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In re CSRBA (Coeur d'Alene) Hedden-Nicely

2-26-2018

IDSC USA Opening Brief

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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.

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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STATEMENT OF THE CASE

A. Nature of the Case

This appeal arises from consolidated subcases that are part of the broader Coeur d'Alene-Spokane River basin general stream adjudication. The United States, as trustee for the Coeur d'Alene Tribe ("Tribe"), filed 353 claims to federal reserved water rights for the Tribe to fulfill the purposes of the Coeur d'Alene Reservation. The State of Idaho and others objected. The District Court of the Fifth Judicial District ("Water Court") consolidated the claims related to the Reservation (consolidated subcase No. 91-7755) and bifurcated the proceedings. In a May 3, 2017 decision, the district court addressed the nature of water rights held in trust for the Tribe, including priority dates. The court left the quantification of rights for a later phase of litigation.

The United States claimed water rights on behalf of the Tribe in two general categories: (1) rights to divert water for consumptive use in irrigation, domestic, commercial, and industrial applications; and (2) rights to maintain instream flows, lake levels, seeps, springs, and wetlands for the continuation of traditional tribal practices like hunting, fishing, plant gathering, recreation, and cultural activities. Both categories of water rights are essential to fulfilling the Coeur d'Alene Reservation's general purpose: to serve as a permanent homeland for members of the Coeur d'Alene Tribe.

These categories serve diverse purposes, but even the full quantity of water claimed has a limited scope. Consumptive claims are tied only to lands owned by the United States and held in trust for the Tribe or for an allottee or owned in fee by the Tribe, and such claims amount to less than one percent of the total outflow of the Coeur d'Alene-Spokane River Basin. Domestic usage claims are tied to the population of the Reservation. And agricultural claims have been tied to the well-established practicably-irrigable acreage standard.

In its May 3, 3017, decision, the Water Court held that the United States established the

Coeur d'Alene Reservation for the "primary purpose" of enabling tribal hunting, fishing, domestic, and agricultural activities. The Water Court determined that the United States did not reserve water for other traditional Tribal practices or for commercial or industrial uses—and that those uses cannot be considered in quantifying the overall reserved right—because those uses are "secondary" to the purposes of the reservation. This cramped interpretation of the federal reserved right for Coeur d'Alene Reservation is contrary to decisions of the United States Supreme Court and of various state supreme courts. Those decisions demonstrate that when the United States established reservations to serve as tribal homelands, the United States impliedly reserved water to support both traditional practices and future needs. They further demonstrate that water required for commercial and industrial uses reasonably may be considered in determining rights of use and in quantifying the water rights reserved for Indian reservations.

The Water Court also incorrectly rejected claims for off-reservation instream flows required to protect on-reservation fisheries. It cannot be seriously disputed—and the Water Court correctly found—that the United States established the Reservation in part to protect tribal fisheries and fishing rights. Off-reservation stream flows necessary to protect the fish are not different from off-reservation stream flows required to protect on-reservation water uses. Finally, the Water Court erred in holding that non-consumptive water rights appurtenant to reservation lands that were granted to private parties via allotment and homesteading (and then reacquired for the Tribe) lost their time immemorial priority. Under federal law, these reserved water rights appurtenant to lands held in trust for Indians are properly accorded a time-immemorial priority, notwithstanding interim ownership and state-law rules that might have applied during that time.

B. Course of Proceedings

On March 23, 2006, the Idaho Legislature approved initiation of the Northern Idaho Adjudication, a general stream adjudication for the determination of surface and ground water

rights in the Coeur d'Alene-Spokane River basin. Idaho Code § 42-1406B. The United States is a party to the adjudication under the McCarran Amendment, 43 U.S.C. § 666. The first basin to be adjudicated by the Water Court is the Coeur d'Alene-Spokane River drainage, which includes the Coeur d'Alene Indian Reservation. On November 12, 2008, the Water Court issued a *Commencement Order for the Coeur d'Alene-Spokane River Basin General Adjudication* setting forth a process for filing of claims. On January 30, 2014, the United States filed 353 claims to federal reserved water rights for the Tribe to fulfill the purpose of the Reservation. *See* R.8 (United States' Cover Letter for Tribal Claims).[1] The Tribe entered an appearance on its own behalf and joined in the claims. *See* R.4. On February 17, 2015, the court issued an order consolidating all federal claims for water on the Reservation into one subcase and bifurcating litigation of that subcase into issues of entitlement and quantification. R.461–62. The Water Court has thus far considered—and this appeal involves—only issues of entitlement and of the priority date to be assigned to different categories of water claims.

On motions for summary judgment, the United States argued that the Coeur d'Alene Reservation was established in 1873 to create and maintain a permanent homeland for the Coeur d'Alene Tribe. It argued that accomplishing this homeland purpose requires reserved water rights that serve both traditional and modern uses, including rights for domestic, commercial, municipal, and industrial uses; irrigated agriculture; instream flows for fish habitat; maintenance of water levels in Coeur d'Alene Lake; and maintenance of wetlands, springs, and seeps. And the United States argued that the water rights serving traditional subsistence uses (fishing, hunting, gathering, and domestic) have a time-immemorial priority date, and modern uses (agriculture and

[1] Citations to the Clerk's Record on Appeal prepared jointly for this and the related appeals regarding the Tribal claims (Idaho Supreme Court Nos. 45381, 45383, and 45384) are designated as "R.#."

commercial/industrial) have a date-of-Reservation priority date. *See* R.2540–90; R.3511–3599; R.4062–101; R.4356–63; R.4405–21.

After extensive briefing and argument, the Water Court (Judge Eric J. Wildman) issued its ruling on entitlement on May 3, 2017. R.4310–33. The court rejected the United States' contention that, when establishing the Reservation, the United States impliedly reserved all water rights necessary to provide a homeland for the Tribe. Instead, the court held that United States impliedly reserved only those water rights needed for what the court deemed to be the specific "primary purposes" of the Reservation, namely, agriculture, domestic use, hunting, and fishing. R.4317–23. The court therefore denied claims for rights to use water for commercial, industrial, and plant gathering; for maintenance of Lake Coeur d'Alene levels (for purposes other than fishing and hunting); and for other uses that it decided were "secondary purposes" of the Reservation. R.4323–24. The court also rejected claims for the maintenance of instream flows outside the Reservation boundaries for the protection of on-Reservation fisheries. R.4324–26. The court recognized a time-immemorial priority date for hunting and fishing uses and held that a date-of-reservation priority (which it determined to be 1873) applied to domestic and agricultural water claims. R.4326–27. It applied a date-of-reacquisition priority for consumptive claims for reservation lands reacquired by the Tribe following a period of private ownership due to allotment and homestead grants. R.4327–28.

The United States and the Tribe jointly moved for reconsideration on two issues: first, the apparent accidental dismissal of certain *on*-reservation instream flow claims for fishing purposes; and second, rejection of plant gathering (along with fishing and hunting) as a primary purpose of the Reservation. R.4356–63. The State and other objectors likewise sought reconsideration or clarification on the priority date assigned to non-consumptive uses attached to reacquired lands. On July 26, 2017, the court granted the motion of the United States and the Tribe to the extent

that they sought to allow the fishery-supporting on-reservation instream flow claims to continue to the quantification phase. R.4481–82. But the Water Court again rejected plant gathering as one of the primary purposes of the Reservation, and it ruled that a date-of-reacquisition priority date would apply to water rights on all reacquired lands, including for non-consumptive uses on former allotments and homesteaded lands. R.4474; R.4480.

These decisions are now the subject of four appeals before this Court. *See* No. 45381 (appeal by State of Idaho); No. 45383 (appeal by Coeur d'Alene Tribe); No. 45384 (appeal by North Idaho Water Rights Alliance, et al.). These appeals have a consolidated record on appeal, *see* R.1–2, but briefing of the appeals is proceeding separately.

C. Statement of Facts

The U.S. Supreme Court detailed the history of the Coeur d'Alene Tribe and establishment of its Reservation in *Idaho v. United States,* 533 U.S. 262 (2001) ("*Idaho II*"), which held that the United States holds submerged lands within the Coeur d'Alene Reservation in trust for the benefit of the Tribe. The Coeur d'Alene Tribe's aboriginal territory included more than 3.5 million acres in what is now northern Idaho and northeastern Washington, including Lake Coeur d'Alene, the St. Joe River, and surrounding areas. *Id.* at 265. As the Court explained: "Tribal members traditionally used the lake and its related waterways for food, fiber, transportation, recreation, and cultural activities. The Tribe depended on submerged lands for everything from water potatoes harvested from the lake to fish weirs and traps anchored in riverbeds and banks." *Id.* (citations and footnote omitted). The United States acquired title to this area under an 1846 treaty with Great Britain. *Id.* Then, as American immigration into the Tribe's territory became an increasing issue, President Johnson in 1867 issued an Executive Order setting aside "a reservation of comparatively modest size." *Id.* The Tribe was apparently unaware of this Order, however, and in 1871 it petitioned the Government to set aside a reservation. *Id.* at

265–66. “The Tribe found the 1867 boundaries unsatisfactory, due in part to their failure to make adequate provision for fishing and other uses of important waterways.” *Id.* at 266. Accordingly, when the Tribe again petitioned the Commissioner of Indian Affairs for an adequate reservation, “it insisted on a reservation that included key river valleys because ‘we are not as yet quite up to living on farming’ and ‘for a while yet we need have some hunting and fishing.’ ” *Id.* After further negotiations, the Tribe agreed in 1873 to relinquish all claims to its aboriginal lands outside the bounds of a larger reservation; in exchange, the United States would “set apart and secure” “for the exclusive use of the Coeur d’Alene Indians, and to protect . . . from settlement or occupancy by other persons.” *Id.* (quoting 1873 agreement). The reservation boundaries described in the agreement included part of the St. Joe River and nearly all of Lake Coeur d’Alene. *Id.*[2] The 1873 agreement was by its terms not binding without congressional approval, but later that year “President Grant issued an Executive Order directing that the reservation specified in the agreement be ‘withdrawn from sale and set apart as a reservation for the Coeur d’Alene Indians.’ ” *Id.* at 266 (quoting Exec. Order of Nov. 8, 1873, *reprinted in* 1 C. Kapler, *Indian Affairs: Laws and Treaties* 837 (1904)); *see also* R.1868.

As of 1885, Congress still had neither ratified the 1873 agreement nor compensated the Tribe, so the Tribe again petitioned for “a proper treaty” and compensation. *Idaho II*, 533 U.S. at 267; *see also* R.1869–72. After further negotiations, the Tribe agreed in 1887 to cede “all right, title, and claim” to land outside their present reservation. *Idaho II*, 533 U.S. at 267; R.1873–77. Again, Congress did not immediately ratify this agreement. Instead, in 1889, the United States and Tribe negotiated a new agreement under which the Tribe would cede the northern portion of its reservation in exchange for $500,000. *Idaho II*, 533 U.S. at 269–70; R.1882–84. Congress

[2] The full text of the 1873 agreement may be found in various places in the record, including R.1865–67 and R.4201–03.

ratified the 1887 and 1889 agreements in 1890. *Idaho II*, 533 U.S. at 270.

The Reservation boundaries have remained largely constant since that time, but control of Reservation lands has evolved, most substantially as a result of the 1906 Indian Appropriations Act, ch. 3504, 34 Stat. 325, 335–36 (June 21, 1906), which allowed allotment of the Coeur d'Alene Reservation. Under that law, and over vigorous and near-universal objection by the Tribe, *see* R.1750–51, each Indian on the Coeur d'Alene Reservation received an allotment of 160 acres; surplus lands—those not allotted or reserved for common Tribal purposes—were open to settlement by non-Indians. 34 Stat. at 335–37. The result of this policy was that non-Indian holdings of allotments on the Reservation soon *far* exceeded Indian holdings, due both to non-Indian homesteading and to the loss of Indian allotment ownership due to sale, forfeiture, or loss in mortgage sale. *See* R.2244–50. The federal government reversed course on the Indian allotment policy in the Indian Reorganization Act of 1934, Pub. L. No. 73-383, 48 Stat. 984. As for the Coeur d'Alene Tribe, the result was eventual transfer back to the Tribe of only minimal remaining surplus lands (i.e., lands that had not yet been homesteaded following the 1906 allotment Act). R.3101, 3105; R.799–802. Over the last few decades, the Tribe has endeavored to reacquire lands alienated from Tribal control during allotment. *See* R.3108–10.

In this water rights adjudication case, the United States and Tribe retained historians who prepared reports on the history of the Coeur d'Alene Tribe, particularly with respect to the circumstances surrounding the creation of the Reservation. *See* R.2627–28 (United States and Coeur d'Alene Tribe's Joint Statement of Facts, summarizing expert reports submitted in this case). These expert reports thoroughly document the Tribe's historical reliance on waterways for fishing, hunting, gathering, trade, culture, and general survival from time immemorial through (and beyond) Reservation creation; the Tribe's initiation of agriculture on the Reservation due to the federal government's intent to promote that activity; and the Tribe's demand for a reservation

with waterways. *See generally* R.2632–72. Similarly, experts documented Tribal resistance to federal allotment policy and the Tribe's continued commitment to fighting for its water resources. R.2671–76. And an expert explained the biological attributes of the fish species that are the focus of the claims for instream flows to protect fish habitat, and why maintenance of fish habitat that happens to be outside the Reservation boundaries is critical to effectuating the fishing purpose of the Reservation. R.2676–78.

The United States' water right claims on behalf of the Tribe fall into several categories, all of which further the Reservation's role as a permanent homeland for the Coeur d'Alene Tribe. The United States claimed non-consumptive water rights to support the Tribe's hunting, fishing, gathering, cultural practices, transportation, recreation, and related uses. These claims are for the maintenance of certain flows or levels in Lake Coeur d'Alene and its associated waterways and for seeps, springs, and wetlands on Reservation lands. These in-situ water rights allow for the Tribe's continued traditional activities on Reservation waters, which require protecting the upstream habitat upon which the Tribe's fishery depends. The claimed consumptive water rights would entitle the Tribe to divert water for domestic, agricultural, municipal, commercial, and industrial uses, which serve the Reservation's homeland purpose by supporting basic domestic needs and by aiding in the Tribe's continued economic development and self-sufficiency.

In weighing the United States' entitlement to water for the Coeur d'Alene Tribe, the Water Court rejected the argument that the Reservation's acknowledged "homeland" purpose may be the basis for a reserved water right. Instead, the Water Court sought to identify particular uses of water that it deemed so essential to the Reservation that only they supported reserved water rights for the Tribe. Those uses, the court found, were only hunting, fishing, agriculture, and domestic uses; only those uses may now be considered in the next phase of the adjudication when the court determines the quantity of water reserved for the Tribe. Accordingly, the Water

Court held that the Tribe is entitled to zero water for cultural practices, commercial or industrial activities, plant gathering, transportation, or any other use not specifically approved. And although it did not question the dependence of the Tribe's on-Reservation fisheries on upstream flows for spawning, the court denied any right to those flows if they happen to be needed outside the Reservation boundaries. Finally, while the Water Court properly recognized that water rights tied to traditional Tribal water uses hold a time-immemorial priority date, it undermined this holding by excepting any such rights to maintain water for seeps, springs, and wetlands on Reservation lands that were alienated from Tribal control through allotment or homesteading.

ISSUES PRESENTED

The issues presented in this appeal are:

(1) whether the Water Court erred in holding that the reserved water right for the Coeur d'Alene Reservation is limited to water needed for specified purposes that the Water Court deemed "primary," as opposed to all water reasonably necessary to provide a permanent homeland for the Tribe (Section I.A);

(2) whether the permanent homeland purpose of the Reservation encompasses the Tribe's traditional activities recognized by the Supreme Court in *Idaho II*, as well as commercial and industrial activities required to achieve self-sufficiency, enabling these other uses to be considered when defining and quantifying the Reservation's water rights (Section I.B–D);

(3) whether claims for instream flows outside of Reservation boundaries are properly included as part of the Reservation's water rights because they are necessary for protecting the on-Reservation fishery (Section II); and

(4) whether non-consumptive reserved water rights appurtenant to reacquired reservation lands hold a time-immemorial priority date, notwithstanding the period of interim private ownership due to allotment or homestead grants (Section III).

STANDARD OF REVIEW

In an appeal from an order granting summary judgment, this Court "employs the same standard of review as the district court." *Pocatello v. State*, 180 P.3d 1048, 1051 (Idaho 2008). Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." *Id.* (quoting Idaho R. Civ. P. 56(c)). This court exercises "free review" over issues of law. *Id.*

ARGUMENT

I. Establishment of the Coeur d'Alene Reservation included the implied reservation of water to provide a permanent homeland for the Tribe.

Over a century ago, the United States Supreme Court held that when the United States sets aside an Indian reservation, it impliedly reserves sufficient water to fulfill the purposes of the reservation, with the priority date established as of the date of the reservation. *Winters v. United States*, 207 U.S. 564 (1908). Indian reserved rights to water thus differ significantly from the appropriative water rights that are typical of western states: they are not based on actual diversion and beneficial use of water but instead are implied from the reservation of land, and they are measured by the amount of water needed to accomplish the purposes of the reservation. Critically, because these rights are implied, they need not be made explicit at any time during negotiations between the Tribe and the United States, nor need they be expressly indicated in any document formalizing the reservation. *See United States v. Adair*, 723 F.2d 1397, 1409 (9th Cir. 1983); *In re Gen. Adjud. of All Rights to Use Water in Gila River Sys. & Source*, 35 P.3d 68, 75 (Ariz. 2001) ("*Gila V*"); *Mont. ex rel. Greely v. Confed. Salish & Kootenai Tribes,* 712 P.2d 754, 764 (Mont. 1985). Instead, the scope of the water rights impliedly reserved to serve a federal Indian reservation is generally determined with a view to several factors, such as the history of the tribe and reservation at issue, including their traditional practices and their need to maintain themselves under changed circumstances; the language of the treaty, order, or agreement that

created the Indian reservation; and the canon of interpretation requiring agreements between the federal government and Indians to be construed in a light favorable to the Indians. *Colville Confed. Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981); *see also Washington v. Wash. State Comm'l Fishing Vessel Ass'n*, 443 U.S. 658, 676, 680 (1979) ("*Fishing Vessel*"); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200, 206 (1999). A background principle governing such interpretation is that that an agreement to confine a Tribe to a reservation "was not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted." *United States v. Winans*, 198 U.S. 371, 381 (1905); *see also Pocatello*, 180 P.3d at 1057; *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 353–54 (1941) (creation of Indian reservation protects any pre-existing possessory rights of the Indians in absence of clear contrary intent).

While there is some variation in how courts have defined the extent of reserved water rights—varying from tribe to tribe and reservation to reservation—the United States Supreme Court has made clear that reservations were established for the purpose of creating and maintaining a permanent homeland for Indian people. The Water Court here erred by failing to recognize this core purpose. Had it properly done so, the court would have (and should have) determined that in the establishment of the Coeur d'Alene Reservation, the United States impliedly reserved water to satisfy both the present and the future needs of the Coeur d'Alene Tribe. Those needs include sufficient water to allow the Tribe's continued traditional activities and the development of "modern" practices[3] to assist the Tribe in economic development and self-sufficiency.

[3] "Modern" herein refers to agriculture, commercial, and industrial development (i.e. modern at the time of Reservation establishment in 1873), as distinguished from traditional Tribal activities like hunting, fishing, gathering, cultural practices, etc.

A. The Water Court erred by failing to recognize that the Supreme Court has defined the key purpose of Indian reservations: to provide a permanent homeland for Tribes.

The Supreme Court established the doctrine of implied water rights for federal reservations in *Winters*. In that case, after non-Indian irrigators began diverting water from the Milk River, depriving the downstream Fort Belknap Reservation of sufficient water for irrigation, the United States brought suit on behalf of two tribes to establish their prior right to water on the Reservation. The Fort Belknap Reservation was established through an agreement between the Tribes and the United States that provided for a tract of land to be set aside as "a permanent home and abiding place" for the Tribes. 207 U.S. at 565. Although the agreement did not mention water or water rights, the Supreme Court concluded that the provision of land for the Reservation impliedly reserved water sufficient to support the Tribes' livelihood on the Reservation. *Id*. at 576–77. The Court specifically recognized the necessity of water for irrigation in desert environs, asked rhetorically whether the tribes would have agreed to "reduce the area of their occupation and give up the waters which made it valuable or adequate," and concluded that neither the Indians nor the federal government would have intended to establish a reservation absent sufficient water. *Id*. at 576. *Winters* thus poses the proper question to be asked in determining the extent of the water impliedly reserved with the creation of an Indian reservation: how much water is needed to accomplish this reservation's purpose?

Here, the Water Court arrived at an unduly narrow answer in part by reframing the question. Rather than recognizing that the Coeur d'Alene Reservation was intended as a permanent homeland for the Tribe and determining what water is needed to accomplish that purpose, the Water Court instead sought and purported to find the more limited "primary" purposes of the Reservation. The court then held that only those supposed "primary" purposes of the Reservation enjoy implied federal reserved water rights. R.4316. The Water Court crafted

this methodology based on its interpretation of *United States v. New Mexico*, 438 U.S. 696 (1978). In that case, the Supreme Court addressed federal reserved water rights for the new statutorily-directed specific uses of the Gila National Forest, held that those uses were "secondary" uses of the Forest, and concluded that only the original purposes for the establishment of the Forest enjoyed implied federal reserved water rights. Mistakenly applying that framework fashioned for a circumstance very different from the initial reservation of land as a permanent homeland for a tribe, the Water Court proceeded to reject the United States' argument (based on *Winters*) that the purpose of the Coeur d'Alene Reservation was to provide a permanent homeland for the Tribe and other Indians residing there. According to the court, such purpose "is overly broad." R.4318. The court reasoned that if the "homeland" could be the primary purpose of an Indian reservation, and if "homeland" encompasses "every use of water associated with the Coeur d'Alene Indian Reservation dating back to its inception over 130 years ago," then "the homeland theory fails to accommodate the notion of secondary purposes or, for that matter, the notion that the reserved rights doctrine is intended to reserve water rights for some, but not all, uses associated with a federal reservation of land." R.4318–19.

In direct conflict with the Supreme Court's recognition of the homeland purpose in establishing an Indian reservation and with the Court's conclusion that this purpose is the focus for determining the water rights implied by the reservation of land, the Water Court opined that a homeland purpose of the Coeur d'Alene Reservation is "contrary to law," R.4318. In *Winters*, the Supreme Court recognized, first, that the reservation at issue there was established as "a permanent home and abiding place"; and, second, that the tribe, in agreeing to cede its vast territories in exchange for being confined to this reservation, could not have agreed to "give up the waters which made [the reservation] valuable or adequate." 207 U.S. at 565, 576. This determination that Indian reservations are meant to be tribes' homelands has never been

abrogated, and it applies with equal force to the Coeur d'Alene Reservation as it did to the Indian reservation at issue in *Winters*. Decades later, the Supreme Court further explained that the implied reservation of water under *Winters* requires enough water "to make the reservation livable," and that it must account for both future and present needs of a tribe. *Arizona v. California*, 373 U.S. 546, 599, 600 (1963) ("*Arizona I*"). In contrast to the Water Court, other courts have properly applied these binding precedents. The Supreme Court of Arizona relied on *Winters* and *Arizona I* to hold that Indian reservations were "created as a 'permanent home and abiding place' for the Indian people," observing that this "broad" purpose must be "liberally construed" to allow "tribes to achieve the twin goals of Indian self-determination and economic self-sufficiency." *Gila V*, 35 P.3d at 76 (quoting *Walton*, 647 F.2d at 47); *see also Greely*, 712 P.2d at 768. Just last year, the Ninth Circuit determined broadly that the primary purpose of the Agua Caliente Reservation was "to create a home for the Tribe, and water was necessarily implicated in that purpose." *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.,* 849 F.3d 1262, 1268 (9th Cir. 2017), *cert. denied* 138 S. Ct. 468, 469 (2017). The Water Court erred by summarily dismissing the statements in *Winters* and in *Arizona I* about the purpose of Indian reservations and by instead focusing on the fact that those decisions ultimately concerned only water for irrigation. R.4319. Those decisions addressed water for irrigation because that was the question presented in those cases.

In any event, even if *New Mexico* directly applies to Indian reservations, it did not alter *Winters*.[4] *New Mexico* involved water rights for the Gila National Forest, which was reserved

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[4] The fundamental difference between reservations of land for homelands for Indian tribes and reservations of land for national forests has caused some courts to wholly reject the application of *New Mexico* in the Indian water rights context. In *Gila V*, for instance, the Arizona Supreme Court reasoned that while "the primary purpose for which the federal government reserves non-Indian land is strictly construed after careful examination," reservations of land for Indians "are construed liberally in the Indians' favor" and their purposes "'are given broader

under the authority of the Organic Administration Act of 1897. That statute provided that the purpose of such reservations was to conserve water flows and preserve timber. *See* 438 U.S. at 707 (citing 16 U.S.C. § 473 et seq.). The Multiple-Use Sustained Yield Act of 1960 ("MUSYA") broadened the uses national forests would henceforth be administered to include aesthetic, recreational, wildlife-preservation, and stockwatering. *See id.* at 713 (citing 16 U.S.C. § 528 et seq.) In *New Mexico*, the Supreme Court addressed whether the uses specified in MUSYA supported federal water reservations in addition to those that would fulfill the original purposes of the forests. The Court held that while MUSYA broadened the use of national forests, it did not indicate a broader reservation of water for those forests, which was limited to the original purposes of the forest reservation at the time of the Organic Administration Act of 1897. *Id.*[5] at 708, 714–15. Thus, while new reservations created after enactment of the 1960 MUSYA might include implied reservations of water for this broader set of purposes, *see id.* at 715 n.22, reservations under the Organic Act only had implied water rights tied to the original set of purposes, *id.* at 718. Even assuming *New Mexico*'s primary/secondary framework applies here, it requires only that the federal reservation of water rights be tied to the original purposes of the Coeur d'Alene Reservation; any later-defined purposes of the reservation would have to be

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interpretation in order to further the federal goal of Indian self sufficiency.' " 35 P.3d 68, 74 (quoting *Greely*, 712 P.2d at 768); *see also* William C. Canby, *American Indian Law* 435 (2004) ("Although the purpose for which the federal government reserves other types of lands may be strictly construed . . . the purposes of Indian reservations are necessarily entitled to broader interpretation if the goal of Indian self-sufficiency is to be attained."); *Cohen's Handbook of Federal Indian Law* § 19.03[4], at 1217 (2012) ("The significant differences between Indian reservations and federal reserved lands indicate that the [primary-secondary] distinction should not apply.").

[5] In doing so, the Court noted that some of the new uses enumerated in the 1960 Act appeared to conflict with the original set of purposes, and that by "reaffirming the primacy of" these original uses, Congress indicated its intent to reserve water for these original purposes only. *New Mexico*, 438 U.S. at 715.

assessed to determine whether they were merely "secondary" uses that are not entitled to federally-reserved water rights. But this case presents no *later-defined* uses that might be categorized as "secondary" like the uses so categorized in *New Mexico*. *New Mexico* does not alter *Winters*' recognition that the *original*—or in the Water Court's parlance, "primary"—purpose of Indian reservations is to provide a permanent homeland for Indian people. Where there is *only* an original ("primary") purpose at issue, application of *New Mexico* properly results in an outcome no different from application of *Winters* alone.

Moreover, the Water Court's bare statement that a "homeland" purpose is too broad is unsupported by any law, including the *New Mexico* decision on which the Water Court principally relied. Providing a permanent, livable homeland may be a "broad" purpose that potentially encompasses multiple uses of the land and associated uses of water, but the Supreme Court has repeatedly recognized that federal reservations may be established for broad purposes: in *New Mexico* itself, the Supreme Court recognized that a federal reservation for federal agency purposes may have an "extremely broad" purpose. 438 U.S. at 707 n.14. *New Mexico* rejected one purpose of the national forests—to "improve and protect the forest"—as a matter of statutory construction, not because that purpose was overly broad or because of some other principle. *Id.*[6] There is no legal basis for the Water Court's cramped understanding of the general purposes of Indian reservations, and its approach to the water rights claims for the Coeur d'Alene

[6] In recognizing the limits of the federal government's reservation of national forests, the Supreme Court observed that Congress would have been "primarily concerned with limiting the President's power to reserve the forest lands of the West." 438 U.S. at 707 n.14. That point is self-evidently not applicable to the establishment of an *Indian reservation* via executive order, particularly given the long-established rule that Indian reservations be broadly interpreted in Indians' favor. *Fishing Vessel*, 443 U.S. at 675–76 (citing *Jones v. Meehan*, 175 U.S. 1, 11 (1899); *Tulee v. Washington*, 315 U.S. 681 (1942); *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919); *Winans*, 198 U.S. 371).

Reservation should be rejected as a matter of law.

Indeed, there can be no serious dispute that the United States created the Coeur d'Alene Reservation as a homeland for that Tribe. While the Arizona Supreme Court urged against heavy reliance on historical documents to discern the purpose for creating Indian reservations—as that search tends to reveal more about the government's motivations than the tribe's, *Gila V*, 35 P.3d at 75—the historical record here supports an intent to create a homeland for the Coeur d'Alene. For instance, the 1873 agreement between the Tribe and federal government states that the Indians will "make their homes upon the Reservation." R.1866. And the 1887 agreement between the Tribe and federal government (which recognizes the pre-existing 1873 reservation, *see* R.1873, and which was ultimately ratified by Congress) agreed that "the Coeur d'Alene Reservation shall be held forever as Indian land and *as homes for the Coeur d'Alene Indians*." *Idaho II*, 533 U.S. at 267 (emphasis added); *see also* R.1874. Even while erroneously rejecting "homeland" as a purpose that could support a reservation of water here, the Water Court acknowledged the uncontroversial fact that this was the Reservation's purpose: "There 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 (emphasis added).

In short, the Water Court plainly erred in parsing "primary" purposes and "secondary" uses of the original Coeur d'Alene Reservation, as if *New Mexico* dictates that a federal reservation in every instance must have both primary and secondary purposes. There is no such dictate in *New Mexico* or any other relevant precedent.[7] *New Mexico*'s holding instead rests on

[7] The Ninth Circuit has thrice applied *New Mexico* in the Indian reservation context and has never identified a "secondary" purpose or use or otherwise suggested that identifying such a purpose or use is necessary to its endeavor. *See Agua Caliente*, 849 F.3d 1262; *Adair*, 723 F.2d 1394; *Walton*, 647 F.2d 42.

the distinction between the *original* purposes of a federal reservation and *later*, secondary uses assigned by statute for the management of lands that had already been reserved.

Having recognized that the United States created a homeland for this Tribe on this Reservation, *see* R.4319, the Water Court should have held that the Tribe holds *Winters* rights for all uses of water that effectuate this purpose. Instead, the Water Court took the overly narrow view that only individual activities—and not the provision of a homeland—could be "primary" purposes of the Coeur d'Alene Reservation that could support federal reserved water rights. In determining the purpose of the Reservation, the court was obligated to "consider the [reservation-creating] document and circumstances surrounding its creation, and the history of the Indians for whom it was created," as well as "consider [the Indians'] need to maintain themselves under changed circumstances." *Walton*, 647 F.2d at 47 (citing *Winans*, 198 U.S. at 381). Here, the Water Court wrongly prejudged that the Reservation purpose and attendant water rights must be narrowly defined, and its analysis failed to credit the Supreme Court's decision in *Idaho II* or the undisputed facts regarding the creation of the Coeur d'Alene Reservation.[8]

B. The Supreme Court has established that the Coeur d'Alene Reservation's purpose includes the Tribe's use of Reservation waterways, including Lake Coeur d'Alene, for "food, fiber, transportation, recreation, and cultural activities."

The United States and the Tribe claimed sufficient water to maintain the level of Lake

[8] Even were this Court to determine that the "primary" purpose of the Coeur d'Alene Reservation was not to provide a permanent homeland for the Tribe, the following arguments support multiple primary purposes of the Reservation (instead of various aspects of a general homeland purpose), each of which supports an implied reservation of water. This approach is consistent with the Ninth Circuit's approach, which led it to find multiple coexisting primary purposes supporting implied water reservations in at least two instances. *See Walton*, 647 F.2d at 47–48 (divining two purposes of the Colville reservation, namely, "to provide a homeland for the Indians to maintain their agrarian society," and "preservation of the tribe's access to fishing grounds"); *Adair*, 723 F.2d at 1408–11 (purposes included supporting agriculture and maintaining hunting and fishing).

Coeur d'Alene to support the Tribe's activities on the Lake, all of which serve the Reservation's function as homeland for the Tribe.[9] *See* R.11. The Water Court rejected these claims with limited discussion. *See* R.4323–24, 4328. In so doing, the court failed to heed that the Supreme Court, as part of its determination in *Idaho II* that the Tribe owns the submerged lands within its Reservation, confirmed the Tribe's reliance on a host of traditional activities on the Lake that the Court summarized as "food, fiber, transportation, recreation, and cultural activities." 533 U.S. at 265.

The Water Court's ruling in this regard was erroneous in several respects. First, the Water Court misunderstood its task when it denied as a matter of law the Tribe's claim for water rights to maintain the level of Lake Coeur d'Alene at certain elevations, stating simply that "Lake level maintenance was not a primary purpose of the reservation." R.4328. "Lake level" is not itself a claimed purpose of the reservation, the same as instream flow is not a claimed purpose of the reservation. *See infra* Section II. Rather, preservation of the Lake is meant to *facilitate* specific traditional uses. And maintaining those uses serves the Reservation's homeland purpose.

Second, while the Water Court recognized that facilitating the Tribe's continued hunting

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[9] The claims for maintenance of Lake level are meant to mirror the natural hydrograph of the Lake, and, accordingly, would establish a minimum water level to be measured at various times of the year and would also set a minimum outflow rate necessary to keep the lake from becoming a stagnant pool. *See* R.11, 20. This claim is meant to prevent other water users from draining the Lake below its natural level. As a practical matter, the claimed Lake levels are below the levels currently maintained under a Federal Energy Regulatory Commission license for the operation of a hydroelectric facility at Post Falls. But because the water rights in this basin are being adjudicated now, *see* Idaho Code § 42-1420, it is critical that minimum Lake levels be established that will control if and when operations at Post Falls cease. Moreover, the federal reserved water right is also complementary to longstanding State intent to maintain water in the Lake for the benefit of the public. Since 1928, the State has held a water right "to maintain the level of Coeur d'Alene Lake," *see* State Water Right 95-2067, available at https://go.usa.gov/xnF78, which the Idaho Legislature deemed "desirable for all the inhabitants of the state." Idaho Code § 67-4304.

and fishing was a "primary purpose" of the reservation, R.4321–22, it wrongly rejected all other traditional activities as merely "secondary" and therefore ineligible for a federal reserved water right. In so doing, the court departed from the Supreme Court's findings in *Idaho II*. R.4323–24. While the Water Court quoted from that decision, it gave no reason for ignoring the part of the decision that speaks to the very question to be resolved by the Water Court: what is the purpose of this reservation?

Idaho II posed this question in determining the holder of title to submerged lands underlying navigable waters on the Reservation. The Supreme Court emphasized that courts must consider "whether the purpose of the reservation would have been compromised if the submerged lands had passed to the State" because where that 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." 533 U.S. at 273–74 (citations omitted). The Supreme Court having determined purposes of the Reservation in *Idaho II,* those determinations should be followed here in considering the Tribe's water rights claims. The Tribe's longstanding need for the Lake and related waterways informed the Supreme Court's decision that the federal government intended to reserve submerged lands within the Reservation for the Tribe, *id.* at 274–75, even in the face of "a strong presumption" that submerged lands would instead pass to the State, *id.* at 273 (quoting *United States v. Alaska*, 521 U.S. 1, 34 (1997)). *See also United States v. Idaho*, 210 F.3d 1067, 1075 (9th Cir. 2000) ("the purpose of the reservation would have been defeated had it not included submerged lands," so total was the Tribe's dependence on its waterways). As the Supreme Court explained, the Tribe "depended on submerged lands" and used the Lake and its related waterways for "food, fiber, transportation, recreation, and cultural activities." *Idaho II*, 533 U.S. at 265. Indeed, "submerged lands and related water rights had been continuously important to the Tribe throughout the period prior to congressional action confirming the

reservation and granting Idaho statehood," so much so that the " 'Federal Government could only achieve its goals of promoting settlement, avoiding hostilities and extinguishing aboriginal title' " by meeting the Tribe's " 'demand[]' " for " 'an enlarged reservation that included the Lake and rivers.' " *Id.* at 275 (quoting *United States v. Idaho*, 95 F. Supp. 2d 1094, 1107 (D. Idaho 1998)).

The district court decision that was ultimately affirmed in *Idaho II* provides far more detail about the Tribe's historical activities and about the importance of the waterways within its aboriginal territory.[10] The district court described plant gathering in the Lake and other watercourses, explaining that the waterways in the Tribe's domain "provided the primary highways for travel, trade and communication," and it described the waterways as "tied to the Tribe's recreational pursuits, religious ceremonies and burial practices." 95 F. Supp. 2d at 1099–1101. That court found that the importance of these waterways led the Tribe to bargain for "exclusive use" of the water resources upon which it relied. *Id.* at 1109.

Expert reports on the history of the Coeur d'Alene Tribe further support and build upon those findings of the *Idaho II* courts. For instance, historian Ian Smith summarized his findings about the purposes of the Coeur d'Alene Reservation by observing that "water has been essential to both the physical and cultural existence of the Tribe for millennia," with waterways offering tribal members "an array of materials essential to their sustenance," but also playing "a significant role in Coeur d'Alene mythology, language, and cultural practices." R.638–39. Mr. Smith described in great detail the Tribe's take of fish, game, berries, and water potatoes for

[10] The Ninth Circuit and Supreme Court noted that the State did not challenge that court's findings of facts in its unsuccessful appeal. *See* 210 F.3d at 1070; 533 U.S. at 265 n.1. This Court recently cited the *Idaho II* district court decision with approval in *Coeur d'Alene Tribe v. Johnson*, 162 Idaho 754 (2017).

food, R.655–61; its harvest of aquatic grasses used to make mats, baskets, and fishing and hunting equipment, R.661–63; its reliance on canoes for transportation, R.664; and its deep cultural ties to the Lake and aquatic environs, R.665–66. Historian Richard Hart similarly described in great detail the Tribe's dependence on water resources, *see generally* R.1430–86, including the Tribe's fishing activities, R.1452–67, which were "crucial to the survival of" the Tribe, R.1466; the Tribe's use of waterways to aid in the take of deer and other game, R.1468–70. Mr. Hart concluded that "[v]irtually every aspect of daily life had some relationship to the rivers and lakes by which the Coeur d'Alene lived," R.1475, such as the use of waters for transportation, R.1470–74, for recreation, R.1475, 1477, for gathering food and materials, R.1475–78, as part of their burial practices, R.1479, all of which "demonstrated [the Tribe's] integral connection to and dependence on these water resources," R.1481.

There was no basis for the Water Court—through the rubric of deciding which of these Lake uses were "primary" and which "secondary"—to determine that certain of these longstanding Tribal uses of the Lake are worthy of *Winters* rights, while others are not. That rubric imposes a narrow and unsubstantiated view of the Tribe's "primary" uses of the Lake that cannot be reconciled with *Idaho II*'s findings that the Tribe "depended on" the Lake for food, plants, and transportation and that "the Tribe's spiritual, religious and social life centered around the Lake and rivers." 95 F. Supp. 2d at 1101. There is no evidence to support the Water Court's determination that the Tribe agreed to cede its aboriginal territory for a permanent home on the Reservation without features "essential" to its traditional lifestyle, *id.* at 1100, and "without which the Tribe could not have survived," *id.* at 1104. This aspect of the Water Court's decision must be reversed.

C. The Water Court erroneously rejected water rights to maintain wetlands, seeps, and springs to support plant gathering, one of the Tribe's essential traditional uses of water within the Reservation.

The United States claimed rights to sufficient water "to maintain wetlands, springs, and seeps on Tribal lands within the Reservation to provide" habitat that will allow for continued "Tribal plant gathering." R.11. The United States presented this gathering-related claim as part of its traditional-subsistence-activities claim, which also includes hunting and fishing. *See, e.g.*, R.2556. While the Water Court correctly held that fishing and hunting were uses for which water was implicitly reserved at the creation of the Reservation—including maintenance of wetlands, seeps, springs for the purpose of providing habitat for hunted animals, *see* R.4302—the court inexplicably rejected plant gathering as a similarly important purpose of the Coeur d'Alene Reservation. R.4321–22; R.4480. That determination cannot be squared with the record evidence that gathering was (and remains) an important Tribal traditional activity that was encompassed in the homeland purpose of Reservation creation. This Court should reverse and require the gathering-related claims to proceed to the quantification phase of this adjudication.

The inquiry into whether a tribe is entitled to water rights for subsistence purposes involves determining whether those subsistence activities were of "historical importance" to the tribe. *See Adair*, 723 F.2d at 1409. As noted above, the Supreme Court opined in *Idaho II*, 533 U.S. at 265, on the Coeur d'Alene's historical activities and the purposes of its Reservation; among those key uses of the Lake and its shores were harvesting water potatoes. The *Idaho II* district court's undisturbed findings include that the Tribe "gathered several plants growing in the marshes and wetlands" of the Lake, including the water potato, rushes, and tule, which were used for food, baskets, mats, and the Tribe's lodges. 95 F. Supp. 2d at 1100–01. "[P]lant materials" were among the resources provided by the Lake and rivers that "were essential to the Coeur d'Alenes' survival." *Id.* at 1101. The district court further found that at the time of the

Reservation's creation, "the waterways provided a reliable, year-round source of food, fibre, and transportation without which the Tribe could not have survived." *Id.* at 1104.

Unrebutted expert reports prepared for the present case further document the Tribe's extensive historical reliance on the Lake Coeur d'Alene waterways for plant gathering, along with hunting and fishing.[11] Underscoring its centrality to the Tribe's survival, Mr. Smith described gathered plants as "the final pillar of the Coeur d'Alene subsistence cycle," along with hunting and fishing. R.659. He detailed the Tribe's gathering of water potatoes in marshy areas along the shores of lakes; its reliance on berries gathered along rivers; and its collection of rushes, tule reeds, and other aquatic grasses, with which tribal members made mats, baskets, bags, fishing line and other fishing gear, and to construct deer snares. R.660–63. Mr. Hart similarly described water potatoes harvested from the marsh along the lake shore as a staple of the Tribal diet that is "spiritually regarded and treated with reverence," R.1476–78. And he described the Tribe's diverse uses of materials found in or alongside rivers and lakes, including use of hemp for twine and rope, and grasses for mats and bags. R.1475–76. The federal government was well aware of these activities when it was negotiating with the Tribe regarding establishment of a reservation: an 1866 report proposing a reservation for the Coeur d'Alene described the land to be reserved as including "agricultural & grazing lands, with hunting, fishing, *berries & roots*, & suitable locations for mills & c." R.696 (emphasis added). Consistent with this understanding, the lands included in the 1873 agreement reflected the Tribe's desire to incorporate within the Reservation gathering grounds upon which they had relied for centuries.

[11] Findings of the various experts in this case about the Tribe's plant gathering activities are summarized in the United States' and Tribe's Joint Statement of Facts at R.2638–40, ¶¶ 22–25. The State did not dispute any of the cited findings. *See* R.3373–75.

R.2663 ¶ 71.[12] Those gathering activities continued, along with hunting, fishing, and agriculture, through the end of the 19th Century and beyond. R.740, 743.

The Water Court ignored the Supreme Court's recognition in *Idaho II* that gathering was one of the Tribe's uses of waters within its territory, and it failed to acknowledge the record evidence of the critical importance of gathering to the Tribe. Instead, the court focused exclusively on the Tribe's 1871 Petition for a reservation, which discussed fishing and hunting but did not mention gathering. R.4321–22. That Petition is but one piece of evidence among many, and it was reversible error to dismiss all others, particularly because reserved rights are recognized by implication and their creation (or the desire for them) need not be expressly documented. *See Adair*, 723 F.2d at 1409 (finding that tribe entitled to water rights to support hunting even though other activities—and not hunting—were mentioned in the Tribe's treaty). *Cf. Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968) (federal government's termination of Indians' recognized rights must be explicit, not by implication). Critically, there is *no* evidence that the Tribe or United States intended to *exclude* from the Reservation the Tribe's continued use of these natural resources, as is necessary to overcome the presumption that the United States intended to allow the Tribe to continue its subsistence practices. *See Winans*, 198 U.S. at 381. *Cf. United States v. Finch*, 548 F.2d 822, 832 (9th Cir. 1977) (holding that even though the nomadic Crow Indians did not traditionally fish, once confined to a reservation, it is "inconceivable that the United States intended to withhold from the Indians the right to sustain themselves from any source of food which might be available on their reservation").[13]

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[12] The State disputed other aspects of this finding of fact, but not the principle for which it is cited here. *See* R.3373–74.

[13] The Water Court's rejection of non-consumptive water rights for gathering purposes while approving consumptive water rights for agriculture yields the counterintuitive result that the Tribe has no water right to maintain naturally-occurring wetlands and springs in which

Accordingly, this Court should overturn the Water Court's exclusion of gathering as a key tribal subsistence activity supporting a federal reserved water right.

D. The Water Court inappropriately rejected water claims tied to commercial and industrial use that are essential to the Tribe's ability to have a permanent, viable home on their Reservation.

When the United States set aside the Reservation as a permanent homeland for the Coeur d'Alene Tribe, it impliedly recognized and reserved not only the water necessary for continuation of the Tribe's traditional activities but also the water necessary for the Tribe to maintain self-sufficiency. This meant that the Tribe was (and is) entitled to water necessary to permit it to develop not only agriculture on the Reservation, but also commercial and industrial uses. The United States accordingly claimed water rights to support the commercial and industrial uses that the Tribe has developed and plans to develop. The Water Court rejected those claims on the ground that (under *New Mexico*) industrial and commercial uses served only "secondary" uses of the Reservation and thus could not be the subject of federal reserved water rights. R.4323–24. This ruling fails to recognize that establishing a permanent homeland for the Coeur d'Alene Tribe meant ensuring that the Tribe had the resources it would need to establish self-sufficiency, allowing for flexibility and changed uses over time.

As a threshold matter, and as discussed above, the Water Court misapplied *New Mexico* and should have acknowledged that the original purpose of the Reservation remains its "primary" purpose and, further, that the original purpose of the Reservation was to provide a homeland for the tribe under *Winters*. Critically, too, the Supreme Court has also directed that a reservation of water must meet a Tribe's future needs. *Arizona I*, 373 U.S. at 600; *see also United States v. Ahtanum Irr. Dist*, 236 F.2d 321, 327 (9th Cir. 1956) (implied reservation of

harvestable plants grow, but does have the right to divert water from rivers and streams in order to unnaturally irrigate lands on which these plants would not normally grow.

water "looked to the needs of the Indians in the future"); *Finch*, 548 F.2d at 832 (rights reserved to Tribes need not be tied to traditional uses); *Greely*, 712 P.2d at 767, 768 (reservation includes "water for future needs and changes in use" and serves "the federal goal of Indian self sufficiency"). The Supreme Court of Arizona has explored the issue of rights tied to tribal economic development more thoroughly than most other courts, and in doing so started from this same uncontroversial premise: creating "a 'permanent home and abiding place' for the Indian people," is a "broad" purpose that must be "liberally construed" to allow "tribes to achieve the twin goals of Indian self-determination and economic self-sufficiency." *Gila V*, 35 P.3d at 76 (quoting *Walton*, 647 F.2d at 47). Accordingly, "nothing should prevent tribes from diversifying their economies if they so choose and are reasonably able to do so." *Id*. Thus, determining the quantity of water necessary to ensuring the "permanent homeland" purpose requires a court to consider "the optimal manner of creating jobs and income for the tribes [and] the most efficient use of the water." *Id.* at 79, 80 (internal quotation marks omitted).

That water for commercial and industrial activities was impliedly reserved for the Coeur d'Alene in 1873 is consistent with the Arizona Supreme Court's approach to recognizing tribal rights to water for forward-looking economic development and is also supported by the specific record in this case, as the State has conceded. *See* R.2504 (State acknowledgment before Water Court that "One Purpose of the Reservation was to Promote Commercial and Industrial Activities," citing the 1891 Act that confirms and builds upon the purposes established in the 1873 agreement). The documents surrounding the Reservation's creation recognize the move toward then-modern (as distinguished from traditional) practices, particularly agriculture as at least a supplement to the Tribe's traditional hunting, fishing, and gathering practices. *See* R.2641–42, ¶ 29; R.701, 715; R.782–92. The 1873 agreement stated that the government would provide, among other things, wagons, plows, mowers, a grain cradler, and a grist mill. *See*

R.2642, ¶ 30; R.1866. The government agreed to furnish "1 grist and 1 saw miller and 1 blacksmith," and those government employees would "teach the Indians to perform such labor." R.1866. The Tribe's 1885 petition for a "proper treaty" conveyed its awareness of the changing world, and requested "grist and saw mills, proper farming implements, and mechanics to help to teach us and our children proper industrial pursuits, and the use of tools in connection therewith." R.1871. The 1887 Agreement (ratified in 1891) provides further evidence of federal intent to support then-modern activities: the government agreed that as soon as possible after ratification, "there shall be erected on said reservation a saw and grist mill, to be operated by steam, and an engineer and miller employed" at the government's expense. R.1874; Act of Mar. 3, 1891, ch. 543, 26 Stat. 1028. Further funds would "be expended in the purchase of such useful and necessary articles as shall best promote the progress, comfort, improvement, education, and civilization" of the Tribe. R.1874; 26 Stat. at 1028. The government would also furnish "a competent physician, medicines, a blacksmith, and carpenter." R.1875; 26 Stat. at 1029. And the government agreed that "all millers, engineers, and mechanics" employed on the Reservation would "teach all Indians placed under their charge their trades and vocations." R.1875; 26 Stat. at 1028. Thus, while it is clear that the Coeur d'Alene and federal government were concerned with the Tribe's ability to continue their traditional activities on a Reservation, they focused also on the Tribe's ability to undertake new activities in the future. The introduction of technology on the Reservation, the stated goals of "progress, . . . improvement, . . . and civilization," R.1874, and the emphasis on teaching skills that would help the Tribe become more self-sufficient all make clear that all parties understood that a purpose of the Reservation was to help the Tribe survive in a changing world.

This concept is a logical outgrowth of the commonly-accepted idea that tribes need not be confined to their traditional methods of hunting or agricultural production or to antiquated

industrial technologies. For instance, "treaties did not in any way . . . restrict the treaty fishers to using technology that was in existence at the time of the treaty." *Grand Traverse Band of Ottawa & Chippewa Indians v. Dir., Mich. Dep't of Nat. Res.*, 141 F.3d 635, 639 (6th Cir. 1998). Tribes' use of water cannot be required to remain frozen in the past, just as "[o]ther right holders are not constrained . . . to use water in the same manner as their ancestors in the 1800s," *Gila V*, 35 P.3d at 86. That a water right supports a Tribe's modern, rather than historical, use does not "destroy its right" to that water now. *Agua Caliente*, 849 F.3d at 1272 (citing *Walton*, 647 F.2d at 51). Rather, "permitting the Indians to determine how to use reserved water is consistent with the general purpose for the creation of an Indian reservation providing a homeland for the survival and growth of the Indians and their way of life." *Walton,* 647 F.2d at 49. And "modern" activities did not include only agriculture: "Congress envisioned agricultural pursuits as only a first step in the 'civilizing' process. This vision of progress implies a flexibility of purpose*." Id.* at 47 n.9 (omitting citation to 11 Cong. Rec. 905 (1881)); *see also In re Crow Water Compact*, 364 P.3d 584, 589 (Mont. 2015) (concluding that "under *Winters* and its progeny the tribe has a right to water for development of industrial interests"), *cert. denied*, 136 S. Ct. 2472 (2016).

The reserved water rights on the Coeur d'Alene Reservation have not previously been quantified, and the Tribe has now developed and planned commercial and industrial activities and corresponding water uses aimed toward achieving long-term economic self-sufficiency. Those current and proposed activities should be used as a proxy in quantifying the amount of water reserved to the Tribe. But that question—the quantity of water reserved for the general commercial-industrial purpose—will be determined in the next, quantification phase of litigation before the Water Court; all that is currently at issue is whether the Tribe's reserved water rights

include water for commercial and industrial activities.[14]

The Water Court's rigid interpretation of the scope of permissible water rights for "modern" activities erroneously eliminated commercial and industrial uses, thereby depriving the Tribe of the flexibility required to accomplish its long-term economic self-sufficiency. This Court must reverse the Water Court's ruling to correct this error.

* * *

The Water court erred here by taking a too-restrictive approach to determining the purpose or purposes of the Coeur d'Alene Reservation, a starting-point that led it to erroneously dismiss water rights that serve the Reservation's core purpose: providing a permanent homeland for the Coeur d'Alene Tribe. Recognizing this core purpose should have led the court to rule that water was implicitly reserved for a suite of the Coeur d'Alene Tribe's traditional activities recognized by the U.S. Supreme Court, and for modern uses not limited to agriculture. This Court should reverse, and rule that the Coeur d'Alene Tribe is entitled to water to fulfill all aspects of this homeland purpose, which requires enough water to satisfy both the present and the future needs of the Tribe.

II. The Tribe has a right to maintain instream flows outside Reservation boundaries that are essential to on-Reservation fishing activities, an acknowledged purpose of the Reservation.

The United States claimed water rights for the Tribe both within and outside of the Reservation's boundaries to support the Tribe's fishing activities. These non-consumptive water

[14] The United States claims consumptive water rights to support present commercial activities (including a casino, hotel, and golf course) and future commercial and industrial activities (including a fish hatchery) on the Reservation. *See* R.9–10. These rights were perfected at the time of Reservation establishment, before these specific activities began. The *entitlement* to water for commercial and industrial development does not depend on these specific commercial and industrial uses. But they are currently the best evidence of the *quantity* of water necessary for present and future development, an issue not yet before this Court.

rights are necessary for the fish species harvested by the Tribe within its Reservation boundaries, and so they are a necessary part of the implied reservation of water to facilitate that use of Reservation resources. While the Water Court properly recognized the importance to the Tribe of Lake Coeur d'Alene and associated waterways for fishing, its narrow decision ignores the practical reality that the continued viability of this use depends on the maintenance of upstream habitat without which the fish cannot survive. The Water Court correctly recognized that "the Tribe's need to access the waterways to facilitate its traditional fishing and hunting practices" was at the forefront of the Tribe's negotiations for its Reservation. R.4321. *Cf. Pocatello*, 180 P.3d at 1056 (opining that although the interpretation of an Indian treaty or agreement is a question of law, "examination of a treaty's negotiating history and purpose . . . serves as an aid to the legal determination"). Indeed, the Tribe's rejection of the 1867 Reservation was based in part on the failure of that reservation to adequately provide for this necessary use. *Idaho II*, 533 U.S. at 265–66. As the Water Court explained, moreover, the United States recognized that there would be "trouble" with the Tribe if its fishing activities were not protected; in negotiation for establishment of the Reservation, the government intended "to avoid such trouble" while also clearing the way for non-Indian settlement of the Tribe's aboriginal territory. R.4322. The resulting agreement between the Tribe and United States led to creation of a Reservation that included portions of Lake Coeur d'Alene, the Coeur d'Alene River, and the St. Joe River. *Id.* The Water Court acknowledged that the very location of the Reservation was tailored to serve the key hunting and fishing purposes of the Reservation and that in creating the Reservation, the United States impliedly reserved water rights necessary to fulfill those purposes. *Id.*

But the Water Court drew an unsupported and arbitrary line when it approved only

fishing-related claims for instream flows that are *within*, and not *without*, the Reservation.[15] R.4324. It arrived at this conclusion via four errors: first, it failed to recognize the practical similarity between traditional water rights and the disallowed "off-reservation" instream flow rights; second, it incorrectly attributed significance to a lack of specific historical support for the notion that a "primary" purpose of the Reservation was to protect off-Reservation fish habitat; third, it misapplied the Tribe's agreement that it would extinguish all off-Reservation rights; and fourth, it incorrectly opined that off-Reservation flows could not be reserved as a matter of law because they were not "appurtenant" to the Reservation. R.4324–26. The Water Court's ruling on this issue misunderstands the applicable law and is contrary to reason. Once it correctly recognized that the United States impliedly reserved water to support the Tribe's fishing rights, the Water Court should further have recognized that the United States impliedly reserved adequate water to ensure off-Reservation habitat to support on-Reservation fishing, the accomplishment of which requires fishing-related instream flows that are outside the boundaries of the Reservation.

A. Even on-reservation rights can impact competing off-reservation uses.

The Water Court agreed with objectors that no instream flow claims could be recognized for locations outside of the Tribe's current Reservation boundaries. That holding is mistaken because the practical effect of recognizing such claims is the same as with recognizing other water rights. Indeed, the idea that a water right-holder's rights might limit the conduct of others—even those geographically distant—is common to all water right adjudications: a senior right-holder will always, at least in theory, limit the activities of others on a hydrologically-

[15] Importantly, the United States and Tribe are not claiming a right of the Tribe to physically access these upstream waters for fishing. Instead, the "off-Reservation" instream flow claims are meant solely to support the Tribe's *on-Reservation* fishery.

connected waterway, because the senior owner's ability to recoup the full share of his water rights may limit the water available for junior right-holders. *See, e.g.*, *Moe v. Harger*, 77 P. 645 (Idaho 1904).

Likewise, here, the Tribe's right to a continued on-Reservation fishery limits upstream users from dewatering a stream to the extent that it interferes with that fishery. Not only did the Water Court fail to appreciate that this situation mirrors every situation in which there are senior and junior water right-holders, the historical record here directly contemplates that Tribal rights could enjoin off-Reservation activities: "the 1873 agreement guarantees 'that the water running into said reservation shall not be turned from their natural channel where they enter said reservation,' " which demonstrates the importance of retaining water flows to support the Reservation. *Idaho II*, 95 F. Supp. 2d at 1108. Simply put, there is no reason that a Tribe's on-Reservation rights may not limit off-Reservation activities by others whose exercise of junior rights would limit flows and thereby impair the Tribe's protected on-Reservation uses.

B. Instream flows are necessary to ensure the availability of a viable fishery, and fishing is key to preserving the Coeur d'Alene Reservation as a tribal homeland.

Next, by asking whether reservation of off-Reservation instream flows was a "primary" purpose of the Coeur d'Alene Reservation, the Water Court framed its inquiry in a way that could never have led to a favorable answer for the Tribe. The proper question is not, as the Water Court asked, whether a *specific reservation of water* is a purpose of the Reservation's creation. The proper question rather is *what water is needed to support the Tribe's use* of the Reservation as a homeland (or the specific activities that individually constitute the purposes of the Reservation, if this Court rejects the homeland concept). Had the Water Court properly framed the question, it would have arrived at the correct answer. The court had already determined that fishing is a core part of the Tribe's use of the Reservation, and thus should have also recognized

that the implied reservation of water includes water sufficient to support that use, both at the time of the Reservation's creation and into the future. Indeed, the court *approved* instream flows on the Reservation, demonstrating that it understood (at least implicitly) the biological need for this water. R.4481–82.

It is undisputed that the Coeur d'Alene fisheries are biologically dependent on waterways beyond the boundaries of the Reservation. R.594. And the specific instream flows claimed for fish habitat are tied directly to the Tribe's fishing use and the dependence of that use on these off-Reservation areas. The strong biological basis for these claims stands unchallenged: fisheries scientist Dr. Dudley Reiser explained that Westslope Cutthroat Trout and Bull Trout—two species that the Tribe historically harvested, R.2676; R.571—are adfluvial species, which means that their life strategy requires access to and movement through properly-functioning lake and riverine habitats, R.2677, R.593. The movements of these species occur, of course, without regard to title or political boundaries; they are instead restrained by physical barriers like natural waterfalls, turbulent rapids, or dewatered streams. R.2677; R.562. Relevant here, this life history strategy means that these species spend a substantial part of their lifecycle in Lake Coeur d'Alene, but they seek suitable spawning habitat by migrating upstream in rivers and streams located off-Reservation. *See* R.2676; R.577–78. Young fish continue to live in these upstream areas for years before migrating back downstream to the Lake. R.2676; R.577. These spawning areas are widely distributed within the Coeur d'Alene Basin: fish may travel from a few miles to more than a hundred miles in search of suitable spawning habitat. R.578. Beyond providing required habitat for the adfluvial fish that are part of the Coeur d'Alene fisheries, these connected rivers and streams also support subpopulations of these species that contribute genetic diversity and thus help ensure survival of the fish population as a whole. R.593. Collectively, the watersheds represented in the instream flow claims represent waters upon which the Coeur

d'Alene Tribe traditionally relied for fishing. *See* R.561–64.

Other courts have readily accepted this same type of biological evidence in determining tribal rights. For instance, in *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032, 1033–35 (9th Cir. 1985), the Yakima Nation sought protection for stream flows that provide salmon spawning habitat. The Ninth Circuit recognized the need for sufficient water to support the spawning portion of the salmon's lifecycle even though the stream flows at issue were 50 miles from the Yakima Reservation. *Id.* In the subsequent adjudication of the Yakima River Basin, the state court confirmed that water rights extend beyond the boundary of that reservation to support the fishery's migratory lifecycle. *Wash. Dep't of Ecology v. Acquavella*, No. 77-2-01484-5, slip op. at 9 (Wash. Super. Ct. Sept. 1, 1994), *available at* R.2308. *Kittitas* involved both on- and off-reservation treaty fishing rights—as opposed to a reservation created with an eye to providing for fishing on-reservation—yet the concept that water is necessary to the continued vitality of a fishery is equally applicable here. That same logic led the Ninth Circuit to hold that where the purposes of a tribe's reservation included maintaining and reestablishing fishing, the "right to water to establish and maintain the [fishery] includes the right to sufficient water to permit natural spawning of the trout." *Walton*, 647 F.2d at 48.

Although the Water Court correctly recognized that fishing was a key tribal use of the Reservation, that bare recognition is rendered meaningless if the fishery does not remain vital. The off-Reservation instream flow claims here are intended to ensure that this recognized purpose of the Reservation is not undermined by loss of habitat upon which the fishery depends. R.10. The Tribe historically depended and still depends on these fish species, *see* R.2676; R.562–63, and these species depend on these waterways—including rivers, streams, and portions of Lake Coeur d'Alene outside the Reservation boundary—for spawning, *see* R.594. In other words, the Tribe's fishing activities *within* the Reservation are reliant on these fish species'

access to and use of adequate habitat *outside* the Reservation. R.594. Thus, even accepting the Water Court's application of *New Mexico*, the off-Reservation stream flow claims effectuate one of the primary purposes of the Reservation and should have been approved.

C. The Water Court erroneously determined that the Tribe could hold no off-reservation rights of any kind and incorrectly interpreted the "appurtenancy" requirement.

As another basis for its erroneous denial of certain instream flow claims, the Water Court incorrectly determined that the Tribe retained no off-Reservation rights of any kind based on the Tribe's *land* cessions. The Tribe's 1873 and 1887 agreements with the federal government provide that the Tribe would "relinquish . . . all their right and title in and to all of the *lands* heretofore claimed by them" outside the new Reservation, and would cede "all right, title, and claim . . . to all *lands*" outside the present reservation. R.1865; R.1873 (emphasis added). As a textual matter, the limited references to relinquishing rights to "lands" outside the reservation cannot be fairly understood as an agreement to cede *water* rights necessary for accomplishing *Reservation* purposes. *Cf. Mille Lacs Band*, 526 U.S. at 195–96 (finding no abrogation of former treaty rights in the absence of express language because federal "treaty drafters had the sophistication and experience to use express language"). As a practical matter, the Tribe could not have understood its agreement for a Reservation that would give them continued use of their traditional fishery to leave the Tribe with so little assurance of the continued viability of the fishery upon which it depended, particularly in the absence of any language so indicating. *Cf. Winans*, 198 U.S. at 371 (holding that a Tribe retains all rights not specifically ceded, because a reservation of rights is not as a grant of rights to a tribe, but a reservation of rights not granted to the government).

Finally, the Water Court misapplied the legal premise that a water right should be "appurtenant" to a reservation in holding that off-reservation flows could not be impliedly

reserved. R.4325–36 (citing *Cappaert v. United States*, 426 U.S. 128, 138 (1976)). The court focused exclusively on the geographic location of the claimed water right vis-à-vis the Reservation lands, but "appurtenancy" is a *conceptual*, not a *physical*, requirement. The Ninth Circuit recently explained this concept in *Katie John v. United States,* 720 F.3d 1214, 1229–30 (9th Cir. 2013), which held that off-reservation waters may be tied to reserved lands. In so determining, the court found "an apparent consensus that [appurtenancy] does not mean physical attachment" of water to land. *Id.* Instead, "appurtenancy" has to do with the "*relationship* between reserved federal land and the use of the water, not the *location* of the water." *Id.* at 1230 (emphasis added).[16] This understanding of the appurtenancy requirement accords with the Supreme Court's recognition of water rights for irrigation of reservation lands from a water source two miles from the reservation boundary. *Arizona v. California*, 376 U.S. 340, 344–45 (1964) ("*Arizona II*"). In any event, *Cappaert* supports the United States' claim here and undermines the Water Court's view. In that case, the Supreme Court agreed that the federal government's implicit reservation of water for Devil's Hole National Monument included "appurtenant water sufficient to maintain the level" of an underground pool, affirming an injunction that limited the pumping of groundwater by private citizens *2.5 miles away* from the pool. 426 U.S. at 133, 141, 147. This off-reservation limitation on use to serve on-reservation uses of water is directly analogous to, and supports recognition of, the instream flows claimed here for the Tribe.

Accordingly, because the Water Court failed to credit evidence that the continued

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[16] The Ninth Circuit's explanation in *Agua Caliente* that federally reserved water rights must be "appurtenant" to, or "attached to," a reservation did not alter or even test this holding of *Katie John*, since *Agua Caliente* involved groundwater that "underlies" the reservation at issue there. 849 F.3d at 1271 & n. 10.

viability of the Tribe's *on-Reservation* fishing activities depends on maintenance of instream flows upstream, the court erred as a matter of law in ruling that the Tribe is disqualified from holding off-Reservation water rights. Its ruling in this regard should be reversed.

III. The priority date for water rights in seeps, springs, and wetlands is time immemorial, regardless whether those features are on lands that were sold and later reacquired.

In addition to determining the broad categories of reserved water rights to which the Tribe is entitled, the Water Court also determined the priority date that should attach to these categories of rights. In its summary judgment order, the Water Court correctly determined that the Tribe's non-consumptive water rights for fishing and hunting have a time-immemorial priority date, recognizing that these uses are traditional subsistence activities that the Tribe has practiced since long before Reservation establishment. R.4321–22, 4327. But after the State and other objectors moved for reconsideration of the priority date for certain of these rights, the Water Court ruled that water rights at seeps, springs, and wetlands on Reservation would have a date-of-reacquisition priority date where they were allotted, sold to non-Indians, and later reacquired by the Tribe. R.4474. This exception potentially swallows up the ruling of a time-immemorial priority date for traditional uses of seeps, springs, and wetlands because of the broad extent of allotment on the Reservation. No law compelled the Water Court to reach this legal conclusion, and a better approach—one that best effectuates the purposes of this Reservation—would recognize that Reservation lands, even those owned at some point in history by non-Indians, have special status that warrants preservation of the original priority date.

As explained above, a majority of the Coeur d'Alene Reservation was alienated from Tribal control during the allotment era, as vast quantities of "surplus" land were granted to non-Indian homesteaders, and many allotments left Indian hands through sale, forfeiture, or loss. Allotment of this Reservation occurred over the objection of the Tribe, and its effects are still

being felt, as the Tribe has embarked upon and continues its efforts to reacquire lands lost during the decades of allotment policy. *See* R.3108–10. But despite the broad alienation of lands formerly controlled by the Tribe, allotted and homesteaded lands within the Reservation boundaries remained and remain Reservation lands. *See United States v. Celestine*, 215 U.S. 278, 285 (1909). When these Reservation lands return to tribal control, they once again contribute to the Reservation purpose, for which the water rights were originally reserved and continue to serve.

Generally, when Reservation lands were held by allottees or homesteaders, rights to water associated with these lands depended the lands' status. Indian allottees took a ratable share of the Reservation *Winters* water rights for irrigation and domestic purposes, *United States v. Powers*, 305 U.S. 527, 533 (1939), preserving the water right's priority date, *Walton*, 647 F.2d at 51. The Indian allottee could sell his or her allotment to a non-Indian along with the full quantum of that ratable share of water. But while the allottee's *Winters* right would never be lost through non-use, a non-Indian successor in ownership would need to preserve the right through beneficial use. *Walton*, 647 F.2d at 51; *United States v. Anderson*, 736 F.2d 1358, 1362 (9th Cir. 1984). Homesteaders would not acquire a *Winters* right at all, but would instead have to establish water rights with their own priority date under state law. *See Pocatello*, 180 P.3d at 1054.

But non-consumptive water rights, such as those claimed here for seeps, springs, and wetlands that support the Tribe's traditional activities, are different from consumptive rights for irrigation and domestic uses. This type of water right may never be held by a non-Indian, nor may it be established or maintained under state law. *See, e.g.*, *Adair*, 723 F.2d at 1418. The Water Court took these precepts to mean that such a right could not survive on lands that had been homesteaded or allotted and later reacquired. But the special status of these rights should have led the court to the opposite conclusion, namely, that these collectively-held rights may

have remained dormant during the period of non-tribal ownership, but they once again contribute to the overall homeland purpose of the Reservation once back in tribal hands and accordingly maintain their original priority date.

The Water Court's application of *Anderson* likewise rests on a failure to appreciate the fundamental difference between consumptive rights (such as for irrigation), which can be held by individuals and transferred to non-Indians, *see Anderson*, 736 F.2d at 1362, and non-consumptive rights (such as for maintenance of springs and wetlands), which are held by and for the communal benefit of the Tribe generally and may not be severed, individually held, or sold, *see Adair*, 723 F.2d at 1418. *Anderson* held that *irrigation* rights for allotted or homesteaded rights have a date-of-reacquisition priority date. But *Anderson* is not properly understood to apply to anything other than claims for consumptive agricultural rights.[17] The district court in *Anderson* had found both agricultural and fishing purposes of the reservation at issue in that case, and assigned a priority date for the non-consumptive instream flow rights of "at the latest . . . the date of the creation of the reservation." *United States v. Anderson*, No. 3643, Slip op. 10 (E.D. Wash. July 23, 1979), *available at* R.2908. On appeal, the Ninth Circuit considered only the priority date for *consumptive* uses (i.e., water for irrigation) on reservation lands that had been allotted or homesteaded and later reacquired by the Tribe.[18]

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[17] The Wyoming Supreme Court answered this question differently, holding that agricultural claims that serve reacquired allotments maintain a date-of-reservation priority date "[b]ecause all the reacquired lands on the ceded portion of the reservation are reservation lands . . . the same reserved water rights apply." *See In re Gen. Adjud. of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76, 114 (Wyo. 1988).

[18] The decision does not explicitly state that it involves only water for irrigation, but references to an allottee's/successor's right to water "limited by the number of irrigable acres," which may be lost if not "put[] to beneficial use" makes the context clear. *See Anderson*, 736 F.2d at 1362.

The *Anderson* decision on which the Water Court relied addressed only consumptive water claims for irrigation and does not distinguish between treatment of consumptive and non-consumptive water reservations. In other cases, however, the Ninth Circuit has made clear the distinction between treatment of consumptive and non-consumptive water reservations. For instance, in *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 400 (9th Cir. 1985), the court explained that water for non-consumptive use was not subject to individual ownership: "This quantity of water, unrelated to irrigation, was not affected by the allotment of reservation lands and passage of title out of the Indians' hands." *Cf. Walton*, 647 F.2d at 47–48 ("a ratable share of . . . water reserved for irrigation" could be subject to individual ownership and transfer). And in *Adair*, that court similarly made clear that water tied to non-consumptive uses is not subject to transfers: "The hunting and fishing rights themselves belong to the Tribe and may not be transferred to a third party" and thus "no subsequent transferee may acquire that right of use or the reserved water necessary to fulfill that use." 723 F.2d at 1418. The non-transferability of non-consumptive water rights renders *Anderson*'s priority-date analysis inapplicable to the rights to non-consumptive maintenance of seeps, springs, and wetlands. The Water Court's reliance on *Anderson* was thus erroneous.

By failing to recognize the original priority date for those lands' associated non-consumptive *Winters* rights, the Water Court has limited those lands' contribution to the original Reservation purposes served by *Winters* rights. Reacquired lands have always been part of the Reservation, and they again serve the Reservation purpose once back in tribal ownership. In the case of the non-consumptive rights at issue here, this means these lands once again provide habitat for fish and game and support the Tribe's gathering and cultural activities. Those traditional activities supported a *Winters* right with a time-immemorial priority date, which recognizes that the reservation of lands for the Tribe was a grant of rights *from*, and not *to*, the

Tribe. *See Fishing Vessel*, 443 U.S. at 675; *Pocatello*, 180 P.3d at 1057. It is of no moment that federal allotment policy resulted in these lands' temporary alienation from tribal control; once returned to the Tribe, they once again become part of the network of lands that allow continuation of these traditional activities on the Reservation. Recognition of a time-immemorial priority date for these non-consumptive uses best allows the continuity of this Reservation purpose. This result is also most consistent with the stated policy—including "[t]o conserve and develop Indian lands and resources"—of the Indian Reorganization Act of 1934, the law that ended allotment and homesteading of the Coeur d'Alene reservation and allowed reacquisition of Reservation land for the Tribe. 48 Stat. at 984.

Accordingly the Water Court erred in applying a date-of-reacquisition priority date for non-consumptive water rights.

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 off of Reservation lands; and (3) imposed an improper priority date on Reservation lands that have been reacquired by the Tribe.

Respectfully Submitted,

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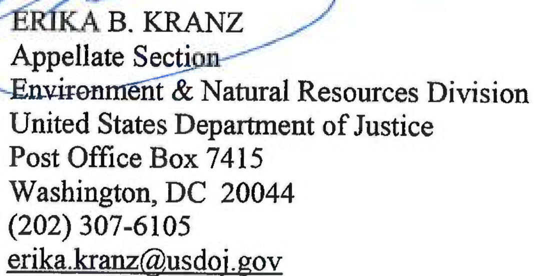

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of February, 2018, I caused a true and correct copy of the foregoing brief to be served as follows:

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