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No. 45382-2017

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

THE UNITED STATES OF AMERICA,

Appellant,

v.

STATE OF IDAHO, et al.,

Respondents.

REPLY BRIEF OF APPELLANT UNITED STATES OF AMERICA

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

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INTRODUCTION

When the Coeur d'Alene Reservation was established in 1873, the United States impliedly reserved and retained water rights sufficient to establish a homeland for the Coeur d'Alene Tribe then and into the future. In the present water rights adjudication, the United States claimed such federal water rights consistent with the purpose of the Reservation when created, mindful of changes in Reservation use since that time. The various water-rights claims reflect the dual nature of the Reservation's homeland purpose: to support continuation of the Tribe's traditional practices including hunting, fishing, gathering, and cultural activities; and to facilitate a move toward "modern" activities like agricultural, commercial, and industrial activities.

Objectors to these water rights claims—including the State of Idaho, the North Idaho Water Rights Group ("NIWRG"), and Hecla Limited (collectively, "Objectors")—seek to restrict the rights of use that are part of the overall reserved water right, arguing that certain traditional tribal activities and certain modern tribal activities are supposed "secondary" uses of the Reservation for which there is no reserved water right. Their arguments mistakenly presume that the Coeur d'Alene Reservation was established—and that water rights were thereby impliedly reserved—for only specific narrow purposes (e.g., to provide agricultural land to the Tribe) as opposed to the broad purpose of providing a tribal homeland. Our opening brief demonstrated that this cramped view of the Tribe's reserved water rights is incorrect.

But even if the Water Court correctly adopted this narrow understanding of Indian reserved rights, the record in this case amply demonstrates that the Coeur d'Alene Reservation was established for purposes that entail the reservation of water for purposes beyond agricultural, domestic, fishing, and hunting uses—for the gathering of roots and berries on the Reservation, for current and planned commercial and industrial activities on the Reservation, and for all uses of Lake Coeur d'Alene that the Supreme Court established were instrumental to the Tribe at the

time of the Reservation's creation. *See Idaho v. United States*, 533 U.S. 262 (2001) ("*Idaho II*").

The Water Court also erred when it ruled that the Tribe could not hold rights to maintain instream flows needed to protect its fishery if those flows were outside the boundary of the Reservation. Contrary to Objectors' defense of this ruling, neither the biological needs of the Tribe's fishery nor the associated reserved instream flow water rights are not constrained by political boundaries. The instream flows are validly tied to the Tribe's downstream on-Reservation use, not to any purported interest in or right to regulate upstream lands.

Finally, the Water Court erred when it determined that certain reserved water rights for in situ water use to maintain seeps, springs, and wetlands have a priority matching the date of reacquisition, as opposed to time-immemorial priority. These water rights on reacquired lands are not meaningfully different from the same rights on lands that were never transferred from federal ownership during the brief allotment era.

ARGUMENT

I. Under *Winters*, the United States' reservation of land for the Coeur d'Alene Tribe impliedly reserved all water rights necessary to fulfill its Reservation's purpose as the Tribe's permanent homeland.

There is no dispute among the parties that the federal reserved rights claimed here are governed by the reserved rights doctrine established by the U.S. Supreme Court in *Winters v. United States*, 207 U.S. 564 (1908). Objectors, however, misinterpret *Winters* and its progeny in determining the reserved right for the Coeur d'Alene Reservation.

Initially, Hecla wrongly argues that a claimed federal reservation of water must be "carefully balanced" against state law. Hecla Br. 16. To the contrary, federal reserved rights arise under and are wholly governed by *federal law*. *Cappaert v. United States*, 426 U.S. 128, 138–39 (1976); *see also infra* note 15. The needs that motivated the federal reservation, which predated Statehood, are not altered by state law, and the federal government "does not defer to state water

law with respect to reserved rights." *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1269 (9th Cir.), *cert. denied* 128 S. Ct. 468, 469 (2017). There is no state law component in assessing federal reserved water rights claims, and Hecla's "balancing" proposition has no legal support.

In *Winters*, the U.S. Supreme Court held that when the United States set aside an Indian reservation, it impliedly reserved sufficient water to fulfill the purposes of the reservation, with the priority date established as no later than the date of the reservation. *See* 207 U.S. at 576.[1] Determining what water rights have been reserved requires an inquiry into the purposes of the particular reservation as evidenced by the reservation-creating documents, the particular tribe's history, and the context of the reservation's establishment, including the many factors relevant to the negotiations between the government and the tribe leading to any agreement. *See generally Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981). Agreements between the federal government and a tribe "'must . . . be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.'" *City of Pocatello v. State*, 180 P.3d 1048, 1057 (Idaho 2008) (quoting *Washington v. Wash. State Comm'l Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979) ("*Fishing Vessel*")). For that reason, too, the State is wrong in asserting that the reservation of water under the *Winters* doctrine for a particular purpose requires that the purpose of a

[1] Hecla's additional suggestion that a federal reservation of water must be express (Hecla Br. 1, 20), is also in direct conflict with *Winters*, which was founded on the simple recognition that a reservation without water to make it serve as a tribe's "permanent home" would be "valueless," and a tribe could not be understood to give up its ancestral lands without necessary water rights. 207 U.S. at 565, 576. Just as *Winters* did not depend on "[state] water law," an "express reservation of water rights," or "legislative history . . . referring to water rights or the need for water rights" (Hecla Br. 1, 20), the implied federal reserved water rights claimed in this adjudication do not depend on state water law, an express reservation of water, or legislative history.

reservation's establishment have been "clearly expressed by Congress." State Br. 7.[2]

It has been long recognized that the fundamental purpose of an Indian reservation is to provide a home for Indian people. Tribes relinquished large portions of their ancestral lands for confinement to significantly smaller reservations through exchanges that must be interpreted to involve fair and adequate consideration. As stated in *Winters*, a tribe cannot be understood to "give up" its "command of the lands and waters" in exchange for a smaller piece of land unless that land can provide a living for the tribe. 207 U.S. at 576. A "livable" reservation requires sufficient water to provide for both present and future needs of a tribe. *Arizona v. California*, 373 U.S. 546, 599, 600 (1963) ("*Arizona I*"). And determining the quantum of water impliedly reserved in connection with any particular tribal reservation is answered by examination of the historical circumstances of the tribe and reservation-creating documents at issue.

Here, the Water Court properly recognized that "[t]here is no doubt that the United States intended to move the Coeur d'Alene people onto the lands reserved to be the reservation with the aim that those lands be their homeland," R.4319. But the Water Court failed to give proper effect to this determination by rejecting the "homeland" purpose as informing the determination of all reserved water rights claimed for the Tribe, as well as the quantification of those rights. The Objectors wrongly rely on *United States v. New Mexico*, 438 U.S. 696 (1978), in asserting that the Water Court properly limited the Tribes' rights to use of water for specific purposes (e.g.,

[2] Relatedly, while the State suggests that only "Congress" may express legitimate "primary purposes" of a reservation, it is well established that reservations established by executive order are equally valid as those established by other means. *See, e.g.*, *Spalding v. Chandler*, 160 U.S. 394, 403 (1896) ("When Indian reservations were created, either by treaty *or executive order*, the Indians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated." (emphasis added)); *Arizona v. California*, 373 U.S. 546, 598 (1963) (*Winters* doctrine of implied water rights applies to reservations established by executive order).

irrigated agriculture) that form a supposed "primary" purpose of the Reservation, while properly denying rights of use for supposed "secondary purposes" (e.g., industrial or commercial uses, plant gathering, and various other traditional activities) that allegedly were not reservation purposes at the time of establishment. That argument misrepresents *New Mexico*. That decision addressed implied water rights for a federal reservation of land as a national forest in which Congress expanded the scope of managing that forest long after it was established. The Supreme Court held that the later-added purposes were "secondary" and did not inform the nature and extent of the water right reserved when the forest was first created. 438 U.S. at 715. *New Mexico* has no proper application here, where there has been no post-establishment change to the Coeur d'Alene Reservation upon which to base any conceivable distinctions between primary and secondary purposes in determining what water rights were reserved or preserved when the reservation was established. Nothing in *New Mexico* prevents the Court from recognizing that the Coeur d'Alene Reservation was established to be a tribal "homeland" and from adjudicating specific rights of water use based on that purpose and on the presumption that uses associated with a permanent homeland necessarily are broad and subject to evolution.

Nor is the State correct (State Br. 4) that adjudicating the Tribe's reserved rights based on a permanent tribal "homeland" purpose would render the reserved right unlimited. The water reserved by establishment of the Coeur d'Alene Reservation is dependent upon actual traditional use and reasonably anticipated future use at the time the Reservation was established in 1873. The United States does not claim unlimited water rights, but rather claims specific water rights based on the Tribe's historical use of its ancestral territory and "modern" types of water use that could have been reasonably anticipated in 1873, as informed by actual evolving uses of the Reservation. *See In re General Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 35 P.3d 68, 77 (Ariz. 2001) ("*Gila V*"). As a practical matter, the claimed consumptive

use rights amount to merely one percent of the total outflow of the Coeur d'Alene-Spokane River Basin, belying Objectors' claimed fears of limitless tribal water appropriation. R.2675–76, ¶ 99.[3]

The State questions the Arizona Supreme Court's decision in *Gila V*, arguing that it rests on "infirm foundations" and "is inconsistent with this Court's precedents and that of most jurisdictions." State Br. 8. To the contrary, *Gila V* did nothing more in than apply the U.S. Supreme Court's approach in *Winters* and *Arizona I*, appropriately recognizing that the Indian reservations at issue were "created" to provide tribes with a "'permanent home and abiding place,' . . . that is, a 'livable' environment." 35 P.3d at 74 (citation omitted). Those decisions hardly present "infirm foundations"; rather, they represent the bedrock precedent necessarily applicable to the reserved water right claims presented here.[4] The State insists that *Gila V* inappropriately ignored historical evidence of intent, but in fact the court simply recognized that historical documents have limited utility in the context of an "implied" ("not express") right, particularly because documents tend to "focus only on the motives" of the federal government and not the motives of tribes. *Id.* at 75. While the State asserts discomfort with *Gila V*'s recognition of "flexibility" in determining the scope of reserved water rights (State Br. 9), flexibility is fully consistent with the premise of *Arizona I* that a reservation is intended to meet present *and future* tribal needs. 373 U.S. at 600; *see also Walton*, 647 F.2d at 47. Nor does the State offer a rebuttal to the Ninth Circuit's determination in *Agua Caliente* that the "general

[3] The State did not object to this Joint Statement of Fact. *See* R.3375.

[4] According to the State (Br. 4), the fact that *Winters* and *Arizona I* involved agricultural water rights claims suggests that claims to reserved water rights for other activities are invalid. That is incorrect: courts applying *Winters* and *Arizona I* have routinely determined that water uses impliedly reserved upon the establishment of Indian reservations include traditional water uses and other uses consistent with a reservation's "homeland" purpose. *See United States v. Adair*, 723 F.2d 1394, 1408–11 (9th Cir. 1983); *Walton*, 647 F.2d at 47–48; *Agua Caliente*, 849 F.3d 1262.

purpose" of an Indian reservation is "to create a home for the Tribe," and that "water was necessarily implicated in that purpose." 849 F.3d at 1270 (citing *Walton*, 647 F.2d at 47).

Establishment of the Coeur d'Alene Reservation involved vigorous efforts by the Tribe to retain land rights, coupled with resistance to restrictions on tribal access to valuable lands and waters that had been historically occupied and enjoyed. *Idaho II*, 533 U.S. at 266, 276. The Tribe ultimately relinquished "vast acreage" in what is now Idaho in exchange for the promise of a permanent, protected home on its Reservation. *Id.* at 262. The Tribe did not "give up all this," *Winters*, 207 U.S. at 576, to be left with a home without water, as that would be no home at all. The United States' water rights claims on behalf of the Tribe properly represent rights impliedly reserved for the Tribe as part of this bargain that the Water Court failed to recognize in its cramped decision.[5]

II. A water right for maintenance of the level of Lake Coeur d'Alene is necessary to ensure the fulfillment of all aspects of the purpose identified in *Idaho II*.

The United States claimed a water right for the Tribe based on the Tribe's use of Lake Coeur d'Alene for a number of traditional activities recognized by the U.S. Supreme Court in *Idaho II*. The Water Court nonetheless rejected the claim for maintenance of the Lake's level for all uses other than hunting and fishing. As detailed in the United States' opening brief (at 18–22), the Water Court's ruling is in conflict with *Idaho II*'s recognition that the United States created a reservation for the Coeur d'Alene Tribe that would facilitate *all* of the Tribe's traditional uses of the Lake. Just as the Supreme Court determined that the importance of these traditional activities helped overcome the presumption that the Lake's submerged lands would pass to the State of

[5] As noted in the United States' opening brief (at 18 n. 8), to the extent the Court disagrees that the establishment of the Tribe's reservation has a single "homeland" purpose and instead has multiple individual purposes, the Court should construe the United States' argument herein as supporting the individual purposes that the Water Court rejected.

Idaho, the importance of these traditional activities also demonstrates an implied right to maintain a water level in the Lake. Failing to address the United States' argument that *Idaho II* answers the question of the Lake's central role in the creation of the Coeur d'Alene Reservation, the State misses the mark by asserting a series of misplaced practical and legal arguments.[6]

The State's principle theory is that the Tribe lost whatever reserved water right it held in Lake Coeur d'Alene when it agreed to a reduced-size reservation in 1889. But the State can identify no cession of water rights in the Lake, because no such cession has occurred. The State's argument ultimately confuses two separate concepts, namely, ownership of submerged lands and ownership of a water right. These are distinct legal rights that may be held simultaneously (as here); however, a water right does not necessarily depend on ownership of submerged lands, nor does ownership of submerged lands depend on a water right. Indeed, linking water rights to ownership of lands along or under a waterway is antithetical to the very concept of Idaho's prior appropriation regime, which is premised on use of water and not on ownership of lands. *Hutchinson v. Watson Slough Ditch Co.*, 101 P. 1059, 1062 (Idaho 1909) ("A riparian proprietor in the state of Idaho has no right in or claim to the waters of a stream flowing by or through his lands that he can successfully assert as being prior or superior to the rights and claims of one who has appropriated or diverted the water of the stream and is applying it to a beneficial use."). Whether the Tribe agreed to cede a portion of the Lake's submerged lands has no bearing on whether the Tribe ceded its right to maintain water in the Lake. The State identifies no historical evidence that the Tribe understood its 1889 cession of certain lands to leave it with no right to maintain the level of the portion of the Lake within its Reservation, and without explicit abandonment of the right the Tribe continues to hold the right. *Menominee Tribe of Indians v.*

[6] Only the State's answering brief addresses the Lake claim directly.

United States, 391 U.S. 404 (1968) (federal government's termination of Indians' recognized rights must be explicit).

The State further contends that the Tribe has no right to maintain water levels in the Lake because the entire Lake does not fall within the current boundaries of the Coeur d'Alene Reservation. Arguing without citation to any authority, the State baldly asserts (State Br. 18) that when "a water body has split ownership, one party cannot claim the unilateral right to maintain a specific lake elevation, because such right, if recognized, necessarily imposes a lake elevation upon all owners of the water body." In addition to lacking legal support, the State's argument also suffers from inconsistent application in the real world: while the State argues here that one sovereign (i.e., the Tribe) cannot hold a lake-level right that would affect another sovereign's right (i.e., the State), the state claims its own and nearly-identical water right for the maintenance of a level of Lake Coeur d'Alene "for all the inhabitants of the state," which "imposes" a lake elevation on the Tribe, the co-owner of the water body. *See* State Water Right 95-2067, available at https://go.usa.gov/xnF78; Idaho Code § 67-4304; *Idaho II*, 533 U.S. 262 (holding that the United States holds submerged lands underlying a portion of Lake Coeur d'Alene in trust for the Coeur d'Alene Tribe).

The State mistakenly relies (State Br. 19) on *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982), for its assertion that there must be an "apportionment" of water rights between competing sovereign interests on a single water body. *Colorado* has no application here, as it concerned *consumptive* (i.e., diversionary) water rights, not an in-situ *non-consumptive* water right like the federal reserved right for maintenance of the Lake's level. The factors bearing on the consumptive right claim at issue in *Colorado* have no proper place in considering a claim for a non-consumptive right. *See*, 459 U.S. at 183 (listing factors to be considered, including "the practical effect of wasteful uses"). The State contends (State Br. 19) that "the principles that

underlie such doctrine" should be applied to the United States' claim for maintenance of lake level. But the principle of equitable apportionment of consumptive uses is based on the notion that sovereigns are competing for diversionary water rights. As noted above, the Lake-level claim does not involve any diversionary water right, and there is no competition between sovereigns. Rather, there is *mutual benefit* to sovereigns: the Tribe benefits from the State's currently-recognized right to hold water in the Lake, and the State will likewise benefit from the Tribe's senior right to hold water in the Lake.[7] Where a grant of the Tribe's claim has no adverse consequence on the State's own non-consumptive claim (because there are no competing claims of sovereigns to differing diversions of a finite water resource), equitable apportionment plays no role in consideration of the Tribe's in-situ Lake level claim.

For this same reason, the State's argument about the effect of the Tribe's decision to cede part of the Lake must also fails. The State insists that the Tribe and United States demonstrated that maintenance of the Lake's level was not critical to the Tribe when they reached an agreement whereby the Tribe ceded ownership of a portion of the Lake. State Br. 18. The State's argument suggests that the Tribe therefore lacked interest in maintaining its right and that would necessarily lead to termination of the right. The State is mistaken on both legal and factual grounds. First as a matter of law, tribal rights may only be terminated through explicit action, not by implication. *See Menominee Tribe*, 391 U.S. 404. Even if cession of a portion of the lakebed *did* demonstrate the (alleged) non-importance of the Lake to the Tribe, the Tribe would still not lose its federal right for Lake-level maintenance unless explicitly ceded or released. IUn any

[7] Critically, the fact that the Tribe potentially benefits from the State's right (and currently benefits from the Post Falls dam that holds Lake levels above the right claimed for the Tribe), does not mean that the Tribe has no need for its own water right or that the United States does not hold such a right for the Tribe. *See* NIWRG Br. 11. As discussed at note 8 below, the Tribe may not properly be deprived of its own property right to water in the Lake and instead be forced to rely on rights and licenses of other parties who may not elect to enforce those rights.

event, as a matter of fact, that the Tribe *retained* ownership of at least a portion of the Lake demonstrates its continuing importance to the Tribe. Indeed, *Idaho II* established that Congress sought a consensual transfer of some northern lands initially set aside for the Tribe, but the federal government did not renegotiate the purpose of the remaining Reservation lands, including supporting subsistence uses such a fishing, hunting, and gathering—all uses that depended on continued tribal control of Reservation waterways. 533 U.S. at 280–81.

Also misplaced is the State's further argument that the construction of a dam at Post Falls demonstrates that the United States does not hold a water right for the Tribe in Lake Coeur d'Alene, particularly a right to ensure that there is adequate outflow from the Lake to prevent it from becoming stagnant. State Br. 20. This argument rests on its faulty premise that the dam is somehow in conflict with the Tribe's water right. To the contrary, the presence of the Post Falls dam currently ensures, as a practical matter, that the Tribe's water right is satisfied. The United States has not requested that the Lake water right be "deferred" on this basis (State Br. 21); rather, the United States has asked that the right be recognized now through this adjudication so that if and when the Post Falls dam is removed or no longer operating, the Tribe will be able to rely on the recognized, enforceable water right reserved for it.[8]

[8] Relatedly, the current practical reality that the Tribe's right is met by present Lake inflows combined with the operation of the hydroelectric facility at Post Falls has no bearing on the existence of the Tribe's federal water right. *See* NIWRG Br. 12. The FERC license for operation of the dam is of limited duration, and there is no guarantee that it will be renewed. *See Avista Corp.*, 127 FERC 61,265, 62,187 (2009) (describing terms of license). This water adjudication, on the other hand, is meant to establish *permanent* rights. This adjudication is the Coeur d'Alene Tribe's one opportunity to have its rights recognized and quantified under Idaho law. *See* Idaho Code § 42-1420. It is thus critical that the adjudication establish the federal right to minimum Lake and inflow levels that will take effect if and when operations at Post Falls cease. Of course, the current level maintained by the dam has no bearing on whether a right to maintain the Lake's level was necessary when the Reservation was established. *See also* United States Answering Br. in No. 45384, at 27.

Finally, the State argues without legal support that the Water Court correctly rejected the United States' claim for maintenance of an outflow from Lake Coeur d'Alene because the specified point of measurement of such flow is outside the Reservation's boundary. State Br. 19. The United States specified the outflow location—which is below the Post Falls dam—simply because that is a convenient and reasonable location at which to measure such flows using a flow gauge that is already in existence. The reserved water right, however, is independent of where it is measured. Moreover, and contrary to the State's argument (State Br. 19–20), the Tribe's conveyance of the downstream dam site in 1891 did not cede its water right in the Lake. *See infra* pp. 19–23 (regarding the severance of land ownership and water rights, discussed in the context of off-Reservation reserved rights to provide fish habitat). Such rights may only be lost through explicit action by Congress, and nothing in the 1891 Act purports to cede or transfer water rights. *See* Act of Mar. 3, 1891, ch. 543, 26 Stat. 989, 1091 (available at R.2191).

The Water Court erred when it failed to fully credit the Tribe's diverse and important uses of the Lake Coeur d'Alene, as detailed in the decisions of the U.S. Supreme Court and other federal courts in *Idaho II*. There is no proper basis for limiting the Tribe's Lake-level right to serving only certain aspects of the Reservation's homeland purpose. None of Objectors' other arguments—such as that the Tribe lost its Lake-level rights by implication—fare any better.

III. The Water Court erred by failing to recognize a tribal water right for plant gathering, which was an essential aspect of the Tribe's way of life when the Reservation was established.

The United States has also claimed non-consumptive rights for the Tribe—particularly for the maintenance of seeps, springs, and wetlands—based on the Tribe's traditional suitable plant-gathering locations. As demonstrated in the United States' opening brief (at 23–26), the Water Court's rejection of this purpose failed to credit the centrality of plant gathering to the Tribe's traditional way of life and is at odds with the Supreme Court's recognition in *Idaho II* of

this important activity. The State's response once again ignores *Idaho II* and fails to recognize the historical evidence supporting these reserved water rights claims.

The State again fails to appreciate the federal reserved rights doctrine in arguing that the Tribe cannot have a water right for plant gathering absent an express right to the same. State Br. 15. For one thing, a tribe has the right to gather on its own reservation. *See Menominee Tribe*, 391 U.S. at 404, 406 (treaty setting aside Indian reservation impliedly included gathering rights); *United States v. Dion*, 476 U.S. 734, 738 (1986) (as a general rule, tribes enjoy the exclusive right to subsistence activities on lands reserved to them). The Tribe's reserved water right also does not depend on an express plant-gathering right. While the Tribe's implied water rights are based on the purpose of the 1873 Reservation, accomplishing that purpose (or those purposes) through recognition of a reserved water right may be implied and need not be express. For example, *Arizona I*'s recognition of water rights for the Colorado River Indian Reservation did not depend on any explicit statement in the reservation-creating order that the reservation was for tribal farming. But the historical circumstances demonstrated that the United States intended to facilitate agriculture, and so the Supreme Court found an implied reservation of water to accomplish that purpose through irrigation. 373 U.S. at 599–600. Here, the historical evidence amply demonstrates that the Coeur d'Alene Reservation was established in part to preserve traditional tribal plant-gathering sites. An implied right to an in situ use of water at such sites is necessarily part of such purpose.

The State makes no effort to challenge the federal caselaw recognizing the centrality of plant gathering to the Tribe at the time of the Reservation's establishment. *See Idaho II*, 533 U.S. at 265; *United States v. Idaho*, 95 F. Supp. 2d 1094, 1100–01, 1104 (D. Idaho 1998). Nor does it adequately credit the ample evidence of the Tribe's reliance on this subsistence activity, which one expert called "the final pillar" (along with hunting and fishing), of the Tribe's subsistence

cycle. R.659; *see generally* United States' Br. as Appellant 24–25. The federal government recognized the importance of this activity in the lead-up to its initial effort to create a reservation for the Coeur d'Alene, as demonstrated by a report identifying what the government believed was an appropriate reservation location based in part on the availability of "berries & roots." R.696. The State dismisses this evidence because the report was prepared in support of the executive order of 1867 that set aside a small reservation for the Tribe, rather than the 1873 executive order that definitively established the Reservation in existence today. State Br. 16. But the State conveniently neglects to note that despite the United States' apparent effort to satisfy the Tribe by creating a reservation that satisfied the need for "berries & roots," the Tribe's needs were not met by this small proposed reservation, and the Tribe accordingly insisted on a larger land base containing more of its ancestral lands.

Indeed, in contrast to its current protestations in this Court, the State did not object before the Water Court to the statement by the United States and Tribe of the facts regarding gathering. That unrebutted statement explains that—

- because the 1867 reservation "excluded their principal fisheries, village sites, and waterways, as well as some of their agricultural lands, the 1867 reservation threatened to undermine tribal members' existence and lifeways," which included "a continued reliance on . . . gathering[] and other traditional subsistence activities";
- the United States' agreement to expand the reservation in 1873 "reflected tribal members' desire to incorporate within the reservation may of the . . . gathering grounds upon which they had relied for centuries"; and
- these facts demonstrate that "the purposes for which the federal government established the reservation in 1873 . . . reflected the [Tribe's] ongoing reliance on their centuries-old traditional subsistence activities, including . . . berry picking[] and root gathering."

R.2663–64 ¶ 71 (citations to expert reports omitted).[9] So while the State attempts to downplay the importance of gathering to the Coeur d'Alene Tribe, the record demonstrates not only the opposite—that gathering, like hunting and fishing, was of central importance to the Tribe at the time its reservation was established in 1873—but also that the State itself did not contest the importance of gathering to the Tribe in the Water Court. The expanded Reservation was established in part to ensure that the Tribe had the ability to continue this activity. Accordingly, under *Winters*, a tribal water right was impliedly reserved for this purpose.

IV. A tribal water right for commercial and industrial activities was reserved to provide the Tribe with flexible avenues for economic self-sufficiency into the future.

The United States claimed water rights based on the Tribe's commercial and industrial activities on the Reservation, predicated on the understanding: (1) that the establishment of the Reservation impliedly reserved waters necessary to provide a permanent homeland; (2) that the permanent-homeland purpose necessarily includes evolving water use over time; and (3) that current or currently-anticipated uses help inform the rights and quantities of use originally reserved. Because industrial and commercial uses were not historical or actual uses of the Coeur d'Alene Reservation in 1873, the Water Court viewed these uses as "secondary" uses that were not relevant to defining the overall reserved right. That view, and the State's supporting argument, improperly limits a Tribe's water rights to only those activities actually present at the time of reservation establishment. That limitation cannot be squared with the federal reserved rights doctrine.

The State argues that *Winters* does not permit "modern" activities besides agriculture to serve as a potential basis for defining reserved water rights for a Tribe. State Br. 12. Initially, the State's current position directly conflicts with its argument to the Water Court. There, the State

[9] The State's sole objection to the cited ¶ 71 has no relevance to gathering. *See* R.3374.

correctly observed that *Winters* "agreed that water could be reserved for both 'agriculture and the arts of civilization.'" R.2504 (State's Memo. in Support of Mot. for S.J.). *Winters* did not have occasion to further address whether the Fort Belknap tribes in fact possessed a water right for the arts of civilization because the claim was not there presented, but that does not mean that such a right can never exist. After all, *Winters* was not a general stream adjudication, and the U.S. Supreme Court did not purport to determine the full extent and nature of water rights that accompany that reservation. That is, once the Court determined that the Fort Belknap tribes held a right for irrigated agriculture, the Court had no reason to consider—and did not consider—questions about other reserved rights. 207 U.S. at 576–77. In fact, the full extent of federal reserved water rights for the Fort Belknap Reservation are the subject of a current state court adjudication in Montana. The United States as trustee has claimed reserved water rights—including from the Milk River—on behalf of that reservation, including rights of use in addition to agriculture. *See* R.4221 (an example of Statement of Claim Form filed by the United States on behalf of the Fort Belknap Reservation). Finally, even if *Winters* had been a general stream adjudication and had determined that the Ft. Belknap Tribes possessed no water rights for "the arts of civilization," that conclusion would be linked to the purpose and the circumstances of *that reservation*, which are not necessarily applicable to any other reservation.

Tellingly, the State cites no authority that precludes a court from looking to examining current actual or anticipated industrial and commercial uses in order to adjudicate rights impliedly reserved for a "permanent homeland." And applicable case law allows such examination. *See Gila V*, 35 P.3d at 74, 80–81 The State mistakenly relies (Br. at 13) on the Special Master's report in *Arizona v. California.* But the Special Master there merely noted that the United States had not sought water for industrial and commercial uses—"only for enough water to satisfy future agricultural and related uses." R.2235. That statement demonstrates only

that the *Arizona I* court was not presented with a claim to a reserved water right for industrial and commercial activities. And more generally, the Special Master's report cited, and the ultimate Supreme Court decision reflects, the fact that reservations of land are accomplished with a definite view to future uses in addition to current uses. *See* R.2232 (reservation is to "establish areas that could be used in the indefinite future to satisfy the needs of Indian tribes . . . as those needs might develop"); *Arizona I*, 373 U.S. at 600.

The other cases cited by the State, like *Washington Department of Ecology v. Yakima Reservation Irrigation District*, 850 P.2d 1306 (Wash. 1993), could not preclude the water rights claimed for the Coeur d'Alene Tribe because they address the histories of those particular tribes and the negotiations and documents leading to the establishment of those reservations. Moreover, the broad principles applicable to the determination of tribal water rights supports the view that courts may look to post-reservation commercial and industrial uses or anticipated uses in defining federal reserved water rights for tribes, recognizing that reservations of land and water "looked to the needs of the Indians in the future." *United States v. Ahtanum Irr. Dist*, 236 F.2d 321, 327 (9th Cir. 1956); *see also United States v. Finch*, 548 F.2d 822, 832 (9th Cir. 1977) (rights reserved to Tribes need not be tied to traditional uses); *Montana ex rel. Greely v. Confederated Salish & Kootenai Tribes*, 712 P.2d 754, 767, 768 (Mont. 1985) (reservation includes "water for future needs and changes in use" and serves "the federal goal of Indian self sufficiency"); *In re Crow Water Compact*, 364 P.3d 584, 589 (Mont. 2015) ("[U]nder *Winters* and its progeny the tribe has a right to water for development of industrial interests.").[10]

The State further imagines that the United States would have sought to achieve

[10] The State argues (Br. at 14) that *In re Crow Water Compact* should be discounted because the court was approving a water rights compact rather than reviewing a water rights adjudication, but that context does not diminish the Montana Supreme Court's recognition of the principles in *Winters* and its progeny.

"civilization" of the Coeur d'Alene Tribe through agriculture alone, and not through commercial or industrial activities. State Br. 12. As before, the State presents a new argument to this Court that conflicts with the State's own prior argument in the Water Court that "One Purpose of the Reservation was to Promote Commercial and Industrial Activities." R.2504. The State's argument before the Water Court pointed to the 1891 Act (which the State argues in its related appeal, No. 45381, established a new reservation that superseded the 1873 Reservation). But the activities and factors identified in the 1891 Act (which called for a "saw and grist mill," for training of tribal members to be "millers, engineers, and mechanics," and for promotion of "the progress, comfort, improvement, education, and civilization" of the Tribe) were essentially the same as those underlying the 1873 executive order in promoting commerce and industry. For instance, the 1873 stated that the government would provide, among other things, wagons, plows, mowers, a grain cradler, and a grist mill; "1 grist and 1 saw miller and 1 blacksmith" who would "teach the Indians to perform such labor"; and funds for "schools, and for such articles of comfort and for the civilization" of the Coeur d'Alene. *See* R.2642, ¶ 30; R.1866.[11] Indeed, the U.S. Supreme Court has expressly recognized that a reservation established "to encourage, assist and protect" a tribe in its efforts to "advance to the ways of civilized life," as was the Coeur d'Alene Reservation, necessarily included "opportunit[ies] for industrial and commercial development." *Alaska Pac. Fisheries Co. v. United States*, 248 U.S. 78, 89 (1918).

In short, while courts have often considered agricultural uses in defining federal reserved water rights for tribes, nothing in the reserved-rights doctrine requires that reserved rights be

[11] Highlighting the State's change in position between the Water Court and this Court, the State now relies on a 1889 document in support of a new argument that "the 'civilization' of tribes was to be achieved not through commercial or industrial activities, but through farming" alone. State Br. 12. But before the Water Court, the State made no such argument, and it instead insisted that water for industrial and commercial uses exclude only *certain types* of industrial and commercial development. R.2506–07.

limited to agricultural uses or amounts reasonably required for such uses. Where actual and anticipated tribal uses have evolved after the establishment of an Indian reservation but before the adjudication of reserved water rights, courts can and should look to current and currently-anticipated uses as a reasonable measure of rights impliedly reserved for a "permanent homeland." *See Gila V*, 35 P.3d at 74, 80–81. This is especially true in light of the general rule that water-rights holders are free to change the place of use or nature of use of a water right over time, as long as the change is without injury to other users. *See Beecher v. Cassia Creek Irr. Co.*, 154 P.2d 507, 509 (Idaho 1944). Here, Objectors do not contend that recognizing rights of use for industrial and commercial activities will result in a greater consumptive use than impliedly reserved in 1873 to meet the Reservation's permanent homeland purpose.[12] Instead, they insist that rights for industrial and commercial use must be categorically disallowed and that the Water Court may not consider reasonable industrial and commercial uses as a measure of water impliedly reserved as necessary to provide a permanent tribal homeland. There is no viable authority supporting either proposition.

V. The claimed reserved instream flow rights serve a critical aspect of the Reservation's purpose and are not dependent on tribal ownership or control of the specific lands over which those waters flow.

The United States claimed reserved rights to maintain in-stream flows both inside and outside of the Coeur d'Alene Reservation's boundaries. Regardless of location, these flows share a single common basis: they provide upstream habitat for adfluvial fish that the Tribe takes and has always taken from Lake Coeur d'Alene and its tributaries where the Tribe has fishing rights. These reserved water rights do not depend on Tribal upstream land ownership, nor do they provide the Tribe a right of access to upstream areas. Instead, the entire basis of the claimed

[12] And recall that the quantum of reserved water rights will be determined in the next phase of this adjudication.

reserved rights is to provide the necessary upstream habitat for the survival of these fish populations and to ensure sufficient fish return to satisfy the Tribe's on-Reservation fishing right. The Water Court agreed that the United States may hold on-Reservation instream rights, but it rejected these instream flow claims to the extent they are outside the Reservation based on its interpretation of the purpose of the Reservation as not including an intent to provide instream flows in ceded areas. But the Water Court's approach addresses the wrong question: the court recognized that maintaining the Tribe's access to its fishery was part of the Reservation's purpose, and the proper question is whether water is necessary to accomplish that use. The record in this case establishes that the fishery without question depends on the availability of upstream habitat for the adfluvial fish. A right for upstream flows is thus implied by the reservation of downstream land for the Tribe.

The State's and other Objectors' responses to the United States' opening brief similarly rest on misconceptions on the source and scope of the claimed water rights. For instance, the State and NIWRG argue that the off-Reservation instream flow claims are impermissible because they must be tied to a reservation of land and cannot exist independent of the reservation of land. State Br. 23; NIWRG Br. 13. But these instream flow claims *are* tied to a reservation of land—the land within the present Coeur d'Alene Reservation on which the Tribe accesses its fishery. It is beyond dispute that the Tribe bargained for an enlarged Reservation to ensure that it was able to continue fishing. *Idaho II*, 533 U.S. at 265–66. A reservation of water rights to facilitate that activity is implied from the reservation of land for which the Tribe successfully bargained. The upstream waters claimed are not independent of this reservation; they are inherently tied to it. *See* United States' Br. as Appellant 34 (describing biological basis of the upstream flow claims); *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032, 1033–35 (9th Cir. 1985) (recognizing the need for sufficient off-reservation water to support the spawning

portion of the salmon's lifecycle).[13] The State argues that the United States is not seeking "to enjoin off-reservation water users 'to serve on-reservation uses of water'" (which the State concedes is proper), but instead is claiming water rights "to preserve off-reservation instream habitat" (which the States deems improper). State Br. 24. But the State posits an imaginary distinction. The reserved right preserves instream habitat *to serve on-reservation uses* by potentially enjoining other off-reservation water users. The whole point of preserving the instream flows is to ensure that adfluvial fish that the Tribe takes *on the Reservation* have adequate water to spawn upstream. In this way, and contrary to the State's argument (State Br. 25), these water rights are appurtenant to Reservation lands: the upstream waters are tied to the Reservation through use and through hydrological connection to the Lake. *See* United States' Br. as Appellant 34–37.

The State nonetheless suggests that more is required. State Br. 23 (citing, e.g., *Ahtanum Irrigation District*, 236 F.2d at 325). The cited case presented the question whether a reservation bounded on one side by a creek also impliedly included the reservation of water to be diverted for irrigation. The court did state that the reservation's boundary is deemed by implication to extend to the middle of the creek, as a side note "of no significance." 236 F.2d at 325. But the court's analysis of whether that tribe was entitled to an implied water right rested on *Winters*' core question: whether the tribe would have given up its aboriginal lands to be confined on a reservation without such a water right. *Id.* at 325–26; *see also Conrad Inv. Co. v. United States*, 161 F. 829, 832 (9th Cir. 1908) (applying *Winters* and concluding that "the policy of the

[13] While *Kittitas* is not a water adjudication case, as the State correctly notes (State Br. 26), it is cited for the proposition that courts have credited just the type of fish-lifecycle evidence that the United States and Tribe have provided in this case in support of the off-Reservation instream flow rights. In the subsequent adjudication of rights, the state court recognized that "[f]ish life cannot be maintained without a place for fish to spawn" and so recognized a right to water in "an amount necessary to maintain fish life in the Yakima River." R.2308.

government to reserve whatever water . . . may be reasonably necessary, not only for present uses, but for future requirements," is clear). In any event, the Ninth Circuit recently clarified in *Katie John v. United States*, 720 F.3d 1214, 1230 (9th Cir. 2013), that off-reservation waters may be tied to reserved lands where there is a "relationship between reserved federal land and the use of the water."

For similar reasons, Hecla and NIWRG miss the mark in arguing that the United States may hold instream flow rights only in the same location in which the Tribe has fishing rights. Hecla Br. 28; NIWRG Br. 19. The existence of instream flow rights is not based on a tribal right to fish at those specific off-Reservation locations, and recognizing instream flow rights outside the Reservation will not also confer upon the Tribe a right to fish in those upstream locations.[14] The State improperly relies on *Western Shoshone National Council v. Molini*, 951 F.2d 200, 203 (9th Cir. 1991); *United States v. Washington*, 18 F. Supp. 3d 1172, 1201 (W.D. Wash. 1991); and *Menominee Indian Tribe of Wisconsin v. Thompson*, 161 F.3d 449, 461 (7th Cir. 1998). But none of these cases concerns water rights, and the United States' instream flow claims here are not premised on the notion that tribal hunting and fishing rights persist on lands that are outside the current Reservation boundaries. *See* State Br. 31. The State is mistaken as well in arguing that the Tribe's property interest in fish ceases once the fish leave tribal property. State Br. 28. These reserved instream flow rights are not premised on a property interest in fish, nor on a claimed right to protect and regulate wildlife outside of tribal property; they are premised only on the Tribe's right to take fish *on the Reservation*, an aboriginal right that was protected through the creation of the Reservation in 1873. The fulfillment of that right depends on the availability

[14] Reliance on the Nez Perce Tribe case is inapt for this reason, as well as for the additional reason that it considered only whether that tribe's right to fish "in common with the citizens of the territory" outside its reservation also implied a reserved water right. R.848, 852.

of upstream waters necessary for the fish populations to survive. No more is needed to recognize an implied reservation of water. The United States' claim based on this implied reservation of water is not meaningfully different from the United States' other reserved-rights claims.

Relatedly, Objectors' arguments belie a confusion of two separate factors—ownership of water rights, and ownership of lands (including submerged lands). In a prior appropriation system like Idaho's, ownership of submerged lands does not grant a right to use water, and vice versa. The practical effect of a prior appropriation regime is that a senior appropriator without waterfront property may have a right to divert water to benefit its landlocked property while its riverfront neighbor may have a water right so junior that it is unable to divert any water at all. This extreme example simply demonstrates the severance of land ownership and water rights: a right to the use of water is not necessarily held by the same entity as holds the land across which that water flows. For this reason the State is incorrect in arguing that the cession of lands—including waterways—by the Tribe through an 1889 agreement necessarily affected water rights as well. State Br. 28. This distinction explains why, even where the Tribe accepted the offer of a permanent homeland on a reservation in exchange for relinquishing its title to its broader aboriginal *lands*, that agreement did not also mean that the Tribe accepted the premise that it would have no rights with respect to *water* outside the Reservation. This distinction also explains why cited like *United States v. Santa Fe Pacific Railroad Company*, 314 U.S. 339, 357–58 (1941), cited in State Br. 27, are inapposite. That case simply represents a premise not at issue here that where a tribe agrees to be confined on a reservation, it releases its rights to lands outside the reservation. *Idaho v. Andrus*, 720 F.2d 1461, 1464 (9th Cir. 1983), is similarly unhelpful to Objectors: as Hecla acknowledges immediately after citing the case in support of its argument that the Tribe does not have off-Reservation water rights, neither that case, nor *Idaho II*, "addressed water rights for the Reservation." Hecla Br. 11.

The State mistakenly relies on *Idaho II* for the proposition that the Tribe ceded its water rights, stating that the Supreme Court "understood the Tribe's cession to include not only land, but waters." State Br. 32. As the State must be aware, *Idaho II* concerned ownership of submerged lands (and, as part of the inquiry, the purpose of the Reservation) but did not present the question of off-Reservation water rights. Consequently, the Supreme Court certainly did not reach the "exact conclusion" the State urges here: that the cessation of "land" also necessarily is a cessation of water rights. State Br. 32. Instead, *Idaho II* held that the Tribe's historic use of Lake Coeur d'Alene and related waters was so instrumental to its way of life that the Tribe overcame the presumption that submerged lands within its Reservation would pass to the State of Idaho upon its admission to the Union. 533 U.S. at 273–74. *Idaho II* did not consider and did not hold that when the Tribe agreed to cede "land," it also silently ceded water rights that continue to serve its Reservation. *Cf. id.* at 278 (no evidence that Congress acted to "pull a fast one" on the Tribe by silently depriving Tribe of submerged lands under Lake Coeur d'Alene). *See also Menominee Tribe*, 391 U.S. 404 (federal government's termination of Indians' recognized rights must be explicit).

The State and Hecla fare no better in arguing that when the Tribe ceded a portion of its Reservation by agreement in 1889, those lands returned to the public domain, thereby demonstrating federal policy to prioritize mineral development (Hecla) or homesteading and private appropriation (State). State Br. 33–34; Hecla Br. 32. While it is true that ceded lands were made available for homesteading and mineral development, it is not also true that junior water rights associated with these post-cession uses trump the senior reserved rights for the Tribe. The instream rights claimed here have a time-immemorial priority date, recognizing that the Tribe's use of these waters predated settlement by Europeans and early Americans. That this priority date is senior to all other water rights is not a reason to reject these claims; it is simply a

fact of the American West that tribes' traditional use of water came first in time, and the priority of rights tied to that use is a legal result of Idaho's prior appropriation regime, which provides that first-in-time is also first-in-right. *See Clear Springs Foods, Inc v. Spackman*, 252 P.3d 71, 96 (Idaho 2011); *United States v. Adair*, 723 F.2d 1394, 1412–14 (9th Cir. 1983) (describing general principles underlying the recognition of a time-immemorial priority date).

Hecla also asserts several arguments joined by no other Objectors. Hecla suggests that, under *Potlatch Corp. v. United States*, 12 P.3d 1260, 1264 (Idaho 2000), the Tribe cannot have a right to maintain instream flows because such a right is only available if, without it, the Reservation would not be "fit for habitation." Hecla 20–21. But that consideration is only part of the *Winters* inquiry, as *Potlatch* itself acknowledges: that inquiry also requires the court to assess what was the "consideration for the agreement if the tribe gave up land and did not receive the benefit of water to make the land they retained habitable." *Potlatch*, 12 P.3d at 1264. Viewed in this light, and given the ample record evidence that the Tribe's fishery necessarily depends on the availability of upstream flows for spawning, it is clear that the Tribe would not have agreed to cede upstream flow rights that would undermine the retention of Lake Coeur d'Alene that the Tribe worked hard to secure. Put another way, when the Reservation was created, all parties—and most certainly the Tribe—would have understood that part of what would make the Reservation habitable was the availability of fish in the Lake; absent adequate spawning habitat for the fish, the Tribe cannot ensure that its Reservation does, in fact, remain fit for its use.

Hecla relies on *United States v. State*, 23 P.3d 117 (Idaho 2001) ("*Deer Flat*"), for the proposition that the reservation of upstream waters cannot be recognized simply because fish "might be attracted" to those waters. Hecla Br. 22. But Hecla's reliance is misplaced, as *Deer Flat* concerned the federal government's reservation of islands in the Snake River to create sanctuaries for migrating birds to protect them from hunting. 23 P.3d at 125. This Court held that

because these sanctuaries—as defined by the Migratory Bird Conservation Act—would continue to exist even if there were no longer enough water in the Snake River to maintain these areas as islands, the United States' purpose in creating the reservations did not include a reservation of water as well. *Id.* at 126. This non-Indian case involves a narrowly-defined reservation of land for a use that the Court determined does not require water; it has no bearing on whether a reservation that will be "held forever as Indian land," R.2665, R.1874, includes an implied water right for a Tribe's continued ability to fish—an activity that unquestionably *does* require water.

Finally, Hecla argues that *United States v. Winans*, 198 U.S. 371, 381 (1905), does not support the recognition of off-Reservation instream flow rights here, suggesting that such rights must be expressly reserved. Hecla Br. 27. This argument turns *Winans* on its head: the case directs that interpretation of an agreement to confine a tribe to a reservation is guided by the principle that such a reservation "was not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted. 198 U.S. at 381; *see also Pocatello*, 180 P.3d 1057. In *Winans*, the fishing rights were expressly enumerated, but the Court also found an *implied* tribal right to "such easements as enable the [fishing] right to be exercised." 198 U.S. at 384. The implied water rights claimed here need not be express. Indeed, in *Winters*, the treaty at issue made no mention of water, yet the Supreme Court found a senior water right for Indians, even to the detriment of subsequent non-Indian appropriators. 207 U.S. at 568–69.[15]

[15] Relatedly, Hecla's complaint that the instream flow claims would prevent it from appropriating any water (Hecla Br. 8), is not a factor in determining the reserved rights available to the Tribe, as there is no balancing test for the adjudication of federal water rights (or, for that matter, under a prior appropriation system generally). *See, e.g.*, *In re All Rights to Use Water in Big Horn River System*, 753 P.2d 76, 94 (Wyo. 1988) (holding that the question of effects on other users "does not apply to the question of intent to reserve water"); *Wash. Dep't of Ecology*, 850 P.2d at 1317 ("a court is not to balance the competing interests of Indian and non-Indian water users to reach an 'equitable apportionment' "); *Colville Confed. Tribes v. Walton*, 752 F.2d 397, 405 (9th Cir. 1985) ("Where reserved rights are properly implied, they arise without regard to

In short, Objectors do not dispute the biological basis of the upstream flow rights to support the tribe's Lake Coeur d'Alene fishery, and their legal objections largely rest on a misunderstanding of the basis of the claims and a misapplication of law. Objectors, like the Water Court, err by failing to recognize that because one of the key tribal activities underlying creation of the Coeur d'Alene Reservation—i.e., fishing—depends on water, water is reserved to accomplish that activity, regardless of the location of the instream flows required.

VI. The Tribe's rights to maintain seeps, springs, and wetlands were never "lost" through nonuse and maintain their time-immemorial priority date.

The United States has claimed a time-immemorial priority date for all non-consumptive water rights that serve traditional tribal rights, including hunting, fishing, and gathering. Some of those rights are for the maintenance of seeps, springs, and wetlands. These waters provide habitat for animals and plants hunted and gathered by the Tribe, much as it has done throughout its history. Certain of these rights are located on lands that left tribal and federal ownership early in the 20th century under the United States' allotment policy. The Water Court ruled these rights were lost to the Tribe because non-Indian landowners were not able to hold and maintain these rights, which are available only to tribal members; where these lands were reacquired by Tribe or tribal members, these non-consumptive rights may hold a date-of-reacquisition priority date, but the original priority date is lost. As the United States explained in its opening brief (at 38–42), this conclusion was not required by any law, and the Court could better effectuate the purpose of the federal reserved rights doctrine by recognizing the seniority of these non-consumptive rights.

The State argues that these non-consumptive rights cannot have a time-immemorial

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equities that may favor competing water users."); *Cappaert*, 426 U.S. at 138–39 & n.4 (holding that there is no "balancing test" in determining an implied reservation of water). The fact that a junior water right holder's diversion may be limited by enforcement of a senior water right holder's rights is simply a fact of life in Idaho's prior appropriation regime. *See, e.g.*, *Moe v. Harger*, 77 P. 645 (Idaho 1904).

priority date because that ultimate senior priority must be based on "uninterrupted use and occupation of land and water." State Br. 39. The State does not dispute that the Tribe's non-consumptive use of these waters was uninterrupted at the time of the establishment of the Coeur d'Alene Reservation. State Br. 39. Instead, it insists that the allotment policy and allotment of subject lands broke the chain and leaves the Tribe without a time-immemorial date for seeps, springs, and wetlands on reacquired lands.

But the broad principles in *Adair*, upon which the State relies, support the original priority dates here. *Adair* held that the Klamath Tribe's non-consumptive rights for hunting and fishing persisted even through the allotment of that reservation. 723 F.2d at 1398, 1412. The same should be true here. Aboriginal rights like hunting, fishing, and gathering, are collectively-held rights that benefit the Tribe and the Reservation as a whole. These non-consumptive rights cannot be held by non-Indians, and so there was no other user to "interrupt" the Tribe's exclusive use. Instead, between allotment and reacquisition, there was a period during which the rights went dormant—unused (and unable to be used) by the Tribe or anyone else. But nonuse does not equal loss for tribal water rights. *Walton*, 647 F.2d at 51. Also, this lapse in the Tribe's use was not a significant break in the Tribe's undisputed use of these waters since long before non-Indian settlement of this area. Although particular seeps, springs, and wetlands on particular lands may have left tribal control, in no case did the lands on which the United States has claimed these waters leave the Coeur d'Alene Reservation. Now that these features have returned to tribal control, they once again contribute to the Reservation's purpose of providing a tribal homeland.[16]

[16] That the United States did not claim rights to seeps, springs, and wetlands outside of tribal lands within the Reservation was a pragmatic choice and does not demonstrate anything about the legal basis for the rights that the United States *has* claimed. *See* State Br. 40.

The State argues that allowing dormant non-consumptive rights to regain an enforceable time-immemorial priority date upon reacquisition is unfair to intervening non-Indian owners. Br. 39–40. But alleged unfairness to more junior users is not a factor in determining the priority of tribal water rights. *See supra* note 15. Moreover, *United States v. Anderson*, 736 F.2d 1358, 1363 (9th Cir. 1984), upon which the State relies, concerned only priority for *consumptive* (not non-consumptive) tribal water rights, and the State fails to respond the United States' arguments why *Anderson* should be limited to the consumptive-right context. *See* United States' Br. as Appellant 40–41.

In short, maintenance of a time-immemorial priority date for these non-consumptive uses best allows the Reservation to serve its purpose, consistent with Congress's stated policy in ending the period of allotment and homesteading: "[t]o conserve and develop Indian lands and resources." Indian Reorganization Act of 1934, 48 Stat. at 984.

VII. Hecla's arguments for reversal of some aspects of the Water Court's decision should be stricken, as Hecla did not pursue its own separate appeal.

In its answering brief, Hecla presents lines of argument that are not responsive to the United States' appeal and that are properly available only in an affirmative appeal by Hecla. Namely, Hecla argues that no water right should have been recognized for hunting and fishing (Hecla Br. 29–30), or for agriculture (Hecla Br. 23–24), and that *Winters* rights can have a priority date no earlier than the date of reservation (Hecla Br. 19). These arguments should be stricken because they are not responsive to the opening briefs of the United States (or the Tribe), and are instead arguments that aspects of the Water Court's decision that were favorable to the United States and the Tribe should be reversed. Hecla did not elect to appeal that decision and therefore may not make affirmative arguments for reversal in an answering brief: "an appellee who does not cross-appeal may not 'attack the decree with a view either to enlarging his own

rights thereunder or of lessening the rights of his adversary.'" *Jennings v. Stephens*, 135 S.Ct. 793, 798 (2015) (quoting *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924)); *see also State v. Fisher*, 93 P.3d 696, 703 (Idaho 2004) ("if the respondent seeks affirmative relief of a judgement, order, or decree, then a cross-appeal is required rather than presenting the issue as an additional issue on appeal.").

To the extent the Court nonetheless addresses the merits of these improper arguments by Hecla, the United States respectfully directs the Court to its answering brief in NIWRG's appeal, which raises similar arguments regarding hunting, fishing, and agricultural rights. *See* United States' Answering Br. in No. 45384, at 26–34. As to Hecla's argument regarding the availability of a time-immemorial priority date, its entire argument rests on a case about the reservation of a national forest, *see Avondale Irrigation District v. North Idaho Properties, Inc.*, 577 P.2d 9 (Idaho 1978), which has no time-immemorial basis (unlike the traditional subsistence uses of an Indian tribe). By contrast, tribes' traditional rights are entitled to a time-immemorial priority date, because aboriginal rights are "not created by" an agreement between a tribe and the federal government; rather, such an agreement "confirmed the continued existence of these rights." *Adair*, 723 F.2d at 1414 (citing *Fishing Vessel*, 443 U.S. at 678–81); *Winans*, 198 U.S. at 381.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Water Court insofar as it (1) rejected the United States' water claims not directly tied to hunting, fishing, domestic, and agricultural uses; (2) rejected its claims for instream flow outside Reservation lands; and (3) imposed an improper priority date on Reservation lands that have been reacquired by the Tribe.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May, 2018, I caused a true and correct copy of the foregoing brief to be served as follows:

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