Reservation. Indeed, "the [1873 executive order] and circumstances surrounding [the reservation's] creation, and the history of the [Coeur d'Alene Tribe],"[30] conclusively demonstrates that the primary purpose of the Coeur d'Alene Reservation was to set aside for the benefit of the Coeur d'Alene Tribe a permanent homeland that included (1) Coeur d'Alene Lake and its related waterways; (2) non-consumptive water rights to allow the Tribe to continue hunting, fishing, gathering, and other traditional endeavors; and (3) consumptive water that would allow the Tribe to engage in agriculture and DCMI into perpetuity in order to adequately develop its economy. *See* Joint Statement of Facts at 24- 40; Hart 2015 Report at 111-150; Smith 2015 Report at 58-81; Hart Rebuttal Report at 3-14; 34-53; Smith Rebuttal Report at 12-38. Water for each of the purposes is necessary to fulfill the homeland purpose of the Coeur d'Alene Reservation.

[30] Contrary to Idaho's argument, neither the Tribe nor the United States has ended its analysis with the conclusory statement that the purpose of the Tribe's reservation is a homeland as a matter of law. Instead, the argument is based upon the unique history and circumstances surrounding the creation of the Coeur d'Alene Reservation.

A. The Purpose of the Coeur d'Alene Reservation Would be Defeated without Water for Coeur d'Alene Lake

In its opening brief, the Tribe laid out the extensive historic record that conclusively demonstrates, based upon the "document and circumstances surrounding [the] creation [of the Coeur d'Alene Reservation], and the history of the [Coeur d'Alene] Indians for whom it was created," that an essential purpose of the creation of the Coeur d'Alene Reservation was to set aside Coeur d'Alene Lake and its related waterways for the perpetual benefit of the Coeur d'Alene Tribe. *See generally* Coeur d'Alene Tribe's Opening Brief sections II-III.[31] That history, as outlined by the federal district court, affirmed by the Ninth Circuit and the United States Supreme Court, led the Judge Lodge to find:

> [t]hat the Federal Government did in fact agree to reserve submerged lands for the benefit of the Tribe is demonstrated by the following

[31] In response to the Tribe's arguments, the NIWRG asserts that "the Court should recognize that a federal reserved water right is not necessary to maintain the level of the lake or the flow levels in the St. Joe River," because the State already has a water right in the Lake, 95-2067, and the St. Joe River, 91-7122. In other words, the Tribe doesn't need a water right because the State already has one. It would be interesting to know whether the members of the NIWRG would be willing to forfeit their claims to a water right in favor of the state holding a similar (though much junior) water right for them. Indeed, the Tribe is not aware of any precedent where a party has been so audacious as to suggest that a Tribe's water rights could be satisfied merely by a *state* holding water rights in their place. As grateful as the Tribe is that that the State would be so kind, it prefers its own water rights. Regardless, a similar argument was summarily rejected by the Ninth Circuit just a week ago. 2d. Aff. Counsel, Ex. 2, p. 17-19 (*Agua Caliente Band v. Coachella Valley Water Dist.*, Case No. 15-55896 at 20 (9th Cir. 2017)). There, the Coachella Valley Water District argued that "because (1) the Tribe has a correlative right to groundwater under California law . . . the Tribe does not need a federal reserved water right to prevent the purpose of the reservation from being entirely defeated." *Id.* At least the California litigants acknowledged that the Tribe could have its own water right, albeit pursuant to state law, rather than the State holding it for them. Nonetheless, the Ninth Circuit categorically rejected this argument, stating "the water agencies' arguments fail for three reasons [two of which are relevant here]. First, state water rights are preempted by federal reserved rights . . . . And third, the *New Mexico* inquiry does not ask if water is currently needed to sustain the reservation; it asks whether water was envisioned as necessary for the reservation's purpose at the time the reservation was created. Thus, state water entitlements do not affect our analysis with respect to the creation of the Tribe's federally reserved water right." *Id.*

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

Idaho II, 95 F.Supp.2d at 1109. Based upon this evidence, the district court concluded

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

Id. (emphasis added).

All three courts—the district court, Ninth Circuit, and the Supreme Court—further concluded that reservation of the submerged lands was not ancillary to the 1873 Agreement or Executive Order but was in fact an essential purpose of the Reservation. The district court found "[t]hus, the Federal Government could only achieve its goals . . . by agreeing to a reservation that included the submerged lands." *Id.* at 1107.

The Ninth Circuit found inclusion of the submerged lands to be "[c]rucial to the Tribe's acceptance of the 1873 reservation" and twice repeated its conclusion that "the purpose of the reservation would have been defeated had it not included these lands." *Idaho II*, 210 F.3d at 1074-75.

The United States Supreme Court affirmed, in so doing, it applied the following test:

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

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

Thus, the district court, Ninth Circuit, and Supreme Court all affirmed that the purpose of the Reservation would have been defeated but for the reservation of the submerged lands. The reservation of the submerged lands was an essential purpose of the Coeur d'Alene Reservation and without water these lands would be "practically valueless." *Winters*, 207 U.S. at 576. A water right in the Lake is therefore necessary to fulfil the purpose of the Coeur d'Alene Reservation.

B. The Purpose of the Coeur d'Alene Reservation Would be Defeated without Non-Consumptive Water for Traditional Subsistence Purposes

The Ninth Circuit has found that non-consumptive water rights are necessary where a purpose of the reservation was to ensure the continuation of the Tribe's traditional fishing, hunting, gathering, and other subsistence practices. *Walton*, 647 F.2d at 48. The Court in *Walton* found that fishing was a primary purpose of the Colville Reservation based upon nothing more than the fact that "[t]he Colvilles traditionally fished for both salmon and trout. Like other Pacific Northwest Indians, fishing was of economic and religious importance to them." *Id. c.f.* Idaho Response Brief at 37 ("there is no

precedent for the decree of reserved water rights for . . . religious uses.").[32] Likewise, the Ninth Circuit found in *Adair* that a purpose of the Klamath Reservation was to "guarantee continuity of the Indians' hunting and gathering lifestyle," based upon the language of the 1864 Treaty as well as the "historical importance of hunting and fishing" to the Tribes. 723 F.2d at 1409. Finally, the Ninth Circuit in *Anderson* affirmed the district court's recognition of "the importance of the tribal fishery and . . . award[] [of a] non-consumptive water rights to preserve it." 736 F.2d at 1365.

It is worth reiterating that the Tribe's instream flow water rights are simply not dependent upon ownership of the underlying submerged lands. *See* Coeur d'Alene Tribe's Response Brief at s. III(A). In fact, the Supreme Court made this point abundantly clear in *Arizona v. California*, 373 U.S. at 597-98. There the State of Arizona asserted that the United States could not own water rights from the Colorado River because it did not own the submerged lands of the Colorado River. *Id.* at 598. Since the Colorado River is navigable, Arizona cited *Pollard v. Hagen*[33] and *Shively v. Bowlby*[34] to argue that upon statehood it owned the submerged lands of the River, thereby defeating the United States' ability to reserve water therefrom. *Id.* The Court rejected this argument, finding

---

[32] Idaho argues that *Walton* holds that "[t]he primary purpose test requires a showing that the claims use of water was 'essential to the life of the Indian people.'" Idaho Response Brief at 9. However, even a cursory reading of *Walton* demonstrates that the Ninth Circuit did not so find. Instead, it was merely reiterating a statement of the Supreme Court in *Winters* regarding the conditions on the Fort Belknap Reservation. *See Walton*, 647 F.2d at 46. For the Ninth Circuit, the question was whether the Tribes "traditionally fished," and whether "fishing was of economic and religious importance to them." *Id.* at 48. Notwithstanding Idaho's mischaracterization of *Walton*, the history in our case thoroughly demonstrates that from time immemorial through the present, water for a host of traditional purposes has been "essential to the li[ves] of the [Coeur d'Alene] People." *See, infra*; Coeur d'Alene Tribe's Opening Brief, s. 2; Coeur d'Alene Tribe's Response Brief s. I-II; Joint Statement of Facts, pg. 12-15; 30-34; Hart 2015 Report 20-30.

[33] 44 U.S. 212 (1845).

[34] 152 U.S. 1 (1894).

that "those cases involved only the shores and lands beneath navigable waters. They do not determine the problem before us and cannot be accepted as limited the broad powers of the United States . . . . We have no doubt about the power of the United States . . . to reserve water rights for its reservations and its property." *Id.* at 598.

Undaunted by the express ruling of the United States Supreme Court, the State presses forward on the theory that the Tribe and United States must have exclusive ownership of the submerged lands of streams to claim an instream flow water right. First, Idaho attempts to distinguish *Anderson* from this case by suggesting that the Spokane Tribe retained ownership of the submerged lands underlying the creek because "the boundary of the reservation . . . was drawn . . . to purposefully enclose the entirety of the Creek in the Reservation." Idaho Response Brief at 42. The State does not point to any language from *Anderson* that would suggest that this fact actually mattered to the district court or the Ninth Circuit. Indeed, it even admits that "[t]he court did not address ownership of the land over which the creek flowed . . . ." *Id.* It is obvious that the courts did not address ownership of the submerged lands of Chamokane Creek because—pursuant to *Arizona v. California*—ownership of submerged lands does not matter under the *Winters* doctrine. *See Arizona v. California*, 373 U.S. at 597-98 (finding that ownership of submerged lands is not material to the question of whether the United States reserved water rights). Indeed, the decision was actually predicated upon "the importance of the tribal fishery" to the Tribe, not ownership of submerged lands. 736 F.2d at 1365.

Next Idaho attempts to distinguish *Walton* based upon the "unique factual situation," present in the No Name Creek Basin. Idaho Response Brief at 39. First, Idaho argues that *Walton* is distinguishable because the No Name Creek basin is "a small, self-contained water basin on the

reservation." *Id.* Likewise it repeatedly emphasizes that the fishery at issue was a "replacement fishery" to address the fact that the dams on the Columbia River had destroyed the Colville Tribes' traditional fishery. *Id.* at 39; 55. The State does not explain how the Tribes could have been entitled to such a fishery given their argument that "[p]ost-reservation actions are only relevant if they resulted in a loss of rights on particular lands or waterways . . . ." Idaho Opening Brief at 6.

Regardless, there is nothing in *Walton* that suggests the Ninth Circuit considered the size of the basin in awarding the Tribe's instream flow water right. Further, it expressly highlights that water rights may be appropriate if necessary for the Tribe "to maintain themselves under changed circumstances." *Walton*, 647 F.2d at 48. As such, the Court awarded the Tribe a quantity of water based upon the water necessary to maintain their replacement fishing ground. However, the Court's decision regarding the purposes for the Reservation had nothing to do with the size of the watershed or the fact that the water right was for a replacement fishery. Instead, the water right was awarded because fishing was a primary purpose of the creation of the Colville Reservation based upon the fact that "[t]he Colvilles traditionally fished for both salmon and trout. Like other Pacific Northwest Indians, fishing was of economic and religious importance to them." *Walton*, 647 F.2d at 48.

Second, the State makes much of the fact that "the Tribe[s] [in *Walton*] had acquired most of the allotments by acquisition or long-term lease," and only "three . . . allotments on the creek were owned by a non-Indian . . . ." Idaho Response Brief at 39. The State does not explain how the fact that there was *any* non-Indian or allottee land ownership (since the State argues the Tribe cannot have water rights on allotments) jives with their argument that the United States cannot reserve any water rights in streams on land not held in trust for the Tribe. *Id.* at 38. Indeed, the facts in *Walton* demonstrate that once you remove Boyd Walton's and the individual allottees' land, the Tribes were

actually a *minority landowner* on No Name Creek. *See Colville Confederated Tribes v. Walton*, 752 F.2d 397, 404 (1985) (*Walton* III). Nonetheless, the Tribes were awarded an instream flow water right because "[t]he Colvilles traditionally fished for both salmon and trout. Like other Pacific Northwest Indians, fishing was of economic and religious importance to them." *Walton*, 647 F.2d at 48.[35]

Finally, and most importantly, the State argues "[n]othing in the opinion indicates that the Tribe had any right to protect fish habitat in that portion of the creek flowing through Walton's allotment." Idaho Response Brief at 40. However, as the Tribe pointed out in its response brief, the trial court later found that the fishery as a whole required 350 acre-feet but reduced the Tribe's instream flow right to 187.2 acre-feet to give priority to the consumptive water rights from the stream. *Walton III*, 752 F.2d at 404. To reach this amount the trial court found that a total of 1,000 acre-feet was available in the stream and then subtracted out Walton's entitlement (384 acre-feet) as well as the individual Indian allottees' entitlement (428.8 acre-feet). *Id.* In other words, the district court tried to do exactly what Idaho advocates here: reduce the Tribe's instream flow entitlement proportionally to the amount of land it owns. The Ninth Circuit rejected this approach, stating "*Walton II* is clear. The Tribe has a reserved right "to sufficient water to permit natural spawning of the trout." *Id.* Accordingly, the Ninth Circuit found that "[t]he Tribe is entitled to its *full allocation*,

[35] The State also incorrectly implies that the Colville Tribe had rerouted the Stream away from Walton's property and onto allotments "owned or controlled by the Tribe." *Id.* The district court's actual finding says nothing about whether No Name Creek was rerouted away from Walton's property. *See Walton*, 460 F.Supp. 1320, 1325 (E.D. Wash. 1978). Instead, the district court merely noted that "[t]he Tribe rerouted the course of lower No Name Creek to improve access from the lake to fresh water spawning grounds." *Id.* at 39.

350 acre feet per year," regardless of the ownership pattern in the No Name Creek Basin. *Id.* at 405 (emphasis added).

The State and Hecla likewise argue that *Adair* is inapplicable to this case because, according to them, the Klamath Tribe's 1864 Treaty "expressly" "provided the tribe 'the exclusive right to hunt, fish and gather on their reservation.'" Hecla Response Brief at 4; Idaho Response Brief at 33; 40. Thus, according to the State and Hecla *Adair* requires an express reservation of hunting and fishing rights for a water right to attach.[36]

This is a misstatement of the law regarding the reservation of hunting and fishing water rights that turns the *Winters* doctrine—a doctrine of implied rights—on its head. Simply put, these rights do not need to be "expressly" reserved but have been repeatedly found by implication through the history of the tribes at issue. *Walton*, 647 F.2d at 47, n. 10 (citing "*Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918) (exclusive right to fish implied because necessary for self-sustaining community) . . . *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968) (reservation "for a

[36] The State likewise continues to insist that the fact that the Klamath Termination Act contained an express reservation of water rights is somehow applicable in this case. However, the fact that the Klamath Termination Act contained a disclaimer reserving the Tribes' water rights is immaterial because Coeur d'Alene Reservation was *never terminated.* As such, the Coeur d'Alene's water right are just as intact as the Klamath's water rights. What is material is the fact that the Klamath Reservation was allotted pursuant to the General Allotment Act. *Adair*, 723 F.2d at 1398. Unlike the Klamath Termination Act, the General Allotment Act contained *no savings clause that retained tribal water rights.* The Court found that "[u]nder the allotment system, approximately 25% of the original Klamath Reservation passed from tribal to individual ownership. Over time, many of these . . . allotments passed into non-Indian ownership." The Ninth Circuit did not find this fact relevant to the determination of the Tribe's hunting and fishing water rights. Instead, the operative question was whether traditional subsistence practices were of "historical importance" to the Tribe. *Id.* at 1409. Further, the Court found that none of the Tribe's instream water rights had been lost due to the Allotment Act because "when the Tribe transfers the land to which the hunting and fishing water rights might be said to be appurtenant, it is the Tribe and its members, not some third party, that retains the right to hunt and fish and needs water to support that right." *Id.* at 1418, n. 31. *See also*, section VI(C)(3), *infra.*

home" includes hunting and fishing rights); and *United States v. Finch*, 548 F.2d 822, 832 (9th Cir. 1976) (U.S. intended to reserve right of Indians to sustain themselves "from any source of food which might be available.")); *See also* 2d. Aff. Counsel, Ex. 3, p. 1158-59, n. 2-3 (Cohen's Handbook of Federal Indian Law, Ch. 18.03[1]) ("[A]lthough some treaties provide expressly that Indians have exclusive hunting, fishing, and gathering rights on their reservations, it is not necessary that the rights . . . be expressly mentioned. . . . [O]n-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.").

More importantly, Idaho's argument is premised upon is a misstatement of the terms of the Klamath Treaty. In actuality, the Klamath Treaty does not "expressly" provide for the right to hunt but instead provides only for the "exclusive right of taking fish . . . and of gathering edible roots, seeds, and berries within [the Reservation]."[37] This might seem trivial until you consider that the State emphasizes that *Adair* is entirely inapplicable to this case because the treaty "expressly" reserves all the Tribe's rights. It did not. The Ninth Circuit noted that:

> [t]he specific treaty provision reserving the Klamaths' exclusive right to fish could prompt the argument that their treaty excludes the right to hunt. However, in light of the highly significant role that hunting and trapping played (and continue to play) in the lives of the Klamaths, it seems unlikely that they would have knowingly relinquished these rights at the time they entered into the treaty.

Adair, 723 F.2d at 1409 (quoting *Kimball v. Callahan*, 493 F.2d 564, 566 (9th Cir. 1974)). *See also*, *State v. Tinno*, 94 Idaho 759, 762 (1972) (finding off-reservation fishing right despite Treaty of Fort

---

[37] 1864 Treaty with the Klamath, etc., 16 Stat 708 (Oct. 14, 1864), *available at*: 2 C. Kapler, Indian Affairs: Laws and Treaties 736-37 (1904). *Available at*: http://digital.library.okstate.edu/kappler/vol2/treaties/kla0865.htm (last visited March 13, 2017).

Bridger only mentioning the right to hunt based upon the history of the Shoshone-Bannock Tribes, the circumstances surrounding the treaty, and subsequent events).

Idaho fails to acknowledge that the Ninth Circuit's holding in *Adair* was not based solely upon the language in the 1864 Treaty but also upon "the historical importance of hunting and fishing" for the Klamath people. *Adair*, 723 F.2d at 1409. In fact, the Court's opinion hardly focuses on the language of the 1864 Treaty at all, concentrating instead on the history of the Tribe: "[t]he central importance of the Tribe's hunting and fishing rights is confirmed by reference to the historical fact that at the time the 1864 Treaty was negotiated, the Tribe

> hunted and trapped throughout the area set aside in [the] treaty . . . . They hunted and ate grizzly bear, brown bear, deer, elk, antelope, beaver, raccoon, badger, and the Modoc also hunted and ate fox, coyote, wolf, puma, wildcat, skunk, porcupine, rabbit, groundhog and gopher. The Klamath Tribe also hunted coyotes, grey-wolves, foxes, badgers, wildcats, rabbits and various fur-bearing animals which furnished blankets and clothing and swans, geese, ducks and wading birds, the majority of which were used by the tribes as food in various ways, the skins of swans, geese, and other birds with especially fine down being made into feather blankets, swaddling clothes, etc.
>
> Plaintiffs are known to have had a large number of methods of hunting, including driving game into the water or mud, or surrounding it by fire; they trapped game by nooses above the trail (including deer and other large game), and as to birds by nooses held on a stick or suspended from a cord. They netted game, and captured deer and other game in pitfalls; they hunted from booths and blinds and from brush fences or enclosures, and ambushed game from pits and from dugouts run into tules. In hunting they disguised themselves by wearing animal heads and entire skins; they used flares or jacklights to attract waterfowl; they imitated cries of the game, including imitating the cries of a fawn; and they smoked bears out of their dens."

Id., n. 14 (quoting *Klamath & Modoc Tribes v. Maison*, 139 F.Supp. 634, 636-37 (D. Or. 1956)).

In comparison, the Supreme Court found in *Idaho II* that Coeur d'Alene "[t]ribal members traditionally used the lake and its related waterways for food, fiber, transportation, recreation, and cultural activities." 522 U.S. at 265. The Court went on to find "[t]he Tribe depended upon submerged lands for everything from water potatoes harvest from the lake to fish weirs and traps anchored in riverbeds and banks." *Id.* The district court made more extensive findings:

> The Tribe traditionally survived by fishing, hunting and gathering. For the reasons set forth below, the Court finds the Lake and associated waterways were essential to the Tribe's traditional lifestyle.
>
> Historically, the Coeur d'Alene Indians lived in a number of villages located around the Lake and along the rivers. The Tribe consumed resident trout and whitefish year-round. The resident fishery was a main staple of the Tribe's diet. Among other methods of fishing, the Coeur d'Alenes constructed fish traps and weirs which were anchored in the bed and banks of the watercourses. . . . Occasionally, tribal members also harvested crayfish and freshwater mussels.
>
> The Lake and associated rivers were commonly used to facilitate hunting activities. During communal hunts, deer were driven into a waterway and large numbers, sometimes hundreds, were killed by tribal members waiting in ambush. The Coeur d'Alenes also depended on the waterways to hunt small game, such as beaver, as well as migratory waterfowl.
>
> The Tribe gathered several plants growing in the marshes and wetlands of the Coeur d'Alene waterways. Most important among these was the water potato, a plant that was gathered annually by tribal members from the shallow waters of the Lake and rivers. The Coeur d'Alenes also collected rushes and tule from alongside the waterways for use in the construction of baskets, mats and the Tribe's lodges.
>
> The watercourses provided the primary highways for travel, trade and communication. Canoes were prevalent and constructed in several distinct styles. Travel was measured in the days it took a canoe to get from point to point. Canoes also facilitated the Tribe's fishing and hunting activities.
>
> The Lake and rivers played an integral part in the Tribe's cultural activities. The waterways were tied to the Tribe's recreational pursuits,

> religious ceremonies and burial practices. In this respect, the Lake and rivers served not only as the means by which the Tribe ensured its corporeal survival, but also as the source of the Tribe's spiritual and cultural identity.

95 F.Supp.2d at 1099-1100. Likewise, the district court found that "the Tribe continued to be dependent on the water resource in 1873" and "[t]he federal government was plainly aware of the Tribe's dependence on the Lake and rivers at the time of the Executive reservation in 1873." *Id.* at 1102-06. In sum, the Coeur d'Alene Tribe's case for its right to use the waterways to fish, hunt, and gather is even more compelling than the Klamath's.

Although, the Coeur d'Alene executive order does not specifically contain any language regarding these activities, the Ninth Circuit has made clear that while this language is helpful toward finding fishing, hunting, and gathering rights, such language is not required. *See*, *Walton*, 647 F.2d at 48 (finding fishing water right despite no express reservation of fishing rights in 1872 executive order because "[t]he Colvilles traditionally fished for both salmon and trout. Like other Pacific Northwest Indians, fishing was of economic and religious importance to them."). Instead, what is more important is to establish the "historical importance of hunting and fishing" to the Tribe. *Adair*, 723 F.2d at 1409. Given, the findings of fact by Judge Lodge and the Supreme Court there can be no question that fishing, hunting, gathering, and other traditional subsistence practices were of "historical importance" to the Tribe and were "of economic and religious importance to them" *Id.*; *Walton*, 647 F.2d at 48. *See also* Joint Statement of Facts, pg. 12-15; 30-34; Hart 2015 Report 20-30. Accordingly, there is little doubt that an essential purpose of the Coeur d'Alene Reservation was to reserve for the Tribe water rights necessary to maintain the Tribe's traditional subsistence fishing, hunting, and gathering activities.

Further, "no court has ever held that the waters on which the United States may exercise its reserved water rights are limited to the water within the borders of a given federal reservation." *John v. United States*, 720 F.3d 1214, 1230 (9th Cir. 2013). Instead, it found that "the Supreme Court has recognized that federal water rights may reach sources of water that are separated from, but 'physically interrelated as integral parts of the hydraulic cycle' with, the bodies of water physically located on reserved land." *Id.* at 1230 (quoting *Cappaert*, 426 U.S. at 133). Accordingly, the Ninth Circuit concluded "the federal reserved water rights doctrine does not typically assign a geographic location to implied federal water rights. The rights are created when the United States reserves land from the public domain for a particular purpose, and they exist to the extent the waters are necessary to fulfill the primary purpose of the reservation." *Id.* at 1231 (citing *Cappaert*, 426 U.S. at 139).

In its response brief, the Tribe established the legal and factual basis for its claims to non-consumptive instream flow water rights located off the Reservation. *See* Coeur d'Alene Tribe's Response Brief, s. III(C)(3). There, the Tribe pointed out:

> [u]pon entering into negotiations, the federal negotiators found that "the Coeur d'Alenes demanded an enlarged reservation that included the Tribe's fishing grounds . . . ." *Idaho II*, 95 F.Supp.2d at 1109. As the State points out, "the Tribe . . . sought to obtain a Reservation that included all waterways it considered necessary to its survival." Idaho Opening Brief at 24. Notably, the principle species of fish upon which the Tribe relies are native cutthroat trout and bull trout. Joint Statement of Facts at 52. These fish are principally adfluvial in nature, meaning they live in the Lake but migrate into headwater streams to spawn. *Id.* If there is not sufficient water for their upstream migration or at their spawning grounds to spawn and rear their young, the fish population will eventually be extirpated. *Id.* at 54. In other words, unless water is reserved in these streams located on and off-reservation, the Tribe's on-reservation fishing right, a primary purpose of the Coeur d'Alene Reservation, will be entirely defeated.

Id. at 89.

For its part, the United States in 1873 was concerned with "promoting settlement, avoiding hostilities, and extinguishing aboriginal title . . . ." *Idaho II*, 533 U.S. at 275-76. Given the adfluvial

nature of the fishery, these goals could not be achieved while at the same time acquiescing to the Tribe's demand that it reserve all of its fishing grounds. As the Tribe pointed out in its response brief:

> The 1873 Agreement represents a middle ground. It set aside the Lake, the mouths of the Lake's principle tributaries—the St. Joe River and Coeur d'Alene River—as well as the outlet of the Spokane River. Aff. R. Hart, Ex. 2 (1873 Agreement at Art. 1); Joint Statement of Facts at 39. Then, rather than reserving the land encapsulating the headwater streams necessary to ensure the continued survival of the native fishery, the parties agreed that "water running into said reservations shall not be turned from their natural channel where they enter said reservation." Aff. R. Hart, Ex. 2 (1873 Agreement at Art. 1).
>
> The agreement represents a compromise given the objectives and purposes of the parties. The United States could acquire the Tribe's aboriginal title and promote settlement in a majority of the Tribe's territory in exchange for reserving to the Tribe a land base to protect its homeland, the Lake, and the water rights necessary to ensure the survival of the Tribe's adfluvial fishery.

Coeur d'Alene Response Brief at 89.

Hecla attempts to minimize the language in the Agreement that guaranteed that "water running into said reservations shall not be turned from their natural channel where they enter said reservation," by making the ridiculous argument that "the language was included in relation to the reservation of a public 'right of passage over reservation roads.'" Hecla Response Brief at 12. It cites the State of Idaho's Statement of Additional Facts as its only support for this proposition. *Id.* However, the State's additional facts are silent regarding this issue.

Although Hecla's argument is far from clear, it appears to piggy-back on an argument made by the State in its opening brief that this language was "inserted . . . to preserve public rights of navigation on waters included in the Reservation." Idaho Opening Brief at 74-75, n. 24. However, the United States need not expressly preserve "public rights of navigation," because the United States

maintains its navigational servitude on navigable waters within Indian Reservations. *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987). Further, Idaho has demonstrated that, to the extent treaty negotiators felt compelled to include a right of navigation within an Indian reservation, those negotiators were savvy enough to at least mention the word "navigation."

Next, Hecla argues that the language in the 1873 Agreement "only refers to the 'natural channel **where they enter said Reservation.**" Hecla Response at 12 (emphasis in original). In other words, the United States promised they wouldn't build a canal and divert water on the reservation line but could do whatever it wanted to those streams just five feet "before 'they enter said Reservation.'" *Id.* (emphasis in original). "This is certainly an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the nation for more." *United States v. Winans*, 198 U.S. 371, 380 (1905).

Despite Idaho's and Hecla's demand that "[t]he law does not allow the Court to rewrite the Agreements," they both seem perfectly willing to stretch the interpretation of this language. However, the language guaranteeing that "water running into said reservations shall not be turned from their natural channel where they enter said reservation," is crystal clear.[38]

Although the 1873 Agreement was not ratified. *Idaho II*, 95 F.Supp.2d at 1096. Judge Lodge specifically found that "an object of the 1873 Executive Order was, in part, to create a reservation for the Coeur d'Alenes that mirrored the terms of the 1873 agreement . . . ." *Id.* at 1109. By using the

[38] Hecla also points out "[n]othing is said [in the 1873 Agreement]. . . about fish habitat in the tributaries." Hecla Response Brief at 13. That is because an express water right such as this does not need to iterate out the purposes for which the water was set side. Its purpose was not solely for fish but also "to provide the Tribe with a reservation that granted tribal members exclusive use of the water resource." *Idaho II*, 95 F.Supp.2d at 1109. Further, ***Hecla is wrong*** that "passage of legislation that promoted the development of public land . . . for farming and mining," could operate to defeat these water rights. *Rio Grande*, 174 U.S. 690, 703 (1899); *FPC v. Oregon*, 349 U.S. 435, 448 (1955); *Cappaert*, 426 U.S. at 143. *See also*, Coeur d'Alene Tribe Response Brief at 89-91; United States Response Brief at 76-80.

word "terms" rather than "lands," Judge Lodge clearly interpreted the 1873 Executive Order to adopt all the terms of the 1873 Agreement.

In conclusion, reservation of the Tribe's traditional subsistence activities was an essential purpose of the Coeur d'Alene Reservation. The parties recognized that reservation of instream flows off the reservation would be necessary to protect the Tribe's on-reservation fishing rights. To address this while simultaneously providing for non-Indian settlement on those lands, the parties expressly agreed to preserve flows in the off-reservation streams, the President signed an executive order that "mirrored" those terms, and that executive order was ratified by Congress. In short, the purpose of the creation Coeur d'Alene Reservation would be entirely defeated without off-reservation instream flows.

C. The Purpose of the Coeur d'Alene Reservation Would be Defeated without Consumptive Water for Agriculture

The Tribe conclusively demonstrated in its response brief that an essential purpose of the 1873 executive reservation was to ensure the Tribe had sufficient water supply to enable it to engage in agriculture. Coeur d'Alene Tribe Response Brief, p. 101-105, s. IV. Those arguments are incorporated herein and need not be repeated, nor have they been refuted by any objector in this case. Instead, the Tribe focuses here on the arguments of the State of Idaho, the NIWRG, and Hecla that the Tribe is not entitled to water for agriculture because, as Hecla puts it, "neither the United States nor the Tribe have established that irrigation was necessary for these agricultural and pastoral activities, either at the time of the Reservation or today." Hecla Response Brief at 22.[39] Idaho would

[39] Outside of pure animus, it is not clear why Hecla has objected to the Tribes agricultural water right claims or makes this argument here. Hecla has no water rights within the Coeur d'Alene-Spokane River Basin outside subbasin 94. The Tribe has exactly zero irrigation water right claims in subbasin

be so kind as to allow the Tribe an irrigation water right "if there are places of use on which the Tribe cannot earn a 'moderate living' by raising basic grain or other crops without irrigation." Idaho Response Brief at 22.[40]

The arguments of the State and Hecla fail because they misconstrue the purpose of the Reservation. The purpose of the reservation was not necessarily "irrigation," but was to develop the Tribe's agricultural economy. The Supreme Court has determined that where agriculture (not irrigation) is a purpose of the Reservation, the appropriate quantification standard is the practicably irrigable acreage ("PIA") standard. *Arizona v. California*, 373 U.S. at 600-01. The Ninth Circuit agrees, finding in *Walton* that "one purpose for creating this reservation was to provide a homeland for the Indians to maintain their agrarian society . . . and . . . 'the only feasible and fair way by which reserved water [for this purpose] can be measured is irrigable acreage.'" 647 F.2d at 47.

Even more probative is *Adair*, where the Ninth Circuit found, as the State and Hecla have pointed out, the Klamath Reservation was "a high, cold plain, nearly on a level with the summit of the

---

94. It is hard to understand why Hecla makes this argument with such fervor given the minimal risk that the Tribe's irrigation claims will interfere with *any* of Hecla's water rights.

[40] It is likewise difficult to understand why the State of Idaho is demanding such an exacting quantification of the Tribe's irrigation water rights considering they amount to approximately 0.4% of the total annual discharge of the Basin. During argument of CSRBA Basin-Wide Issue No. 1 the State argued "the uncontroverted facts . . . demonstrate conclusively that domestic and stockwater rights have a *de minimis* impact on the water supply," because the total consumptive use for domestic and stockwater rights amounted to between 0.44 and 3% of the total annual discharge in the Basin. *State of Idaho's Reply Brief*, In Re CSRBA Case No. 49576, Subcase No. 00-40001 at 5-6 (Jan. 25, 2016). The State strenuously argued that state-law domestic and stockwater rights need not be investigated to the same degree as other water rights because "the impact of domestic and stockwater rights is less than one-half percent of the total water supply in the Coeur d'Alene-Spokane River Basin, and . . . investigating domestic and stockwater rights would require between 24,000 and 48,000 person-hours of work." *Id.* at 6. The Tribe's irrigation water rights likewise amount to less than one-half percent of the total water supply in the Basin and yet the State *demands* the Tribe not only demonstrate its entitlement to this miniscule amount of water but also *demands* the Tribe quantify these rights in exacting detail.

Sierra Nevada mountains, too frosty to raise cereal or roots with success, and fit only for grass." Idaho Opening Brief at 67, Hecla Response Brief at 17 (quoting *Adair*, 723 F.2d at 1409, n. 15). Nonetheless, The Court found that that

> [t]he state and individual appellants argue that the intent of the 1864 Treaty was to convert the Indians to an agricultural way of life. The Government and the Tribe argue that an equally important purpose of the treaty was to guarantee continuity of the Indians' hunting and gathering lifestyle. . . . We find that both objectives qualify as primary purposes of the 1864 Treaty and accompanying reservation of land.

Adair, 723 F.2d at 1409. Although, as the State and Hecla have pointed out, irrigation was apparently not necessary on the Klamath Reservation, the Ninth Circuit found that the Tribes had the right to "sufficient water to 'irrigate all the practicably irrigable acreage on the reservation.'" *Id.* at 1415.

The reason the Tribe's water right is quantified under the PIA standard regardless of whether irrigation water is currently necessary is simple: the water right is for both current and future uses. The very purpose of the PIA standard was to quantify water for irrigation that was not yet occurring. The Special Master in *Arizona v. California* specifically found that the purpose of those reservations was to allow the Tribes to "develop an agricultural economy." 2d. Aff. Counsel, Ex. 5, p. 260 (Simon H. Rifkind, Special Master: Report, December 5, 1960, *Arizona v. California*, 373 U.S. 546 (1963) (hereinafter "*Arizona v. California* Rifkind Report")). That purpose, the Master concluded, reserved enough water to satisfy "future expanding agricultural and related water needs," because "[i]nvariably the United States intended that the Indian tribes settled on a Reservation would remain there for generations." *Id.* Inconsistent with the State's argument that the Tribe is only entitled to irrigation water if it "cannot earn a 'moderate living' by raising basic grain or other crops without irrigation," the Master in *Arizona v. California*, affirmed by the United States Supreme Court, found that tribes are entitled to sufficient irrigation water to support "expanding populations [and] expanding

agricultural development . . . ." *Id.* Contrary to Idaho's implication, the Master in Arizona concluded "[i]t is unreasonable to attribute to the United States an intention or an expectation that the Indians would remain stagnant or die out when they were settled on a Reservation." *Id.*

As a result, the Master decided that "[w]hat the United States did, in withdrawing public lands for these Indian Reservations, was to establish areas that could be used in the *indefinite future* to satisfy the needs of Indian tribes in the United States *as those needs might develop*." *Id.* at 262 (emphasis added). Citing the Ninth Circuit, the Master emphasized that the Tribes' water rights need to "extend[] to the ultimate needs of the Indians as those needs and requirements should grow to keep pace with the development of Indian agriculture upon the reservation." *Id.* at 261 (quoting *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321, 327 (9th Cir. 1956)).

Application of these principles conclusively demonstrates the Coeur d'Alene Tribe's entitlement to water to develop its agricultural economy. It must be kept in mind that this is the Tribe's one chance to quantify its entire reserved water right. Once again, the State and objectors make their arguments against the Tribe's PIA claims knowing full well that "[t]he decree entered in [this] adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system," and that they would vehemently object to the Tribe making claim to any additional federal reserved water rights after the completion of this adjudication. I.C. § 42-1420. In other words, the State and objectors demand not only that all of the Tribe's water rights be quantified now but that they also be cut off by current conditions.[41]

[41] Undoubtedly, the State would counter that the Tribe is free to acquire water rights pursuant to State law. However, this very notion puts the concept of the *Winters* doctrine on its head. Indeed, The Master in *Arizona v. California*, rejected as "unacceptable" the contention that "the United States

Although, Hecla is correct in asserting the Tribe is not currently engaged in systematic irrigation, the Tribe's agricultural water right must be sufficient into "the indefinite future to satisfy the needs of the [Coeur d'Alene Tribe] as those needs might develop." *Arizona v. California* Rifkind Report at 262. This calls, not for the absolute bare amount necessary to provide the Tribe with a "moderate living," but enough to support "expanding populations [and] expanding agricultural development." *Id.* at 260. In the face of a changing climate where water is becoming scarcer, it is sensible to conclude that irrigation will become necessary within the reasonably foreseeable future. There was similar uncertainty in *Arizona v. California* where the Court concluded "[h]ow many Indians there will be and what their future needs will be can only be guessed." 373 U.S. at 600. This led the Supreme Court to "conclude[], as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage." *Id.*

In short, the Tribe's water right for agriculture does not depend upon whether the Tribe is currently irrigating. If a purpose of the Reservation is agriculture then the quantification standard is PIA. This standard was designed specifically to ensure the Tribe has enough consumptive water for (1) the event that irrigation should at some point become necessary; and (2) other consumptive uses that are not currently known to be quantified. This is why the Ninth Circuit awarded a PIA water right on the Klamath Reservation, which likewise apparently requires little to no irrigation, because "[t]he scope of an Indian irrigation right is well settled. It is a right to sufficient water to 'irrigate all the practicably irrigable acreage." *Adair*, 723 F. 2d at 1415.

---

intended that the Indians would be required to obtain water for their future needs by acquiring appropriative rights under state law." *Id.*

D. The Purpose of the Coeur d'Alene Reservation Would be Defeated without Consumptive Water for DCMI

Indian tribes' entitlement to water rights for current and future domestic, commercial, municipal, industrial ("DCMI") uses is well documented. *See* United States' Response Brief at 53-56. Now, however, Idaho argues that the Tribe entitled to only those DCMI water rights that have some "close nexus" to agriculture because, according to Idaho, agriculture is the sole primary purpose of the Coeur d'Alene Reservation. Idaho Response Brief at 23. However, since one primary purpose of the Reservation is to set aside a homeland that allows the Tribe to develop a viable economy and make the land they reserved "valuable [and] adequate," *Winters*, 207 U.S. at 576, the Tribe is entitled to DCMI water rights for a much broader range of uses than only those necessary for agriculture.

Every case cited by the State is contrary to its approach and supports the Tribe's arguments. The State cites Greely, which is curious since earlier in its brief it accuses the United States of "misrepresenting" the applicability of *Greely* to this Court since "[t]he *Greely* court . . . did not have any reserved water rights claims before it . . . ." Idaho Response Brief at 16. Nonetheless, the Montana Supreme Court in *Greely* was actually acknowledging the possibility that "it may be that such 'acts of civilization' [as quoted in *Winters*] will include consumptive uses for industrial purposes." *Montana ex rel. Greely v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 712 P.2d 754, 765 (Mont. 1985). Although the Master in *Arizona v. California* found that he would not quantify the Tribe's water rights based upon an industrial purpose, the reason for this was that "the United States asks only for enough water to satisfy future agricultural and related uses." *Arizona v. California* Rifkind Report at 265. However, this did not limit the Tribes' ability to use the water, once quantified "for purposes other than agriculture and related uses." *Id. See also,*

section V(C), *supra*. Further, the reason the Yakima were not awarded DCMI water rights in *Acquivella* was because the Tribe's consumptive water rights had already been determined in a prior decree. 850 P.2d 1306 (1993). In short, nothing the State has cited provides support for its arguments or negate the long list of authority cited by the United State that establishes DCMI water rights are a necessary corollary to the Tribe's homeland. United States' Response Brief at 53-56.

Idaho also argues the Tribe is not entitled to commercial water rights "intended to primarily serve the needs of non-Indian visitors . . . ." Idaho Response Brief at 22. Apparently, Idaho believes, based upon exactly no precedent, that the Tribe is only entitled to water for commercial activities that only cater to Indians. It is hard to understand Idaho's position given their argument that the purpose of the Reservation is provide for the "progress, comfort, improvement, [and] education . . . of said Coeur d'Alene Indians." 26 Stat. 1028 (1891). Needless to say, it is tough to develop an economy that provides for these purposes if you can only sell goods and services to yourself.

The State's position is also unfortunate since, according to University of Idaho economist Steven Peterson, the Tribe is the second largest employer in North Idaho. 2d. Aff. Counsel, Ex. 8, p. 6 (Tribal Economic Impacts: The economic impacts of the Five Idaho Tribes on the Economy of Idaho).[42] As of 2014, it employed approximately 1,750 employees, most of them non-Indians. *Id.* The Tribe's commercial activities contribute $330 million to the Idaho economy and generate approximately $13 million in local, county, and state taxes. *Id.* Through the Tribe's commercial activities it has been able to donate more than $21 million to schools and educational organizations throughout Idaho and the Northwest, as well as build and maintain the Benewah Medical Center,

[42] *Also Available at*: https://www.sde.idaho.gov/indian-ed/files/curriculum/Idaho-Tribes-Economic-Impact-Report.pdf (last visited March 16, 2017).

which serves 6,000 patients (approximately half of whom are non-tribal members) and account for approximately 30,000 annual visits. *Id.* This is an important point for the Tribe: the success of its homeland is inextricably intertwined with the success of its non-Indian neighbors and it is insulting for the State to suggest that the Tribe should not be able to interact, commercially or otherwise, with the non-tribal people of north Idaho.[43] The Tribe is not claiming these water rights solely for itself. The fact is that in order for the Tribe to continue to develop its economy and contribute to the broader community in North Idaho, it needs water rights for current and future DCMI needs.

The NIWRG argues that "there is no legal basis for federal reserved rights to groundwater." NIWRG Response at 3. Apparently the NIWRG is unaware that this Court has found not once, but twice, that "federal reserved water rights can extend to groundwater." *Order Disallowing Uncontested Federal Reserved Water Right Claims (Mountain Home Air Force Base)*, In Re SRBA Case No. 39576, Subcase No. 61-11783, 61-11784, 61-11785 at 7 (2001); *Order of Partial Decree on Uncontested Federal Water Right*, In Re SRBA Case No. 39576, Subcase No. 63-30981 (July 31, 2000). Further, contrary to the arguments of the NIWRG, this Court specifically cited the Ninth Circuit decision in *Cappaert* for the proposition that "[a]lthough the United States Supreme Court ultimately concluded that the subject reservation was of surface water . . . the court below concluded that federal reserved water rights extended to groundwater." *Id.* (citing 508 F.2d 313 (9th Cir. 1974). This Court also cited a number of other cases that "approved the application of the doctrine of implied reservations of groundwater . . . ." *Id.* (citing *Nevada ex rel. Shamberger v. United States*,

[43] Indeed, the Tribe has had commercial dealings with non-Indians since before Idaho was a state. *See e.g.*, Hart 2015 Report at 178 (discussing the possibility of tribal members selling wood to commercial steamers on the Lake in 1884)

165 F.Supp. 600 (D. Nev. 1958)), aff'd. on other grounds, 279 F.2d 699 (9th Cir. 1960); *Tweedy v. Texas Co.*, 286 F.Supp. 383 (D. Mont. 1968)).

Notwithstanding the NIWRG's mischaracterization of the current state of the law regarding federal reserved rights to groundwater, this question has been conclusively resolved by the Ninth Circuit since the NIWRG filed its brief. 2d. Aff. Counsel, Ex. 2, p. 17-19 (*Agua Caliente Band v. Coachella Valley Water Dist.*, Case No. 15-55896 (9th Cir. 2017)). The Court there found that "[w]e must now determine whether the *Winters* doctrine . . . extends to . . . groundwater . . . while we are unable to find controlling federal appellate authority explicitly holding that the *Winters* doctrine applies to groundwater, we now expressly hold that it does." *Id.*

VI. THE TRIBE'S WATER RIGHTS VESTED IN 1873 AND NO WATER RIGHTS WERE EXPRESSLY CEDED OR UNILATERALLY ABROGATED IN 1887, 1889, 1891, 1894, OR 1906

To recap, the Coeur d'Alene Reservation was created by executive order on November 8, 1873. *See* section II-IV, *supra*; Coeur d'Alene Tribe's Response Brief, s. I; As a result, the Tribe's water rights vested as "present perfected rights" as of November 8, 1873. *Arizona v California*, 373 U.S. at 600. Since the Tribe's entitlement to water rights turns upon the purposes for the creation of the reservation, the Supreme Court requires that the Coeur d'Alene Tribe's entitlement to water rights turns upon the purposes for the creation of the 1873 Reservation. *Cappaert*, 426 U.S. at 138.

Analysis of "the document and circumstances surrounding [the Coeur d'Alene Reservation's] creation [in 1873], and the history of the [Coeur d'Alene] Indians for whom it was created," conclusively demonstrates that the Coeur d'Alene Reservation had three separate but interrelated purposes necessary to fulfill the overall homeland primary purpose of the Coeur d'Alene Reservation.

Those purposes include (1) the protection and preservation of Coeur d'Alene Lake in its natural condition; (2) the preservation of the Tribe's traditional subsistence activities including but not limited to fishing, hunting, gathering, and other cultural activities; and (3) to allow the Tribe to engage in agricultural and other domestic, commercial, municipal, and industrial activities.

Water rights to fulfill these purposes "vest on the date of the reservation," which was November 8, 1873. Once vested, these rights cannot be lost unless ceded by the Tribe or unilaterally taken by Congress.

Peppered throughout the briefs, the State and Hecla argue that the Tribe has lost essentially all of its water rights through "unspoken operation of law" by Congress. They argue that leading up to 1873 the Tribe intended for its hunting and fishing rights to be temporary and that it only needed fishing "for a while yet." Also, they argue that the Tribe silently ceded their non-consumptive water rights off the reservation through the 1887 and 1889 agreements because "the 1887 and 1889 Agreements do not expressly reserve" them. Hecla Response Brief at 4; 13. Further, Idaho argues through its made up "last reservation doctrine" that, despite confirming the Reservation shortly before statehood, Congress silently repudiated the 1873 Reservation by passing the 1891 Act ratifying the 1887 and 1889 Agreements, thereby requiring a reanalysis of the purpose of the Reservation as of 1891. Idaho Response Brief at 11. Finally, they argue that Congress silently took whatever water rights were left when it passed the Coeur d'Alene Allotment Act. *Id.* at 31.

These argument fail because the blackletter law of the United States Supreme Court is the exact opposite of the State's argument: subsequent agreements between the United States and Indian tribes are "not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted." *Winans*, 198 U.S. at 381. Accordingly, silence means rights are reserved not ceded;

"the tribe retains all rights not expressly ceded to the Government . . . ." *Adair*, 723 F.2d at 1413. More importantly, these arguments fail because the historic record—as found by the United States Supreme Court—establishes that from the moment the 1873 Reservation was set aside through 1891 and beyond, Congress' never wavered in its "intent . . . that anything not consensually ceded by the Tribe would remain for the Tribe's benefit." *Idaho II*, 533 U.S. at 278. In other words, "the negotiating history, not to mention subsequent events, "ma[k]e [it] very plain," that Congress recognized the full extent of the Executive Order reservation lying within the stated boundaries it ultimately confirmed . . . ." *Id.* at 281.

A. The Supreme Court has Repeatedly Reaffirmed that Silence Means Rights Have Been Reserved, Not Ceded

1. In Cession Agreements Between the United States and Indian Tribes All Rights not Expressly Ceded are Retained and Silence is not Sufficient to Infer a Cession of Rights.

From almost the inception of the United States, the Supreme Court has followed the blackletter rule that any rights not expressly ceded remain for the Tribe's benefit. *Worcester*, 31 U.S. at 552-53. The case most closely associated with this fundamental principle of Indian law is *United States v Winans*, 198 U.S. at 371. That case came about after the United States brought suit to enjoin non-Indians in the State of Washington from preventing Yakama tribal members from accessing the Columbia River to fish. *Id.* at 377. After the Treaty with the Yakama in 1859, the United States opened the land outside the reservation to settlement. All the land adjacent to the Tribe's usual and accustomed fishing places had been settled upon by non-Indians, many of whom had installed fish wheels pursuant to Washington State license. *Id.* at 379. These non-Indians were treating the tribal members who attempted to cross the non-Indian property as trespassers, thus necessitating the suit. *Id.*

Although the Treaty, a Stevens treaty, guaranteed "the right of taking fish at all the usual and accustomed places, in common with citizens of the territory," the issue was whether tribal members had a right to access non-Indian property to enjoy that right. This question of access was not mentioned in the treaty. *Id.* at 380.

As such, the case ultimately turned not upon the language of the treaty or what the Tribe expressly reserved but instead turned upon what was not expressly granted away. The Court found "the right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed." *Id.* at 381. Although "new conditions" (i.e. the coming of non-Indian settlers), necessitated a "limitation of," the Tribe's fishing rights, the Court concluded that "the treaty was not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted." *Id.* Accordingly, notwithstanding the apparent silence regarding the Tribe's right of access of non-tribal property for fishing purposes, the Court concluded that "the Indians were given . . . the right of crossing [non-Indian land] to the river . . ." *Id.*

The rule first laid out in *Worcester* and reaffirmed in *Winans* has become known as the reserved rights doctrine, of which reserved water rights are a part. *See* 2d. Aff. Counsel, Ex. 4, p. 401 (Royster and Blumm, NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS (2d. ed.)) Unlike the State's "last reservation doctrine," the reserved rights doctrine is an actual doctrine that has been repeatedly affirmed by not only the United States Supreme Court, but also federal and state courts including the Idaho Supreme Court. *City of Pocatello v. State*, 145 Idaho 497, 506 (2008) ("A treaty with an Indian Tribe constitutes a grant of rights from them, not a grant of rights from the

United States to the Indians."). *See also, State v. Cutler*, 109 Idaho 448, 457 (1985) (Blistine and Huntly, JJ., dissenting) (highlighting as a "fundamental tenant[] of Indian law" that "an Indian treaty involves the granting of rights from the Indians to the grantee. It is not a grant of rights to the Indians.").[44]

The analysis in *Winans* has been applied to executive order reservations subsequently modified by agreement. *See Antoine*, 420 U.S. at 194. Perhaps more importantly, it has been applied to reserved water rights. *Adair*, 723 F.2d at 1412-13; *Ahtanum Irr. Dist.*, 236 F.2d at 326. *See also*, 2d. Aff. Counsel, Ex. 4, p. 406 (Royster and Blumm, NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS (2d. ed.)).[45] Finally, as already thoroughly explained in the Tribe's response

---

[44] *See also, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 433 U.S. 658, 680 (1979); *United States v. Wheeler*, 435 U.S. 313, 327 n. 24 (1978); *United States v. Adair*, 723 F.2d at 1412-13; *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321, 326 (9th Cir. 1956); *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 525 (9th Cir. 2005); *United States v. Washington*, 520 F.2d 676, 684-85 (9th Cir. 1975); *United States v. Confederated Tribes of Colville Indian Reservation*, 606 F.3d 698, 713 (9th Cir. 2010); *United States v. Fox*, 573 F.3d 1050, 1053 (10th Cir. 2009); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 928 (8th Cir. 1997); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 352 (7th Cir. 1983); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 952 F.Supp. 1362, 1391 (D. Minn. 1997); *United States v. Washington*, 384 F.Supp. 312, 331 (W.D. Wash. 1974); *Muckleshoot Indian Tribe v. Hall*, 698 F.Supp. 1504, 1512 (W.D. Wash. 1988); *United States v. Adair*, 478 F.Supp. 336, 345 (D. Oregon 1979); *State v. McClure*, 268 P.2d 629, 632 (Mont. 1954); *State v. Buchanan*, 978 P.2d 1070, 1078 (Wash. 1999); *State v. Clark*, 282 N.W.2d 902, 906 (Minn. 1979); *State v. Forge*, 262 N.W.2d. 341, 347 (Minn. 1977); *State v. Johnson*, 249 N.W. 284, 288 (Wis, 1933); *Confederated Salish and Kootenai Tribes v. Clinch*, 158 P.3d 377, 399-400 (Mont. 2007); *State ex rel. Greely v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 712 P.2d 754, 763 (1985); *State v. Jim*, 725 P.2d 372, 373, n.1 (Oregon 1986); *State v. Coffee*, 97 Idaho 905, 916 (1976).

[45] This Court has distinguished between federal reserved water rights and what was referred to as "Indian reserved water rights." The difference is that while federal reserved water rights are water rights implied based upon the circumstances surrounding the creation of the reservation and the history of the Indians for whom the reservation was created, *Walton*, 647 F.2d at 47, an Indian reserved water right is a water right implied based upon another right expressly reserved in a treaty. *Order on Motions for Summary Judgment*, In Re SRBA Case No. 39576, Consolidated Subcase No. 03-10022 at 24 (1999). However, *Winans* is equally applicable in both situations. Indeed, Justice

brief, the *Winans* approach has been applied to off-reservation reserved rights. Coeur d'Alene Tribe's Response Brief, s. III(C)(2); *Mille Lacs*, 526 U.S. at 172. In short, as more fully outlined in Cohen's Handbook of federal Indian Law, "the Court held [in *Mille Lacs*] that the 1855 treaty did not extinguish the usufructuary rights reserved in the 1837 treaty, because the later treaty was entirely silent as to those rights, and the historical record revealed that the Indians would not have understood that they were surrendering those rights with their cession of land." 2d. Aff. Counsel, Ex. 3, p. 1193 (Ch. 15, Cohen's Handbook of Federal Indian Law (citing *Mille Lacs*, 526 U.S. 195-200)).[46]

This answers Hecla's repeated accusation that the Tribe silently ceded their non-consumptive water rights off the reservation through the 1887 and 1889 agreements because those Agreements do not expressly reserve them. Hecla Response Brief at 4; 8 ("surly they would have included provisions

---

McKenna drafted both opinions just three years apart. Harkening back to *Winans*, Justice McKenna wrote in *Winters*

> The Indians had command of the lands and the waters,-command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?

Winters, 207 U.S. at 576 (emphasis added). *c.f. Winans*, 198 U.S. at 381 ("the right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. . . . [T]he treaty was not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted."). *See also*, *Adair*, 723 F.2d at 1412-13.

[46] Also note, Cohen's Handbook find that *Mille Lacs* "confined the [*Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe*] decision to its facts," based upon the fact that "[u]nlike the Klamath Tribe's hunting, fishing, and gathering rights, the Chippewa rights were neither exclusive nor tied to possession of the land." *Id.* at 1192. The Coeur d'Alene Tribe's off-reservation federal reserved water rights are likewise non-exclusive nor tied to ownership of the land. *See*, *Adair*, 723 F.2d at 1418 ("since . . . treaty right[s] to hunt and fish [are] not transferable, it follows that no subsequent transferee may acquire that right of use . . . .").

regarding the Tribe's . . . off-reservation stream flows."). Indeed, the Supreme Court in *Mille Lacs* noted that "[t]he entire 1855 Treaty, in fact, is devoid of any language expressly mentioning—much less abrogating—usufructuary rights." *Mille Lacs*, 526 U.S. at 195. However, contrary to Hecla, the Supreme Court found this to be evidence the Tribe retained the rights rather than ceded them away, finding "the United States treaty drafters had the sophistication and experience to use express language for the abrogation of treaty rights." *Id. See also* Coeur d'Alene Response Brief, s. III(C)(2).

Mille Lacs also answers Hecla's and the State's repeated inference that fishing, hunting, and gathering rights were no longer important to the Coeur d'Alenes by 1887 and 1889—and therefore intended to cede away their rights—merely because there's no mention of those rights in negotiations. Just like those negotiation sessions, the Supreme Court in *Mille Lacs* noted that "the Treaty Journal, recording the course of the negotiations . . . records no discussion of the 1837 Treaty, of hunting, fishing, and gathering, or of the abrogation of those rights." *Id.* at 198. However, contrary to the assertions of Hecla and the State, the Supreme Court found "[t]his silence suggests that the Chippewa did not understand the proposed Treaty to abrogate their usufructuary rights . . . . It is difficult to believe that in 1855, the Chippewa would have agreed to relinquish the usufructuary rights they had fought to preserved in 1837 without at least a passing word about the relinquishment." *Id. See also* Coeur d'Alene Response Brief, s. III(C)(2).

The Supreme Court also answers Hecla's and the State's reliance upon *Oregon Fish & Wildlife v. Klamath* to argue that the cession language in the 1887 and 1889 Agreements is "clear and unambiguous." Hecla Response Brief at 5-8; Idaho Response Brief at 24; 30.[47] The Supreme Court

[47] In a desperate attempt to bolster this argument, Hecla sites to *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). That case stands for nothing more than the fact that a cession of a tribe's "right, title, and interest," in a particular parcel of land removes that parcel from boundaries of the

expressly rebuked this argument in *Mille Lacs*, finding, that "the State's argument that similar language in two Treaties involving different parties has precisely the same meaning reveals a fundamental misunderstanding of basic principles of treaty construction." 526 U.S. at 202. Instead, the Supreme Court in *Mille Lacs* found that it is not only the language of the cession that controls but also "the historical record and . . . the context of the treaty negotiations." *Id.* To reiterate, in that treaty, the Chippewa agreed to

> hereby cede, sell, and convey to the United States all their right, title and interests in, and to, the lands now owned by them, in the Territory of Minnesota, and included within the following boundaries, viz: [describing territorial boundaries]. And the said Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they now have in, and to any other lands in the Territory of Minnesota or elsewhere.

Id. at 185. However, the Court found that "the historical record refutes the State's assertion that the 1855 Treaty 'unambiguously' abrogated the 1837 hunting, fishing, and gathering privileges [of the Tribe]" and then applied the canon of construction that "Indian treaties are to be interpreted liberally in favor of the Indians, and that any ambiguities are to be resolved in their favor." *Id.* at 200. The Court concluded that "[g]iven this plausible ambiguity, we cannot agree with the State that the 1855 Treaty abrogated Chippewa rights." *Id.*

---

reservation. *Id.* It does not control the question of whether the tribe retained any reserved rights in that parcel. The Tribe does not contend that the land ceded in the 1887 and 1889 agreements continue to be part of the Reservation but it does contend that it continues to have reserved water rights in those areas. *Yankton Sioux* provides this Court no help in determining this question. Instead, it is *Mille Lacs* that controls.

2. The Supreme Court Will Not Imply Unilateral Congressional Abrogation of Indian Rights

The Supreme Court "require[s] that Congress' intention to abrogate Indian treaty right be clear and plain." *United States v. Dion*, 476 U.S. 734, 738 (1986) (citing Cohen's Handbook of Federal Indian Law; *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 353 (1941)).[48] Far from implying abrogation of tribal rights in the manner suggested by the State and Hecla, the Court has found that "[a]bsent explicit statutory language, we have been *extremely reluctant* to find congressional abrogation of treaty rights." *Id.* (emphasis added) (quoting *Washington v. Washington Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 690 (1979)). Although the State argues that a Congressional change to the boundaries of an executive reservation effects the total repudiation of that reservation, the Supreme Court has found that "[w]e do not construe statutes as abrogating treaty rights in 'a backhanded way.'" *Id.* (quoting *Menominee Tribe*, 391 U.S. at 412. The reason for this is simple: "Indian treaty rights are too fundamental to be easily cast aside." *Id.*

The United States Supreme Court typically requires an "'express declaration' of its intent to abrogate treaty rights." *Id.* (citing *Leavenworth, L., & G. R. Co. v. United States*, 92 U.S. 733, 741-42 (1876)). Although in limited circumstances, Congressional abrogation can sometimes be found without an explicit Congressional declaration, "in the absence of explicit statement, 'the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.'" *Id.* (quoting *Menominee Tribe*, 391 U.S. at 412 (which was quoting *Pigeon River Co. v. Cox Ltd.*, 291 U.S. 138, 160 (1934)). Accordingly, if no express statement of abrogation is present "what is essential is that Congress

---

[48] The Court goes on to make clear that it's reference to "treaty" rights is simply a shorthand way to identify right set aside with an Indian reservation and that "Indian reservations created by statute, agreement, or executive order normally carry with them the same implicit hunting rights as those created by treaty." 476 U.S. 734, 745 n. 8 (1986).

actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Dion*, 476 U.S. at 739-40.

B. As Applied to the Coeur d'Alene Reservation, the Supreme Court Found That Congress Sought to "Obtain Tribal Interests only by Tribal Consent"

The Supreme Court has repeatedly applied these canons time after time to questions involving the cession or abrogation of tribal treaty rights. In this case the canons are also necessary because the historical record conclusively demonstrates that Congress, through its dealings with the Tribe, made it express that its intent "was that *anything* not consensually ceded by the Tribe would remain for the Tribe's benefit." *Idaho II*, 533 U.S. at 278 (emphasis added).

In analyzing the historic record the Supreme Court found that between 1885 and 1891 Congress repeatedly demonstrated that "its object was to obtain tribal interests only by tribal consent." *Id.* at 277. The 1887 Agreement was spurred not by the United States but by the Tribe: "[a]s of 1885, Congress had neither ratified the 1873 agreement nor compensated the Tribe. This inaction prompted the Tribe to petition the Government again, to 'make with us a proper treaty . . . by which [the Tribe] may be properly and fully compensated for such portion of their lands not now reserved to them; [and] that their present reserve may be confirmed . . . ." *Id.* at 268.

The resulting agreement in 1887 provided that in exchange for the cession of the Tribe's aboriginal title to lands outside "their present reservation . . . known as the Coeur d'Alene Reservation," the United States promised that "the Coeur d'Alene Reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians . . . and no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation." *Id.* at 267-68.

The history leading into the 1887 Agreement demonstrated to the Court that Congress' "object was to obtain tribal interests only by tribal consent." *Id.* at 276. The Court concluded that "the manner in which Congress then proceeded to deal with the Tribe shows clearly that preservation of the land within the reservation, absent agreement with the Tribe, was central to Congress's complementary objectives of dealing with pressures of white settlement and establishing a reservation by permanent legislation." *Id.*

Congress' behavior was not entirely altruistic: "the Tribe had shown its readiness to fight to preserve its land rights." *Id.* at 276. "Hence, although the goal of extinguishing aboriginal title could have been achieved by congressional fiat [in 1887] . . . the goal of avoiding hostilities seemingly could not have been attained without the agreement of the Tribe. Congress in any event made it expressly plain that its object was to obtain tribal interests only by tribal consent. When in 1886 Congress took steps toward extinguishing aboriginal title to all lands outside the 1873 boundaries, it did so by authorizing negotiation of agreements ceding title for compensation." *Id.* at 277.

Shortly thereafter, in May 1888, "Congress passed an Act granting a [railroad] right-of-way [through the lands] . . . 'set apart for the use of the Coeur d'Alene Indians by executive order, commonly known as the Coeur d'Alene Indian Reservation . . . .' Notably, the Act directed that the Tribe's consent be obtained and that the Tribe alone . . . be compensated . . . ." *Id.* at 268-69.

Rather than immediately ratify the 1887 Agreement, Congress authorized a second round of negotiations in 1888 "owing to a growing desire to obtain for the public . . . certain portions of the [1873] reservation itself." *Idaho II*, 533 U.S. at 269. However, the Court found that "Congress did not simply alter the 1873 boundaries unilaterally, Instead, the Tribe was understood to be entitled beneficially to the reservation as then defined . . . ." Indeed, it had been warned by the Secretary of

the Interior, who "advised the Senate against fiddling with the scope of the Reservation without the Tribe's agreement." *Id.* at 277. As a result, Congress directed the Secretary of the Interior "to negotiate with the [Tribe] . . . for the purpose and release of said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe *shall consent to sell*." *Id.* at 269 (emphasis added). Based upon this authorization, the Supreme Court concluded that "Congress undertook in the 1889 Act to authorize negotiation with the Tribe for the consensual, compensated cession of such portions of the Tribe's reservation 'as such tribe shall consent to sell . . . in the meantime it honored the reservation's . . . boundaries by requiring the Tribe be compensated for the [railroad right-of-way]." *Id.*

During negotiations federal negotiators repeated reiterated to the Tribe "[i]t is not our intention to do anything but what is satisfactory to you, and will protect your rights . . . ." Aff. R. Hart, Ex. 4 (1889 Agreement Negotiation Transcript). General Simpson also said "[w]e want to deal justly and right with you," and we want to buy that which you want to sell." *Id.* For their part, Chief Seltice made clear that the Tribe was extremely reluctant to sell any land, stating "[y]ou say we have a great deal of land. If we wanted to let it go for money we would say, take more, but we do not care for money; it is land we want." *Id. See also, id.* ("if our object was money, you would be correct, but money is no object; our land we wish to keep."). He said, "I know this land is my property." He went on to recite the Tribe's understanding of the history of the creation of the Reservation:

> A long time ago there was an officer with long whiskers came and told us this was our land. Then came General Watkins, and he said for us to hold our land; General Howard said the same thing. Then President Grant, the head of the nation, ratified [what] all the others had done in giving us this land. Two years ago a commission of three appointed by the President came and we had a long talk; they wanted to treat for land they said was ours; . . . we said . . . they could have it, but we want the land of our present reservation, provided we were to hold it forever, as had been

> promised. They seemed well satisfied, and said they would make a tie to our land that would never be untied.

Id. Ultimately, Seltice relented and told the commissioners "[w]e are willing to let some [land] go now," but upon completion of the negotiations he told them "I want you to understand it was just the same as cutting my left arm off . . . ." *Id. See also, City of Pocatello*, 145 Idaho at 507 ("Considering that the Indians were loathe even to give up any land, it seems unlikely they would have given up any water rights had the issue been raised.").

The resulting agreement in 1889 was specifically conditioned upon ratification of the 1887 Agreement. Both agreements were ratified in 1891. *Idaho II*, 533 U.S. at 270-71. Based upon the whole of this historic record, the Supreme Court concluded:

> The facts, including the provisions of the Acts of Congress in 1886, 1888, and 1889, thus demonstrate that Congress understood its objective as turning on the Tribe's agreement to the abrogation of any land claim it might have and to any reduction of the 1874 reservation's boundaries. The explicit statutory provisions requiring agreement of the Tribe were unchanged right through to the points of Congress's final 1891 ratification of the reservation.

Id. at 277-78. As a result, the Court decided "the evidence [demonstrates] that Congress . . . authorized the reservation's modification solely by agreement. The **intent**, in other words, was that anything not consensually ceded by the Tribe would remain for the Tribe's benefit." *Id.* at 278.

C. The Tribe Did Not Cede or Lose Any Water Rights Pursuant to the 1887 Agreement, 1889 Agreement, 1891 Act, 1894 Agreement/Act, or the 1906 Coeur d'Alene Allotment Act

The historic record clearly establishes that throughout the operative time period from 1873 through the early twentieth century the Lake and traditional subsistence practices continued to be vitally important to the Tribe. *See* Joint Statement of Facts; Hart 2015 Report; Smith 2015 Report; Coeur d'Alene Tribe Opening Brief; Coeur d'Alene Response Brief, s. III-IV. The record also

demonstrates that the Tribe clearly and unambiguously retained all water rights necessary to fulfill the purposes of the 1873 Reservation, including water rights for the Lake, traditional activities, agriculture, and DCMI. At the very least the record is completely devoid of any evidence that the Tribe expressly gave any of these rights up.

The absence of any express cession of water rights is dispositive proof that those rights are retained, not just because that is the unquestioned rule of the Supreme Court. *See* section VI(A)(1), *supra*, but because it was categorically the will of Congress that "anything not consensually ceded by the Tribe would remain for the Tribe's benefit." *Idaho II*, 533 U.S. at 278; section VI(B), *supra*.

1. Nothing in the Record Demonstrates that the Tribe Understood its Hunting and Fishing Rights Would be Temporary

Both the State and Hecla argue that leading up to the 1873 Agreement and executive order the Tribe intended for their water rights for hunting, fishing, and gathering to be temporary. Hecla Response Brief at 4; Idaho Response Brief at 32. Neither can cite to any precedent that would indicate treaty rights, once vested, could be temporary and disappear without either an express tribal cession or Congressional abrogation. *See* Section VI(A)-(B), *supra*. Instead Hecla bases this on a single out-of-context statement by the Tribe in an 1872 petition wherein the Tribe said "for a while yet we need have some hunting and fishing." Hecla Response Brief at 4; 5. The petition Hecla is referring to reads as follows:

> [a]s to the two valleys [St. Joe and Coeur d'Alene River], we did not think to ask for them, though they have been from old the habitual residence of most of us . . . . What we are unanimous in asking, besides the 20 square miles already spoken of, are the two valleys, the S. Joseph, from the junction of S. and N. forks, and the Coeur d'Alene from the Mission inclusively. It would appear too much, and it would be so if all or most of us were fit for farming but the far greatest part of it is either rocky or too

> dry, too cold or swampy; besides we 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 aided 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.

Idaho II, 95 F.Supp.2d at 1103.

Despite Hecla's laser focus on the "a while yet," language, Judge Lodge had a different view. He found that, when read as a whole,

> [t]he second petition makes three points relevant to the Court's present inquiry. First, the Tribe never entertained the possibility of withdrawing to a reservation that did not include the river valleys. Second, the Tribe considered the area adjacent to the waterways its home. Third, and most important, in 1872 the Tribe continued to rely on the water resource for a significant portion of its needs.

Idaho II, 95 F.Supp.2d at 1103 (*c.f. Walton*, 647 F.2d at 48 (finding fishing purpose where "[t]he Colvilles traditionally fished for both salmon and trout. Like other Pacific Northwest Indians, fishing was of economic and religious importance to them."); *Adair*, 723 F.2d at 1409 (finding water right for hunting, fishing, and gathering where those activities were of "historical importance of hunting and fishing" to the Tribes).

Indeed, all the other evidence from this time period suggests that while the Tribe was farming small garden plots, it was still entirely reliant upon traditional subsistence for its survival. *See* Hart 2015 Report at 111-50; Joint Statement of Facts at 24-40. David Thompson, who was tasked with surveying the 1867 Reservation, observed that "[s]hould the fisheries be excluded there will in my opinion be trouble with these indians [sic] but should they be included . . . in the Reservation there will be no trouble." *Idaho II*, 95 F.Supp.2d at 1103. Governor Bennet, a federal negotiator during the 1873 Agreement negotiations reported that "[w]e found that the Indians demanded an extension of

their reservation so as to include . . . fishing and mill privileges . . . ." *Id.* at 1105 (emphasis in original).

To support its "ag only" theory, Idaho, in typical fashion, cherry-picks a single statement made by Seltice a full ten years after the creation of the 1873 Coeur d'Alene Reservation that suggests the Tribe was only engaged in agriculture by that time. However, it is just as easy to find history that suggests the Tribe as a whole was still very much dependent upon traditional substance. For example, in arguing against moving from around the Cataldo Mission to the Hangman Valley tribal members said

> We already have a permanent home: the pure fresh waters of the Coeur d'Alene River filled with fish, the mountains full of game, lakes with an abundant supply of water potatoes, nearby timber with all the wood we need Why should we move to the Palouse Valley?

Hart 2015 Report at 163.

No single out-of-context statement is determinative. However, Judge Lodge, looking at the entire body of historical evidence concluded in *Idaho II*,

> [A]t the time of the Executive reservation in 1873, the Tribe continued to be dependent on the Lake and rivers. Reports describing the Tribe's agricultural successes are in conflict with other official assessments, are not necessarily based on personal knowledge, and may be tainted by cultural and personal bias. Depictions of agricultural activity most likely are based on the Tribe's maintenance of garden plots, horses and, in some cases, cattle. Estimates of farmed acreage and agricultural output demonstrate that in the early 1870's the Coeur d' Alenes were not engaged in systematic farming practices.
>
> In this regard the Court rejects the State's contention that the 'Big Move' to the Hangman Valley area occurred in the late 1860's and early 1870's, and that by 1873 the Tribe had converted to an agrarian based society, no longer dependent on the Lake and rivers ...

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

95 F. Supp. 2d at 1104 (citations omitted).

Indeed, if the State's "ag only purpose" theory were correct and by 1889 the Tribe no longer cared about nor depended upon the Lake and rivers, then why did the Tribe fight so hard to reserve the waterways in the 1889 agreement? If the Tribe were solely dependent upon agriculture by that time it could have sold the Lake and used the proceeds to further develop its agricultural economy in the Hangman valley. The negotiation transcript from 1889 wholly refutes this theory, Chief Seltice in response to General Simpson saying "the more land you let us have the more money you will get, said "if our object was money, you would be correct, but money is no object; our land we wish to keep." Aff. R. Hart, Ex. 4 (1889 Agreement Negotiation Transcript) *See also, Id.* ("[y]ou say we have a great deal of land. If we wanted to let it go for money we would say, take more, but we do not care for money; it is land we want.").

In sum, despite the State's and Hecla's revisionist snapshot of the historic record, the evidence, when taken as a whole, conclusively demonstrates that the Tribe never viewed any of its rights to be temporary. Instead, the Tribe's understanding—just like Congress' understanding—was that "the Tribe was . . . entitled beneficially to the reservation as then defined . . . ." *Idaho II*, 533 U.S. at 269.

2. The 1887 and 1889 Agreements, As Well as the 1891 Act Ratifying Those Agreements, Confirmed and Ratified the 1873 Reservation and Related Water Rights

Hecla is correct that "the 1873 language . . . was not included in the 1887 or 1889 Agreements . . . ." Hecla Response Brief at 13. However, where Hecla runs astray is with its suggestion that the Tribe's failure to use the exact same words in the 1887 and 1889 Agreements as it did in the 1873 Agreement demonstrates that water was no longer important to the Tribe and it intended to abandon its rights. To the contrary, this silence confirms that the Tribe's water rights were retained not ceded because Congress' "object was to obtain tribal interests only by tribal consent." *Idaho II*, 533 U.S. at 276.

Hecla's argument is further undermined by the fact that the Supreme Court found that the Tribe in 1887 sought to have "their present reserve . . . be confirmed . . . ." *Id.* at 268. Indeed, the 1873 Reservation was expressly confirmed by the 1887 Agreement, which referenced the "present reservation . . . known as the Coeur d'Alene Reservation." Aff. R. Hart, Ex. 4, pg. 67-70 (Art. II, 1887 Agreement). The Tribe understood that their "present reservation," was the reservation created in 1873, which guaranteed "the water running into said reservation shall not be turned from their natural channel where they enter said reservation." *Idaho II*, 95 F.Supp.2d at 1105 (emphasis added). In addition, the 1887 Agreement added the guarantee that "the Coeur d'Alene Reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians . . . and no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation." *Id.* at 267-68. Far from silently ceding away their water rights, the historic record from 1887 conclusively demonstrates that the Tribe took affirmative action to have its water rights confirmed.

The Supreme Court found further confirmation of the 1873 Reservation in the 1889 Agreement and negotiating history. Congress authorized the negotiators to do one thing: "negotiate with the [Tribe] . . . for the purpose and release of said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell." *Id.* at 269. Congress did not authorize the negotiators to purchase any tribal water rights in 1889. *Mille Lacs*, 526 U.S. at 198 (noting that legislation authorizing treaty negotiations mentioned only land and was "silent with respect to authorizing agreements to terminate Indian usufructuary privileges.") The 1889 negotiations were likewise devoid of any discussion regarding water rights. "This silence suggests that the [Coeur d'Alene] did not understand the proposed Treaty to abrogate their [water] rights . . . . It is difficult to believe that in [1889], the [Coeur d'Alene] would have agreed to relinquish the . . . rights they had fought to preserved in [1873] without at least a passing word about the relinquishment." *Mille Lacs*, 526 U.S. at 198. Finally, the silence in the Agreement itself demonstrates the reservation of the Tribe's water rights because Congress' intent . . . was that anything not consensually ceded by the Tribe would remain for the Tribe's benefit." *Idaho II*, 533 U.S. at 278. *See also, Mille Lacs*, 526 U.S. at 195 ("[t]he entire 1855 Treaty, in fact, is devoid of any language expressly mentioning—much less abrogating—usufructuary rights.").

The 1891 Act ratifying the 1887 and 1889 Agreements likewise did not abrogate any water rights from the Tribe. For this Court to find that Congress took the Tribe's water rights it must find that Congress did so through "express declaration" in the 1891 Act. *Dion*, 476 U.S. at 738. At the very least, there must be concrete evidence that "Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Id.* at 739-40. No objector has provided any evidence to support

such a contention. Just the opposite, the evidence demonstrates that the sole purpose of the 1891 Act was to ratify the 1887 and 1889 Agreements, which in turn have been found to have ratified and confirmed "the **full extent of the Executive Order reservation** lying within the stated boundaries it ultimately confirmed . . . ." *Idaho II*, 533 U.S. at 280-81 (emphasis added). *See also*, Section III, *supra*.

3. Neither the 1894 Harrison Cession Nor the 1906 Coeur d'Alene Allotment Act Caused the Tribe to Lose Any Water Rights that Vested in 1873

Little need be said about the 1894 Harrison cession. *See* Coeur d'Alene Response Brief at 100 (discussing Harrison Cession). Suffice it to say, there is no evidence in the record that "Congress [by passing the 1894 Harrison cession], actually considered the conflict between its intended action [remove Harrison from the Reservation] on the one hand and Indian treaty [water] rights on the other, and chose to resolve that conflict by abrogating the treaty." *Dion*, 476 U.S. at 739-40.

The same analysis applies to the Coeur d'Alene Allotment Act of 1906: Like the Harrison cession, there is no evidence in the record that "Congress [by passing the Coeur d'Alene Allotment Act], actually considered the conflict between its intended action [to allot each tribal member 160 acres and make surplus available to non-Indians] on the one hand and Indian treaty [water] rights on the other, and chose to resolve that conflict by abrogating the treaty [water rights]." *Dion*, 476 U.S. at 739-40. Although the Tribe may no longer be able to access and use its consumptive water rights on lands it does not own, the Tribe claims no consumptive water rights on these lands.

The Allotment Act Did Not Cause the Tribe to Lose Instream Flow Water Rights

Nothing in the Coeur d'Alene Allotment Act would indicate Congress "actually considered" and "chose to . . . abrogate[e]" the Tribe's instream flow water rights by selling certain lands to non-

Indians." *Id. See also*, Coeur d'Alene Response Brief at 31-40 (discussion the effect of the Coeur d'Alene Allotment Act).

The State makes much of a single sentence from a footnote in *Adair* that "[w]here the Tribe transfers land without reserving the right to hunt and fish on it, there is no longer any basis for a hunting and fishing right." 723 F.2d at 1418, n. 31. When put in proper context, the Court's statement actually entirely rebuts the State's arguments and supports the Tribe's arguments for instream flows. In *Adair*, the United States was claiming an interest in the Tribe's non-consumptive water rights to support hunting and fishing. The Court rejected this argument, finding that

> [t]he hunting and fishing rights from which these water rights arise by necessary implication were reserved by the Tribe in the 1864 Treaty . . . . The hunting and fishing rights themselves belong to the Tribe and may not be transferred to a third party. Because the Klamath Tribe's treaty right to hunt and fish is not transferable, it follows that no subsequent transferee may acquire that right of use . . . .

Id. at 1418. The Court then dropped a footnote stating

> a forceful argument can be made that the Klamath's hunting and fishing water rights should not be treated differently from other reserved water rights, such as those for irrigation. Under this view, the Tribe's hunting and fishing rights would be transferable . . . . We decline to adopt this analogy, however, because even when the Tribe transfers the land to which the hunting and fishing water rights might be said to be appurtenant, it is the Tribe and its members, not some third party, that retains the right to hunt and fish and needs water to support that right.

Id. at 1418, n. 31. Only then did the Court make the unremarkable statement that "[w]here the Tribe transfers land without reserving the right to hunt and fish on it, there is no longer any basis for a hunting and fishing right." *Id.* This statement is inapplicable to the Coeur d'Alene Tribe because it says nothing about requiring "express" treaty hunting and fishing rights. As already thoroughly

demonstrated, the Tribe did reserve hunting and fishing rights on the Coeur d'Alene Reservation. *See* section V(B), *supra*.

What is remarkable is the application of the Court's analysis to the Tribe's argument that its non-consumptive water rights remain with the Tribe even if the land is transferred to a third-party. Although many lands on the Coeur d'Alene Reservation have passed out of Indian ownership, the water necessary to support that Tribe's hunting and fishing rights "belong to the Tribe and may be not be transferred to a third party." *Id. See also*, Coeur d'Alene Tribe's Response Brief, section II(A).[49]

These cases demonstrate two critical points for this Court's inquiry. First, even if the Tribe does not have an express treaty provision reserving hunting and fishing rights, the Tribe is nonetheless entitled to non-consumptive water rights for hunting and fishing if those practices were of "historical importance" to the Tribe and were "of economic and religious importance to them" *Adair*, 723 F.2d at 1409; *Walton*, 647 F.2d at 48. Second, these water rights survive the alienation of land because they "belong to the Tribe and may not be transferred to a third party." *Adair*, 723 F.2d at 1418.

If Any Lands Were Flooded in 1907 by the Post Falls Dam Those Lands Continued to be Held in Trust for the Tribe

The NIWRG continues to press its frivolous argument that the Tribe does not own some unknown amount of submerged lands within the Reservation because the Dam at Post Falls caused

[49] Further, the Court's analysis demonstrates the Tribe's argument that no water rights except its irrigation water rights are subject to a later priority date on reacquired lands. *See* Coeur d'Alene Response Brief at Section V(A). The Ninth Circuit expressly "decline[d] to adopt [the] analogy" that non-consumptive water rights should not be treated the same as "reserved water rights . . . for irrigation" because "it is the Tribe and its members, not some third party, that retains the right to hunt and fish and needs water to support that right." *Id.* This conclusively demonstrates that *Anderson* is only applicable to irrigation water rights, not the Tribe's non-consumptive water rights for hunting, fishing, and gathering purposes.

"additional lands [to] bec[o]me submerged [in 1907] . . . ." NIWRG Response at 13. Now, it claims that "[i]n 1906, the land office of Idaho opened lands within the Reservation that the State purchased from the Tribe to patent for private ownership." Notwithstanding the fact that only the United States, not the State, may purchase land from the Tribe, they base their argument upon a newspaper advertisement with a hand written date of Feb 12, 1906. *Id.* at 15 (citing Semanko Aff., Ex. F).

The problem with the argument is that the Coeur d'Alene Allotment Act didn't even occur until June 21, 1906. 34 Stat. 335; State of Idaho's Statement of Additional Facts at 19. The legal description of the Lands to be patented lists Ranges 5 and 6 of Township 49, which are not located within the Reservation. *See* 2d. Aff. Counsel, Ex. 10. Further, it mentions that the lands to be patented were "purchased from the Coeur d'Alene Indians some years ago." Semanko Aff., Ex. F. Notwithstanding the fact that the United States did not purchase lands pursuant to the Coeur d'Alene Allotment Act, any "purchase" would not have occurred until after June 21, 1906. It also mentions that "[t]hese townships were surveyed three years ago [1903]," but the survey of the reservation for allotment purposes didn't even begin until 1905. Hart 2012 Report at 283. Finally, it states that "as high as 28 possessory rights filed on four quarters . . . date from June 1894," a full twelve years before the Coeur d'Alene Allotment Act was passed by Congress. *Id.* To put it as mildly as possible, whether its intentional or the NIWRG simply failed to read its own evidence, the NIWRG is misleading this Court by submitting this as evidence that "the land office opened lands within the Reservation" in 1906.

The Reservation was not opened to homesteading until May 2, 1910, a full three years after the dam at Post Falls began holding back water in the summer. *Confederated Salish and Kootenai*

Tribes of Flathead Reservation, Montana v. Namen, 665 F.2d 951, 953 (9th Cir. 1982).[50] Accordingly, any uplands adjacent to Coeur d'Alene Lake within the Reservation that were flooded in 1907 continued to be held in trust for the Tribe. *See* Coeur d'Alene Tribe's Response Brief, s. III(B)(4), pp. 66-67 ("As NIWRG points out, 'land that later becomes submerged does not change ownership simply because it becomes submerged.' NIWRG Opening Brief at 10 (citing *Jefferis v. East Omaha Land Co.*, 134 U.S. 178 (1890)).").

In sum, no subsequent Congressional Action has acted to abrogate any reserved water rights that vested on November 8, 1873.

VII. THE STATE'S ARGUMENTS REGARDING THE EXTENT OF TRIBAL OWNERSHIP OF SUBMERGED LANDS IS NOTHING MORE THAN A BACK-DOOR ATTEMPT TO LITIGATE OWNERSHIP OF THE NORTHERN TWO-THIRDS OF THE LAKE IN STATE COURT

The Tribe has demonstrated its entitlement to a water right in Coeur d'Alene Lake. *See generally*, Coeur d'Alene Tribe Opening Brief. The Tribe has also demonstrated that, contrary to Idaho's argument, the 1889 Agreement demonstrates that the mutual intent of the United States and Coeur d'Alene Tribe was that it would retain water rights in the Lake. Coeur d'Alene Response Brief at 40-70. Those arguments need not be repeated here. Instead, the Tribe here addresses Idaho's continued insistence that this court make a finding regarding the ownership of the northern portion of Coeur d'Alene Lake.

---

[50] The State of Idaho pinpointed the date the reservation was opened to homesteaders as May 22, 1909, two years *after* the installation of the Post Falls Dam. State of Idaho's Statement of Additional Facts at 20, ¶ 57 (citing Hart 2015 Report at 289). However, the Ninth Circuit in *Namen* clarifies that the Proclamation was issued on May 22, 1909 but there was a delay in its implementation until May 2, 1910. Accordingly, it would appear that homesteaders could not take patents until after that date. Regardless of whether the Reservation was opened on May 22, 1909 or May 2, 1910, both dates are well after 1907.

Idaho is now arguing that "[t]he bisection of the Lake was *conclusively established* by [*Idaho II*]" and that the Tribe is *collaterally estopped* from arguing otherwise. Idaho Response Brief at 50.[51] However, as the Tribe has already pointed out, for collateral estoppel to apply

> 1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; 2) the issue decided in the prior litigation was identical to the issue presented in the present action; 3) the issue sought to be precluded was actually decided in the prior litigation; 4) there was a final judgment on the merits in the prior litigation; and 5) the party against whom the issue is asserted was a party or in privity with a party to the litigation

D.A.R., Inc. v. Sheffer, 134 Idaho 141, 144 (2000).[52]

---

[51] More broadly the State is arguing that since the Tribe has only quieted title to a portion of the submerged lands of Coeur d'Alene Lake the Tribe is not entitled to a water right to lake levels because those levels would transcend reservation boundaries. Idaho Opening Brief at 54; Idaho Response Brief at 49. The Tribe has already thoroughly rebuffed this argument. *See* Coeur d'Alene Tribe's Response Brief, s. III(B)(1)-(2). *See also, infra.* However, it is also worth pointing out that the State's argument against the federal "lake level" claim is actually an objection to the quantity claimed. Whether a water right for a lake level is the appropriate quantification method is an issue for the next phase of this adjudication. The only question presently before this Court is whether the Tribe is entitled to a water right in the Lake, not its quantity. Regardless of the ultimate quantity decreed, the Tribe is undoubtedly entitled to some water right in the Lake.

[52] The federal rule on collateral estoppel is similar to the Idaho rule. *See Robi v. Five Platters, Inc.*, 838 F.2d 318, 322 (9th Cir. 1988). The rule, as articulated by the Ninth Circuit,

> prevents relitigation of all "issues of fact or law that were actually litigated and necessarily decided" in a prior proceeding. "In both the offensive and defensive use situations the party against whom estoppel [issue preclusion] is asserted has litigated and lost in an earlier action." The issue must have been "actually decided" after a "full and fair opportunity" for litigation.

Id. Like Idaho law, the Ninth Circuit requires that "[t]he issue in the prior action must be identical to the issue for which preclusion is sought." *Id.* at 326.

The problem with Idaho's argument is that in *Idaho II* the United States only put at issue the submerged lands underlying navigable waters that were within the current reservation boundaries. 2d. Aff. Counsel, Ex. 6, p. 7-8 (Complaint *United States v. Idaho*). Indeed, in its complaint, the United States specifically limited its prayer for relief to a "judgment and decree . . . [q]uieting the title of the United States to the bed and banks of the approximate southern one-third of Coeur d'Alene Lake . . . [but outside Heyburn State park]." *Id.* at 7. As a result, title to the portion of Coeur d'Alene Lake outside the reservation is not an "issue decided in . . . prior litigation," nor was it an "issue actually decided," and there was never "a final judgment on the merits," regarding who owns the northern portion of the Lake. Most importantly, the Tribe was precluded from asserting its ownership in that case. *See* 2d. Aff. Counsel, Ex. 7, p. 8-11 (Memorandum Decision and Order Re. Tribe's Motion to Intervene and Counter-Claim, *United States v. Idaho*) (hereinafter "*Idaho v. United States* Decision on CDAT Motion to Intervene"). As a result, the Tribe was likewise precluded from putting on evidence or making its arguments that would demonstrate its ownership to that portion of the Lake.

As a matter of fact, the Tribe spent almost a decade attempting to litigate with Idaho (and certain state officials, including the Governor, the Attorney General, and the Director of IDWR) to quiet title "in the bed, banks, and waters of all navigable watercourses within the 1873 boundaries of the Coeur d'Alene Reservation . . . includ[ing] Lake Coeur d'Alene." *Coeur d'Alene Tribe v. Idaho*, 798 F.Supp. 1443, 1445 (D. Idaho 1992). Idaho categorically refused to engage in this litigation, choosing instead to hide behind sovereign immunity and claiming the "action [was] barred by the jurisdictional limitations imposed on the federal judiciary by the Eleventh Amendment to the United States Constitution." *Id.* The Court ultimately sided with the State. *Id.*

The Tribe appealed to the Ninth Circuit, which two years after the district court decision, affirmed the district court's dismissal of the suit against the State *per se* but reversed its dismissal of the Tribe's suit against state officials, citing the applicability of the *Ex parte Young* doctrine. *Coeur d'Alene Tribe v. Idaho*, 42 F.3d 1244, 1250-55 (9th Cir. 1994). Importantly, in so holding, the Ninth Circuit expressly found that "the Tribe could prove facts that would entitle it to the relief sought [ownership of the entire lake within 1873 boundary]." *Id.* at 1257.

The State appealed the Ninth Circuit's holding regarding the applicability of the *Ex parte Young* doctrine to the Supreme Court, which in 1997 ruled that the doctrine did not apply. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997) ("Idaho I"). It specifically referenced *Idaho II*, pointing out that "[a]fter issuance of the District Court's opinion the United States filed suit against the State . . . seeking to quiet title to approximately a third of the land covered in this suit." *Id.* at 266 (emphasis added). Ultimately, the Court reversed the Ninth Circuit. However, the Court was careful to make clear that

> Our recitation of the ties between the submerged lands and the State's own sovereignty, and of the severance and diminishment of state sovereignty were the declaratory and injunctive relief to be granted, is not in derogation of the Tribe's own claim. As the Tribe views the case, the lands are just as necessary, perhaps even more so, to its own dignity and ancient right. The question before us is not the merit of either party's claim, however, but the relation between the sovereign lands at issue and the immunity the State asserts.

Id. at 287. And so, the State fought all the way to the Supreme Court to prevent litigation of ownership of the northern portion of the Lake; the very thing it now asserts to this court that it owns as a matter of law and fact.

Then, in 1997, the United State brought suit against the State. However, it limited the scope of that suit "to the bed and banks of the approximate southern one-third of Coeur d'Alene Lake . . . [but outside Heyburn State Park]." 2d. Aff. Counsel, Ex. 6, p. 7 (Complaint *United States v. Idaho*). The Tribe was allowed to intervene in the case, but it was precluded from broadening the scope of the litigation to include the northern portion of the Lake because the State would once again not waive its sovereign immunity beyond the issues raised by the United States' suit. *Idaho v. United States* Decision on CDAT Motion to Intervene at 8. The Tribe argued that the State itself put the submerged lands of Heyburn State Park at issue in its counter-claim wherein it asserted that it was "entitled to a judgment . . . quieting its title to the beds and banks of those portions of Lake Coeur d'Alene and the St. Joe River located within Heyburn State Park." *Idaho II*, 210 F.3d at 1080. However, the district court rejected this argument. *See generally Idaho v. United States* Decision on CDAT Motion to Intervene. The Tribe appealed this to the Ninth Circuit but that Court likewise found that "[n]either the complaint nor the counterclaim put submerged lands within the Park at issue." *Id.*

This is the history of the Tribe's attempt to litigate ownership of the northern portion of Coeur d'Alene Lake in federal court. The Tribe argued in the federal district court, Ninth Circuit, and Supreme Court that title to the entire lake should be resolved. It argued again in federal district court and to the Ninth Circuit that *Idaho II* should include the submerged lands of Heyburn State Park. The State repeatedly and categorically refused to litigate the ownership of the northern portion of Coeur d'Alene Lake but now asserts to this Court that, not only has the issue has already been decided, but the Tribe is collaterally estopped from arguing otherwise. Idaho's argument is disingenuous, to say the least.

Now, that the State is in State Court, it suddenly is extremely eager to litigate this issue, an issue that this Court lacks jurisdiction to determine.[53] It goes to great lengths to cite every bit of dicta that it believes supports its twisted view of the facts from *Idaho II*. However, a careful reading of those cases reveals that the courts were finding that the evidence cited supported the argument that *at least* the southern portion of the Lake remained with the Tribe. In other words, the Courts were not specifically making a finding regarding ownership of submerged lands located outside of the Reservation but only those located within the Reservation. Further, all three courts were essentially citing to two pieces of evidence: General Simpson's statement that the Tribe "would still have the St. Joseph and the lower part of the lake,"[54] and the fact that the description of the cession drew a line across the lake. However, the Supreme Court also cites to other evidence that

> suggests the possibility that Congress intended to defeat the State's title to even more territory than the United States is claiming here . . . . Congress' actions in 1891 were consistent with an understanding that the State did not have title to the [Spokane] riverbeds conveyed to Post [which are located outside the present reservation boundary].

Idaho II, 533 U.S. at 280, n. 8 (emphasis added).

The point is that while the Court cited evidence that suggested the northern portion of the Lake was ceded by the Tribe, there is other evidence that suggests it was not. However, none of these dicta are dispositive because, despite the State's vehement assertion to the contrary, title to the northern portion of the Lake was not litigated or determined in *Idaho II*. Indeed, the Tribe was ready

---

[53] *See* Coeur d'Alene Tribe Response Brief at 41-2, n. 10.

[54] To which Chief Seltice responded "[t]hat is your idea about the boundary. . . . I do not like those boundaries; you are a chief and have directed your boundaries; now, if you ask us where we want to sell, we could talk." Aff. R. Hart, Ex. 4 (1889 Agreement Negotiation Transcript). To this, General Simpson responded "[t]hat is right and appropriate." *Id.*

to litigate that issue but the State was not. As a result, the Tribe was prevented from putting on its evidence, evidence the Ninth Circuit found "could prove facts that would entitle [the Tribe] to the relief sought [ownership of the entire lake within 1873 Reservation]." *Coeur d'Alene Tribe v. Idaho*, 42 F.3d at 1257. As a result, the Tribe respectfully requests—since the full historic record on this issue has never been developed—that this Court refrain from making any finding regarding this issue based upon the limited and skewed evidence presented.

Indeed, this Court need not make *any* determination regarding ownership of submerged lands underlying the northern portion of the Lake to determine the Tribe's entitlement to water rights in the portion that unquestionably is owned by the Tribe within current reservation boundaries. The Supreme Court has found that regardless of whether the United States owns *any* submerged lands underlying a navigable water body, "[w]e have no doubt about the power of the United States . . . to reserve water rights for its reservations and its property." *Arizona v. California*, 373 U.S. at 598. Indeed, the United States owned *no part* of the Colorado River at issue and yet still reserved 1,000,000 acre-feet from it for the benefit of the tribes, almost a seventh of the River's entire flow. *Id.* *See also*, Coeur d'Alene Tribe's Response Brief at 45-52. Therefore, the fact that the Tribe owns *any* submerged lands makes it argument for a water right all the more compelling.

The Tribe's claim to a water right in the Lake is not based solely upon its ownership of submerged lands but upon the fact that the historic record conclusively demonstrates that it was the mutual intent of both the United States and the Tribe that the Tribe would reserve at least a portion of the Lake—submerged land and overlying water. Importantly, a major premise of the Supreme Court's 1997 ruling in Idaho I was the link between ownership of submerged lands and ownership and control of the overlying water. *Idaho I*, 526 U.S. at 286-87. Specifically, it pointed out

> 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.
>
> Idaho views its interest in the submerged lands in similar terms. Idaho law provides: "Water being essential to the industrial prosperity of the state, and all agricultural development ... its control shall be in the state, which, in providing for its use, shall equally guard all the various interests involved. All the waters of the state, when flowing in their natural channels ... are declared to be the property of the state." Idaho Code § 32-101 (1990). Title to these public waters is held by the State of Idaho in its sovereign capacity for the purpose of ensuring that it is used for the public benefit. . . .
>
> Our recitation of the ties between the submerged lands and the State's . . . sovereignty . . . is not in derogation of the Tribe's own claim. As the Tribe views the case, the lands are just as necessary perhaps even more so, to its own dignity and ancient right.

Id. See also, Tarrant Regional Water Dist. v. Herrmann, 133 S.Ct. 2120, 2132 (2013) (resolving water rights dispute between Oklahoma and Texas, in part, upon the fact that "ownership of submerged lands, and the accompanying power to control navigation, fishing, and other public uses of water, 'is an essential attribute of sovereignty.'").

Despite the Supreme Court's express recognition that ownership of not only submerged lands but the water overlying those land is essential to the Tribe's sovereign "dignity and ancient right," the State would have this Court believe that the Tribe impliedly and silently gave up all of its water rights everywhere in the Lake because, according to the State, the Tribe sold just a portion of the Lake back to the United States. "This is certainly an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the nation for more." *Winans*, 198 U.S. at 380.

This exposes the fundamental flaw in the State's argument and the crux of the Tribe's argument regarding the Lake. Even if the Tribe had ceded the exclusive use of the water in the Lake

by selling some submerged lands—which the Tribe does not concede—the *only way* to guarantee the protection of what was left would be to include a water right for the Tribe in the Lake. It is simply inconceivable that the United States and the Tribe would have intended to "reduce the area of their occupation and g[a]ve up the waters which made it valuable or adequate . . . ." *Winters*, 207 U.S. at 576. Without water, the purpose of the reservation setting aside *at least* the portion of the Lake within reservation boundaries would be entirely defeated.

CONCLUSION

Despite the Objectors' best efforts to confuse the issues and convince this Court of its highly biased and revisionist version of both the law and applicable history in this case, resolution of this case is rather straightforward once the signal is separated from the noise. *Idaho II*—as found by the federal district court, Ninth Circuit, and the Supreme Court of the United States—is the path-making case. Application of the law and facts found in *Idaho II* to the fundamental cases regarding the *Winters* doctrine is the signal that drives the result in this case. The rest is simply noise.

For this reason, those reasons stated above, as well as the arguments made in the Tribe's and the United States' previous briefings, the Coeur d'Alene Tribe respectfully moves this Court for an order granting the *United States' and Coeur d'Alene Tribe's Joint Motion for Summary Judgment*, dated October 20, 2016.

Respectfully submitted this 20th day of March, 2017.

HOWARD FUNKE & ASSOCIATES, P.C.

Howard Funke

Howard Funke, Of the Firm
Attorney for the Coeur d'Alene Tribe

Dylan R. Hedden-Nicely, Of the Firm
Attorney for the Coeur d'Alene Tribe

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of March, 2017, a true and correct copy of the foregoing document was served upon the following individuals by placing the document in the United States Mail, postage prepaid, addressed as follows:

US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATURAL RESOURCES DIVISION
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

VANESSA WILLARD
US DEPARTMENT OF JUSTICE
999 18TH STREET
SOUTH TERRACE STE 370
DENVER CO 80202

CHRISTOPHER H MEYER
JEFFREY C FEREDAY
JEFFREY BOWER
MICHAEL P LAWRENCE
GIVENS PURSLEY LLP
PO BOX 2720
BOISE, ID 83701-2720

NORMAN M SEMANKO
SCOTT L CAMPBELL
MOFFAIT THOMAS BARRETT ROCK & FIELDS
PO BOX 829
BOISE, ID 83701-0829

MARIAH R DUNHAM
NANCY A. WOLFF
MORRIS & WOLFF, P.A.
722 MAIN AVE
ST MARIES, ID 83861

ALBERT P BARKER
BARKER ROSHOLT & SIMPSON LLP
PO BOX 2139
BOISE, ID 83701-2139

WILLIAM J SCHROEDER
KSB LITIGATION, PS
221 NORTH WALL, STE 210
SPOKANE, WA 99201

CLIVE STRONG
STEVEN W STRACK
IDAHO ATTORNEY GENERAL'S OFFICE
NATURAL RESOURCES DIVISION
PO BOX 83720
BOISE, ID 83720-0010

CHRIS M BROMLEY
CANDICE M MCHUGH
MCHUGH BROMLEY PLLC
380 S 4TH STREET STE 103
BOISE, ID 83702

DIRECTOR OF IDWR
IDWR DOCUMENT DEPOSITORY
PO BOX 83720
BOISE, ID 83720-0098

RATLIFF FAMILY LLC #1
13621 S HWY 95
COEUR D'ALENE, ID 83814

JOHN T MCFADDIN
20189 S EAGLE PEAK RD
CATALDO, ID 83810

RONALD D HEYN
828 WESTFORK EAGLE CREEK
WALLACE ID 83873

Dylan R. Hedden-Nicely