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IDSC Hecla Response to USA Appeal

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IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court Docket No. 45382-2017

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

THE UNITED STATES OF AMERICA,

Appellant,

v.

STATE OF IDAHO, et al.,

Respondents.

HECLA LIMITED'S CONSOLIDATED RESPONSE

Appeal from the Coeur d'Alene-Spokane River Basin Adjudication,
Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls;
Honorable Eric J. Wildman, Presiding

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This same brief is filed in Docket No. 45382-2017 and Docket No. 45383-2017, in response to appeals filed by the United States and the Coeur d'Alene Tribe. While their appellate briefs are structured differently, the same issues are at play in both. Hence, for convenience sake, Hecla is responding to both appeals in this Consolidated Response Brief, which is filed in both cases.

I. STATEMENT OF THE CASE

A. Nature of the Case.

This is another in a long line of efforts by the United States to claim water rights in Idaho based, not on Idaho water law and not on any express reservation of water rights, but on implications arising from reservations of land for various purposes by the United States. Here, the reservation of land is the establishment of a Reservation for the Coeur d'Alene Tribe in the nineteenth century. The Executive Orders and Acts of Congress related to the Reservation make no mention of water rights. Nor do the contemporaneous historical records. The agreements between the Tribe and the United States, and the Acts of Congress approving the agreements, all recognize that the Coeur d'Alene Tribe relinquished all right, title and claim outside the Reservation boundaries. Nevertheless, according to the United States and Tribe, this reservation of land and cession of title to land of the Reservation, gives rise to dozens of different types of water rights, from irrigation and domestic use, to commercial and industrial uses, to preservation of wetlands, to instream flows both on and off the Reservation, and ultimately to establishment of a lake level claim that would potentially control all water use in the Coeur d'Alene, St. Joe and St. Maries basins. The lake level and instream flow claims are of particular concern to Hecla Limited ("Hecla"), which led to its participation in this matter.

Hecla has mining properties located on tributaries which drain to the Coeur d'Alene River and Coeur d'Alene Lake above the Tribe's Reservation. The off-reservation instream flows and the lake level claims claimed by the United States, on behalf of the Tribe, are not based upon any treaty language reserving the Tribe any water outside the Reservation boundaries. Nevertheless, the United States' off-reservation claims reach far upstream into tributaries where Hecla's facilities are located. The sole legal basis for the claim by the United States and Tribe rests upon the theory that the reservation of land for the Tribe, impliedly and by necessity, carried with it off-reservation water rights. Some of these off-reservation water right claims exceed the natural flow of the tributaries and would prevent any use of the water by those, including Hecla, who had established State law water rights for use of water in the tributaries long before these reserved rights claims were asserted.

This is the second time that this key issue of off-reservation instream flow rights has been brought before this Court. In 1999, the Snake River Basin Adjudication ("SRBA") court rejected off-reservation instream flow right claims filed by the United States on behalf of the Nez Perce Tribe. *See Order on Motions for Summary Judgment of the State of Idaho, Idaho Power, Potlatch Corporation, Irrigation Districts and Other Objectors Who have Joined and/or Supported Various Motions*, *Consolidated Subcase No. 03-10022*, November 10, 1999 (*Nez Perce Order*, R. 826-874. The United States appealed that decision to this Court. The Nez Perce Tribe even attempted to disqualify the presiding SRBA judge after he issued the *Nez Perce Order*. *See United States v. State*, 137 Idaho 654, 51 P.3d 1110 (2002). But, this Court dismissed that appeal as moot. Before this Court heard the appeal from the *Nez Perce Order* on the merits, the parties reached a resolution of the case. In that resolution, the SRBA district court's opinion was not vacated. The Snake River Water Rights Act of 2004, was entered into between the

parties, including the United States, State of Idaho, the Nez Perce Tribe and the various objectors. *See* Snake River Water Rights Act of 2004, Public Law 108-447, 118 Stat. 3431. No off-reservation instream flow rights were granted to the United States under this 2004 Act. Nevertheless, the United States has now renewed the same claim in the Coeur d'Alene Spokane River Basin Adjudication ("CSBRA") court; this time on behalf of the Coeur d'Alene Tribe, asserting that the United States is entitled to hold federal reserved water rights for off-reservation instream flows. The United States' claim is even based on the same scientific theory espoused by the same expert it used in the Nez Perce case, Dudley Reiser.

The United States' instream flow claims, both on and off the Reservation, its lake level claim, including a lake level off of the Reservation, its domestic, agricultural, commercial, industrial and municipal claims, and its wetland claims all implicate the scope of the implied reserved water right doctrine. This case raises fundamental questions of the proper interpretation of the reserved rights doctrine, and application of the United States Supreme Court decisions in *Winters v. United States*, 207 U.S. 564 (1908), and *United States v. New Mexico*, 438 U.S. 696 (1978). Hence, Hecla will respond to the legal arguments underlying all the United States' reserved right claims and explain why those claims should not be recognized here, because the legal principles underlying those arguments are inextricably intertwined with how the reserved water rights doctrine applies to the claims asserted by the United States and Tribe that directly affect Hecla's water rights.

B. Course of Proceedings.

This is an appeal from the CSRBA district court. The dispute arose when the United States, on behalf of the Coeur d'Alene Tribe, filed 353 claims to federal reserved water rights. Of these 353 claims, 72 claims reached upstream and outside the boundaries of the Reservation to

assert in-stream flow rights, on behalf of the Tribe, for fisheries off the Reservation. *See* Appendix A, list of off-reservation instream flow claims. Hecla objected to the United States' claims. R. 372-375. The State of Idaho, and many other objectors, also filed objections to these claims. The subcases were consolidated into subcase 91-7755. R. 461-474. The CSRBA district court then determined to bifurcate the proceedings so that the question of entitlement to a water right was decided first. R. 461-474. If entitlement was found, then quantification of that right would be the next step. This was the same procedure followed in the subcase involving the United States' claim on behalf of the Nez Perce Tribe in the Snake River Basin Adjudication. All of the parties agreed to this bifurcation procedure.

The general course of proceedings is described in the CSRBA district court's *Order on Motions for Summary Judgment*. R. 4310-4312, at Section I, Background. On October 21, 2016, Hecla filed a timely motion for summary judgment and a memorandum in support primarily directed at the off-reservation instream flow claims asserted by the United States on behalf of the Tribe. R. 2360-2363 and 2402-2424. Hecla also joined in the State of Idaho's motion for summary judgment. *Id.* On February 23, 2017, Hecla filed a *Memorandum in Opposition to the United States and Coeur d'Alene Tribe's Joint Motion for Summary Judgment*. R. 2820-2846. Hecla also joined in the response filed by the State of Idaho and provided additional argument with respect to the off-reservation instream flow claims, the scope of the reservation of rights doctrine, the scope of the United States' trust obligation, the claim for irrigation water and the lake level claim. *Id.* On May 3, 2017, after oral argument, the CSRBA district court entered an Order granting and denying the motions for summary judgment, in part. R. 4310-4333. The CSRBA district court recognized a reserved water right on behalf of the Tribe for agricultural, hunting and fishing, and domestic purposes on the Reservation. R. 4320-4323. The CSRBA

district court held that the United States had not impliedly reserved water rights for other secondary uses of the reservation, including industrial, commercial, water storage, power generation, aesthetics, recreation and lake level maintenance. R. 4323-4324. The CSRBA district court also held that the United States was not entitled to federal reserved water rights extending outside the Reservation boundaries and denied the lake level maintenance claim as a matter of law. R. 4324-4326, 4328. On the same day, the CSRBA district court entered a *Final Order Disallowing Purposes of Use*, R. 4301-4304, and a *Final Order Disallowing Water Right Claims*, R. 4305-4309.

Various parties filed motions for reconsideration of the CSRBA district court's summary judgment Order. On June 9, 2017, Hecla filed its opposition to the motions to reconsider filed by the United States and Coeur d'Alene Tribe. R. 4368-4374 and 4375-4383. On July 26, 2017, the CSRBA district court entered its *Order Granting Motion to Reconsider* and *Order on Motion to Set Aside and Modify*. R. 4373 and R. 4479. *Notice of Appeals* were timely filed by the State and other parties. Hecla, along with other parties, also filed a motion for permissive appeal of the summary judgment Order. *See Hecla Limited's Motion Requesting Acceptance of Appeal by Permission*, filed August 30, 2017. Those motions were denied, but this Court noted that the issues raised by the interlocutory appeals may be addressed in these appeals. R. 4486-4491.

II. STATEMENT OF FACTS

The CSRBA district court's Statement of Facts in the *Order on Motions for Summary Judgment* relied primarily on facts recited by the United States Supreme Court in *Idaho v. United States*, 533 U.S. 262 (2001). That decision arose from an appeal from the Idaho federal district court over a lawsuit between the State and the United States regarding the ownership of submerged lands of Lake Coeur d'Alene. The Supreme Court held that submerged lands within

the boundaries of the Coeur d'Alene Tribe Reservation belonged to the Tribe and were not passed to the State upon its admission to Statehood in 1890. *Id.* However, the submerged lands under the northern two-thirds of the Lake are State property, as the Coeur d'Alene Tribal boundary crosses Lake Coeur d'Alene about one-third of the way up the Lake from St. Maries and just below the mouth of the Coeur d'Alene River. No part of the Coeur d'Alene River itself, or its tributaries, lies within the boundaries of the current Coeur d'Alene Tribe Reservation. In addition to the facts set forth by the CSRBA district court in its *Order on Motions for Summary Judgment*, Hecla believes that the following additional facts are important and undisputed.

A. Formation of the Coeur d'Alene Reservation.

The creation of the Coeur d'Alene Reservation was spurred, in large part, due to the discovery of valuable mineral deposits within the aboriginal lands of the Tribe. R. 2347 ("The one thing that has given them [i.e. the Tribe] trouble has been the fear of losing their homes. They have watched the progress of white settlement in the surrounding county, the discovery of valuable mines, the building of railroads, etc. etc."); *Id.* ("It was feared in the early spring that the great rush to the Coeur d'Alene gold mines would cause considerable trespassing upon their reserve.")

A reservation for the Tribe was originally created through an 1867 Executive Order. *Idaho v. United States*, 533 U.S. 262, 265 (2001). The Tribe was not aware of the 1867 Reservation until 1871, and refused to accept its boundaries as too limited. *Id.* In 1872, the Tribe submitted a petition to the Commissioner of Indian Affairs seeking negotiations on a reservation boundary, asserting:

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> What we are unanimous in asking, besides the 20 square miles already spoken of, are the two valleys, the S. Josephs, from the junction of S. and N. forks, and the Coeur d'Alene from the Mission inclusively. It would appear too much, and it would be so if all or most of it were fit for farming but the far greatest part of it is either rocky or too dry, too cold or swampy; besides ***we are not as yet quite up to living on farming***; with the work of God we took labor too, we began tilling the ground and we like it; though perhaps slowly we are continually progressing; but our aided industry is not as yet up to the white man's. We think it hard to leave at once old habits to embrace new ones; ***for a while yet we need have some hunting and fishing***.

United States v. Idaho, 95 F.Supp.2d 1094, 1103 (emphasis added); *see also* 533 U.S. at 266 ("we are not as yet quite up to living on farming" and "for a while yet we need to have some hunting and fishing.") Thereafter, Congress authorized negotiations with the Tribe to induce "the tribes 'to abandon their roaming habits and consent to confine themselves within the limits of such reservation or reservations as may be designated for their occupancy.'" *United States v. Idaho*, 95 F.Supp.2d 1094, 1095 (D. Idaho 1998).

In 1983, the United States and Tribe agreed on a Reservation of approximately 590,000 acres, *Idaho v. Andrus*, 720 F.2d 1461, 1463 (9th Cir. 1983), "considerably larger than the 1867 Reservation," *United States v. Idaho*, 210 F.3d 1067 (9th Cir. 2000). The Tribe agreed to "cede approximately four million acres of aboriginal land to the United States." *Id.*; 533 U.S. at 266 ("Following further negotiations, the Tribe in 1873 agreed to relinquish (for compensation) ***all claims to its aboriginal lands outside the bounds of a more substantial reservation*** that negotiators for the United States agreed to set apart and secure" "for the exclusive use of the Coeur d'Alene Indians, and to protect...from settlement or occupancy by other persons.") (emphasis added). President Grant's 1873 Executive Order set the northern boundary directly across the lake and confirmed the boundaries of the Reservation. 533 U.S. at 266. This Executive Order did not identify fishing or fish habitat (on or off reservation) as a purpose of the

Reservation.[1] The 1873 agreement required approval from Congress "before it became binding on the parties." *Id.*

The 1873 agreement was never ratified by Congress. In 1885, concerned about "white settlement pressure," the Tribe contacted the Commissioner of Indian Affairs, requesting confirmation of the 1873 agreement. 533 U.S. at 267; *see also* R. 2336-2337 (Non-Indian interest in forest lands of northern Idaho predated the 1880s, but accelerated with the emergence of mining towns along the South Fork of the Coeur d'Alene River); R. 2347 ("The one thing that has given them [i.e. the Tribe] trouble has been the fear of losing their homes. They have watched the progress of white settlement in the surrounding county, the discovery of valuable mines, the building of railroads, etc. etc."); *Id.* ("It was feared in the early spring that the great rush to the Coeur d'Alene gold mines would cause considerable trespassing upon their reserve.") Seeking to "***extinguish the Tribe's aboriginal title*** to lands outside of the reservation," Congress authorized additional negotiations in 1887. 533 U.S. at 267 (emphasis added). Among the area that the United States sought to acquire in 1887, was land with mineral ledges and timber as well as "a magnificent sheet of water, the Coeur d'Alene Lake." *Id.* (*quoting* H.R. Rep. No. 1109, 51st Cong., 1st Sess. (1890).

In 1887, the Tribe agreed to cede

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

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[1] This is not to say that fishing had not been important to the Tribe. *United States v. Idaho*, 95 F.Supp.2d 1094, 1103-04 (D. Idaho 1998) (discussing the importance of waterways and fishing to the Tribe). The issue here, however, is the intent of the United States in setting aside the reservation of land for the Tribe in the 1873, 1887 and 1889 agreements. Nothing in any historical documents relating to the treaties and agreements with the Tribe evidence any intent on the part of Congress to set aside land or water for fishing or fish habitat. Instead, a primary intent of setting aside the reservation was to allow further development of mineral resources off the reservation – something that would require development of the area's water resources. *Infra.*

Id. In return, the United States promised to compensate the Tribe, and agreed that:

> in consideration of the foregoing cession and agreements...the Coeur d'Alene Reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians...and no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation.

533 U.S. at 267-68. The 1887 agreement was not "binding on either party until ratified by Congress." *Id.* As with the 1873 agreement, nothing in the 1887 agreement stated or implied that water rights, fishing or fish habitat were purposes of the Reservation or that any off-reservation water rights or fishing rights were preserved.

The Reservation identified in the 1873 and 1887 agreements included "the vast majority of the Lake" and valuable mineral deposits in the area. 210 F.3d at 1070; 533 U.S. at 268 ("the reservation appears to embrace all the navigable waters of Lake Coeur d'Alene, except a very small fragment.") While the 1887 agreement was pending before Congress, the United States received "pressure to open up at least part of the reservation to the public (particularly the Lake)." 210 F.3d at 1070. This non-agricultural land was very valuable to white settlers for its timber and mineral deposits. R. 2349 ("There is great eagerness on the part of the whites to locate mining claims on the mineral portion of the reserve...and we found mining claims numerously staked off...and in some cases notices posted."); R. 2349-2350 ("These mining prospectors are constantly on this portion of the reserve, and it seems next to impossible to keep them off.") On the other hand, mineral deposits had little value to the Tribe. R. 2349-2350.

Instead of acting on the prior agreements, Congress authorized further negotiations with the Tribe. R. 2359 (January 23, 1888 Senate Resolution directing the Secretary of Interior to consider whether "it is advisable ***to throw any portion of such reservation open to occupation and settlement under the mineral laws of the United States***") (emphasis added); 210 F.3d at

1071; 533 U.S. at 269 (The "northern end of said reservation, is valuable and necessary to the citizens of the United States for sundry reasons" including that "It contains numerous, extensive, and valuable mineral ledges."); 210 F.3d at 1077 (Congress authorized new negotiations in 1889 "with few limitations aside from an instruction to acquire non-agricultural lands.")

Following further negotiations, the Tribe agreed, in 1889, to "cede the northern portion of the reservation, including approximately two-thirds of Lake Coeur d'Alene, in exchange for $500,000." 533 U.S. at 269-70; *see also* R. 2354 ("The commissioners report that they held frequent councils with the Indians, explored the mineral portions of the reservation lying in the northern part thereof, and finally on September 9, 1889, concluded an agreement with the Indians whereby they cede and relinquish to the United States a very considerable portion of their reservation, valuable chiefly for mineral and timber upon terms advantageous as they believe to the Indians and the Government.") This 1889 agreement made no mention of water rights or fishing.

Congress ratified the 1887 and 1889 agreements through the Act of 1891, which provided:

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

533 U.S. at 271; *Andrus*, *supra*, 720 F.2d at 1465. This Act of Congress made no mention of water rights, lake level, instream flows or fisheries.

B. <u>Litigation Regarding the Scope of the Reservation</u>.

In *Idaho v. Andrus*, 720 F.2d 1461 (9th Cir. 1983), the Tribe challenged the State of Idaho's use of former reservation lands that had been acquired by the State in 1908. The patent conveying the land to the State included a condition that "the lands are to be by said state held,

used, and maintained solely as a public park,...the title to revert to the United States...absolutely if the said lands...shall not be...so used and maintained by the state." *Id.* at 1465. When the State began a private cottage leasing program, the Tribe and United States asserted that leasing the land violated that condition. *Id.* at 1462.

The question before the court there was whether the United States had retained any beneficial interest for the Tribe. *Id.* at 1464. To make that determination, the court examined at length the language necessary to demonstrate the intent to extinguish a Tribe's interest in lands or to diminish the size of a reservation. The court held that language such as "cede, surrender, grant, and convey" is "precisely suited to diminish reservation boundaries." *Id.* at 1466. That conclusion is important here because all the cessions by the Tribe and the 1891 Act of Congress agreed that the Tribe did thereby "cede, grant, relinquish, and quitclaim...all right, title and claim which they now have, or even have had" to the lands off the Reservation. 533 U.S. at 271. Likewise, in the Lake case, the Supreme Court confirmed that the Tribe agreed to "reduce" their aboriginal lands "and extinguish[] aboriginal title" to lands outside of the reservation. *Id.* at 276.

None of these prior decisions addressed water rights for the Reservation. Both decisions did, however, address the important issue before this Court and held that the Tribe had agreed to cede all right, title and claim to lands outside the Reservation.

III. ADDITIONAL ISSUES ON APPEAL[2]

1. Whether the district court erred in holding that hunting and fishing are primary purposes of the Executive Order establishing the Coeur d'Alene Indian Reservation?

[2] These were all issues raised by Hecla in its motion requesting acceptance of appeal by permission. *Hecla Limited's Motion Requesting Acceptance of Appeal by Permission*, filed August 30, 2017.

2. Whether the district court erred in concluding that hunting and fishing associated with the Reservation constitutes a primary purpose of the Reservation within the meaning of the *United States v. New Mexico* that would give rise to a reserved water right?

3. Whether the district court erred in failing to determine whether or not the primary purpose of the Reservation would be entirely defeated without a water right for hunting and fishing as required by the *United States v. New Mexico*?

4. Whether the district court erred in deferring the question of whether or not a water right is necessary for the purpose of the Reservation to the quantification stage of the proceedings.

IV. STANDARD OF REVIEW

In an appeal from an Order granting summary judgment, "the Court applies the same standard of review as that used by the district court when originally ruling on the motion." *Potlatch Corp. v. U.S.*, 134 Idaho 916, 919, 12 P.3d 1260, 1263 (2000). "Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* "The fact that the parties have filed cross-motions for summary judgment does not change the applicable standard of review, and this Court must evaluate each party's motion on its own merits." *Borley v. Smith*, 149 Idaho 171, 176, 233 P.3d 102, 107 (2010).

A motion for summary judgment should be granted if there is no genuine issue of material fact based on the pleadings, depositions, admissions and affidavits, and the moving party is entitled to judgment as a matter of law. Idaho R. Civ. P. 56(c); *Harris v. State Dept. of Health*, 123 Idaho 295, 847 P.2d 1156 (1992).

Although a motion is construed in favor of the nonmoving party, the nonmoving party may not rest upon mere allegations or denials. *McCoy v. Lyons*, 120 Idaho 765, 770, 820 P.2d 360, 365 (1991). Immaterial issues of fact do not preclude the granting of summary judgment. *J.R. Simplot Co. v. Dosen*, 144 Idaho 611, 167 P.3d 748 (2006). If the moving party asserts that there is no genuine issue of material fact, the burden shifts to the nonmoving party to "produce evidence by way of deposition or affidavit to contradict the assertions of the moving party and establish a genuine issue of material fact." *McCoy*, *supra* at 770. Conclusory assertions unsupported by specific facts do not create a genuine issue of material fact. *Mareci v. Coeur d'Alene School Dist. No. 271*, 150 Idaho 740, 250 P.3d 791 (2011). Mere speculation, or a scintilla of evidence, is not sufficient to create a genuine issue of material fact. *McCoy*, 120 Idaho at 769; *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 996 P.3d 303 (2000). In the absence of genuine disputed issues of material fact, only questions of law remain and the Court exercises free review. *Stuard v. Jorgenson*, 150 Idaho 701, 249 P.3d 1156 (2011).

This Court has held that interpretation of a Treaty involves a legal question for the Court rather than a question of fact, stating:

> Treaty interpretation is similar to contract interpretation. *Bonnanno v. United States*, 12 Cl.Ct. 769, 771 (1987). However, unlike contract interpretation, the interpretation of a treaty, including an Indian treaty, is a question of law for a court to decide. *Cayuga Indian Nation of New York v. Cuomo*, 758 F.Supp. 107, 111 (N.D.N.Y. 1991) (*citing United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n. 2 (9th Cir. 1986)). The examination of a treaty's negotiating history and purpose does not render its interpretation a matter of fact but merely serves as an aid to the legal determination which is at the heart of all treaty interpretation. *Bonanno*, 12 C.Ct. at 772.

Pocatello v. State, 145 Idaho 497, 505, 180 P.3d 1048 (2008).

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VI. ARGUMENT

A. *Winters* Doctrine and Interpretation of Indian Treaties.

The United States' *Notices of Claim* assert, as a basis for each claim, "the doctrine of federal reserved water rights articulated by the United States Supreme Court in *Winters v. United States*...and its progeny, as well as the operative documents and circumstances surrounding the creation of the Coeur d'Alene Reservation."[3] R. 363.

In *Winters*, the question before the Court was whether Congress had intended to reserve irrigation water when it set aside the Fort Belknap Indian Reservation. *Winters v. United States*, 207 U.S. 564 (1908). The treaty and supporting documents were silent as to the availability of irrigation water. Nevertheless, the Court held that Congress had impliedly intended to reserve water when it set aside the reservation so that the tribes would "become a pastoral and civilized people" on land that was "arid and without irrigation." *Id.* at 576. The Court concluded, "it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste - took from them the means of continuing their old habits, yet did not leave them the power to change to new ones." *Id.* at 577. From this decision, the *Winters*, or federal reserved water rights doctrine, came into being. Under *Winters*, a court can imply an intent to reserve water rights incidental to the reservation of land where that water was necessary to put the land to its intended use.

The court in *Winters* concluded that in the "interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians." *Id.* at 576. This is primarily because "the Indians were [not] alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the

[3] Each of the *Notices of Claim* for the various off-reservation instream flow claims identify the "Basis of Claim" as the *Winters* doctrine. R. 363.

Government." *Id.* at 577; *see also Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) (legal ambiguities in treaties are "resolved to the benefit of the Indians").

Winters is not an open door for the United States to demand water. Implied reservation of water depends on finding the necessary implication at the time the land was reserved. "[C]ourts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal, clearly runs counter to a tribe's later claims.'" *Oregon Dept. of Fish & Wildlife*, 473 U.S. at 774; *Andrus*, 720 F.2d at 1464 ("the general rule [of interpretation] does not command a determination that reservation status survives in the face of congressionally manifested intent to the contrary.") "Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943); *United States v. Choctaw Nation*, 179 U.S. 494 (1900) ("the Court cannot employ any 'notion of equity or general convenience, or substantial justice,' to 'incorporate into an Indian treaty something that was inconsistent with the clear import of its words.'")

The *Winters* doctrine has been extended to apply to other federal land reservations, many of which have come before this Court. *See* Section VI.B., *infra*. However, because the *Winters* reserved rights doctrine is a tool to imply what the United States actually intended at the time of its reservation of land, it has been exercised only within the narrowest boundaries and only when necessary to secure the "primary purpose" of the reservation of land. *Cappaert v. United States*, 426 U.S. 128, 139 (1976) ("In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters ***are necessary to accomplish the purposes for which the reservation was***

created.") (emphasis added). The Supreme Court explained in *United States v. New Mexico*, 438 U.S. 696, 701 (1978):

> The Court has previously concluded that Congress, in giving the President the power to reserve portions of the federal domain for specific federal purposes, impliedly authorized him to reserve "appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." While many of the contours of what has come to be called the "implied-reservation-of-water doctrine" remain unspecified, ***the Court has repeatedly emphasized that Congress reserved "only that amount of water necessary to fulfill the purpose of the reservation, no more."*** Each time this Court has applied the "implied-reservation-of-water doctrine," ***it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated.***

(emphasis added); *see also Cappaert*, 426 U.S. at 143 ("the implied-reservation-of-water-rights doctrine is ***based on the necessity of water for the purpose of the federal reservation.***") (emphasis added).

This implied reservation of water must be carefully balanced against Congress' and the courts' repeated recognition that State water law generally controls the acquisition, ownership and distribution of water. *See e.g. California v. United States*, 438 U.S. 645 (1978). There, the Supreme Court observed, in a quote worth preserving in full:

> Perhaps the most eloquent expression of the need to observe state water law is found in the Senate Report on the McCarran Amendment, 43 U.S.C. § 666(a), which subjects the United States to state-court jurisdiction for general stream adjudications:
>
> > "In the arid Western States, for more than 80 years, the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof."

438 U.S. at 678.

"Careful examination" of a claim for a federal reserved water right is necessary to confirm that the claimed water is a "primary use" and is "necessary to fulfill the very purposes"

of the reservation of land. *New Mexico*, 438 U.S. at 699. However, "where water is only valuable for a secondary use of the reservation...***there arises the contrary inference*** that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator." *Id.* (emphasis added).

The United States and Tribe argue that the Supreme Court's explanation of how the *Winters* reserved water rights doctrine was applied to another federal reservation of land in *New Mexico*, and indeed the court's *New Mexico* decision does not apply to this case. Presumably, this argument encompasses the many *Winters* implied reserved water right decisions of this Court that are ignored by the United States' and Tribe's briefs on appeal to this Court. As explained herein, the United States and Tribe are wrong.

B. Idaho's Extensive Case Law on Federal Reserved Water Rights Precludes the Claims Asserted by United States and Tribe in this Appeal.

This Court has addressed federal reserved water right claims on many occasions, both through the SRBA court proceedings and in the *Avondale* litigation from the 1970s. In the first *Avondale* decision, this Court required the United States to file its reserved water right claims in the Coeur d'Alene National Forest in a general water rights adjudication. *Avondale Irr. Dist. v. North Idaho Properties, Inc.*, 96 Idaho 1, 523 P.2d 818 (1974). In the second *Avondale* decision, this Court described the *Winters* reserved water rights doctrine:

> Although originating in a case concerning water rights on an Indian reservation, *Winters v. United States*, *supra*, this reserved right doctrine has been held to apply to other federal enclaves including national forests. *Cappaert v. United States*, *supra*; *United States v. District Court for Eagle County*, *supra*; *Arizona v. California*, *supra*.

Avondale Irr. Dist. v. North Idaho Properties, Inc., 99 Idaho 30, 35, 577 P.2d 9, 14 (1978); *accord United States v. City of Challis*, 133 Idaho 525, 529, 988 P.2d 1199, 1203 (1999). In

other words, this Court has applied the same principles underlying *Winters* to other federal reservations of land where reserved water rights are claimed.

In the decision approving the commencement of the SRBA, this Court explained in detail the nature of a federal reserved water right:

> 'reserved' rights are those rights reserved, either expressly or implied, by United States and are exempt from appropriation. *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908). Generally, those rights consist of those rights reserved by treaty with the Indians. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 103 S.Ct. 3201, 77 L.Ed. 2d. 837 (1983); *see also In re Rights to Use Water in Big Horn River*, 753 P.2d 76 (Wyoming 1988), *affirmed* by an equally divided court 492 U.S. 406, 109 S.Ct. 2994, 106 L.Ed. 2d. 3342 (1989); *State ex rel. Reynolds v. Lewis*, 88 New Mexico 636, 545 P.2d 1014 (1976). But these rights also include those obtained by the United States prior to granting statehood to a territory by the Riparian Doctrine or for purposes of maintaining applicable stream flows, *United States v. Rio Grande Dam and Irr. Co.*, 174 U.S. 690, 19 S.Ct. 770, 43 L.Ed. 1136 (1899); and other rights created by the U.S. when it held land as a territory, *United States v. Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905).

Idaho Department of Water Resources v. United States, 122 Idaho 116, 120, n. 3, 836 P.2d 289, 293, n. 3 (1992). Thus, *Winters* applies both to Indian reservations and other federal reservations.

Since *Avondale* and the SRBA commencement decision, this Court has had the opportunity to address federal reserved water rights claims in a case involving springs withdrawn for stock watering under an Executive Order, known as *Public Water Reserve* 107 (PWR 107), *United States v. State*, 131 Idaho 468, 959 P.2d 449 (1998); claims to reserved water rights on national forest land under the Multiple Use Sustained Yield Act of 1960 (MUSYA), *United States v. City of Challis*, 133 Idaho 525, 988 P.2d 1199 (1999); claims for reserved water rights under the Wild and Scenic Rivers Act, *Potlatch Corp. v. United States*, 134 Idaho 912, 12 P.3d 1256 (2000); claims for reserved water rights under the lands designated as wilderness under the Wilderness Act and for water in the Hells Canyon National Recreation Area Act, *Potlatch Corp.*

v. United States, 134 Idaho 916, 12 P.3d 1260 (2000) (on rehearing); and the Deer Flat Wildlife Refuge, *United States v. State*,135 Idaho 655, 23 P.3d 117 (2001).

Some of these decisions recognize a reserved right. Some do not. But each opinion carefully examines the reserved rights doctrine. Inexplicably, the Tribe and the United States essentially ignore this Court's reserved water rights decisions, even though these opinions address the scope of the reserved rights doctrine in ways that guide us to the correct resolution of the reserved water rights claims before this Court today.

Thus, in *Avondale II*, *supra*, this Court noted that a reserved water right is based on a reservation of land and vests on the date of the reservation. 99 Idaho at 34, 577 P.2d at 13. Thus, any *Winters* right can only have a priority date of the date of the reservation, not "time immemorial" as the United States and Tribe claim here. This Court relied on the *Winters* reserved rights doctrine and explained that under this doctrine, the United States "is entitled to such a water right only if, and only to the extent it 'is necessary to fulfill the purpose of the reservation, no more.'" (*quoting Cappaert v. United States*, 426 U.S. 128, 141 (1976)). This Court recognized that the Organic Act accommodated many other public uses of water that could be defeated by a reserved water right. 99 Idaho at 36, 577 P.2d at 15. This Court further emphasized that the purpose of the reservation had to be determined by the law at the time of the reservation of land and not by later discovered "supplemental" purposes. *Id.* A reserved water right is not based on an equitable balancing of competing interests but instead on the purpose of the reservation at the time it was created – "no more and no less." *Id.*

In the *PWR 107* decision, this Court examined contemporaneous historical documents making it clear that the purpose of PWR 107 "was to ***retain title*** to and supervision of such springs and water holes." 131 Idaho at 472, 959 P.2d 453 (emphasis added). That was

unambiguous evidence of an intent to reserve water in the Executive Order. Here, no party claims there are any historical documents asserting the need to "retain title" to any water for the Tribe, on or off the reservation. With respect to the off-reservation claims, which include the northern two-thirds of the Lake, the Tribe unequivocally ceded all title off the reservation, clearly indicating that there was no implied intent to "retain title" to water rights or any other rights off the reservation.

This Court, in the *MUSYA* appeal, reiterated that the reserved water right doctrine arises from *Winters*. 133 Idaho at 529, 988 P.2d at 1203. This Court held that when the United States claims an implied reserved water right, such a right must be necessary for the purposes of the reservation, that the necessity must be so great that without that water the reservation would be entirely defeated and that water valuable for a secondary purpose of the reservation must be acquired under State law. *Id.* at 529 and 531-32, 988 P.2d at 1203 and 1205-06. The Court evaluated the legislative history of the MUSYA Act and found nothing implying an intent to reserve water. *Id.* The same is true of Congress' 1891 Act approving the agreements with the Coeur d'Alene Tribe. Neither the Tribe nor the United States point to any legislative history behind that act, referring to water rights or the need for water rights.

The *Potlatch* cases involving the Wild and Scenic Rivers Act, the Wilderness Act and the Hells Canyon National Recreation Area evaluate the reserved rights claims based on contemporaneous legislative intent, as expressed in the language of the Acts. 134 Idaho at 914, and 134 Idaho at 919. In the *Wilderness Act* decision, this Court reviewed *Winters* and explained that it involved a situation where that Tribe would be left with land not "fit for habitation" unless there was an implied water right for the land reserved, 134 Idaho at 920, 12 P.3d at 1264. In *Winters*, giving the Tribe land without water would defeat the very purpose of the reservation. *Id.*

That is the measure of *Winters*. Is the water right necessary to make the land "fit for habitation"? If the land is not "fit for habitation," the reservation would be entirely defeated. In this case, there is absolutely no evidence that the Coeur d'Alene Reservation would not be "fit for habitation" and "entirely defeated" without the implied reserved water rights claimed here. This is especially true for the off-reservation instream flow claims.

The Tribe argues that this Court's *Wilderness Act* decision holds that implied reserved water rights for Indian reservations and implied reserved water rights for other federal lands must be evaluated under different legal tests. *Tribe Brief*, pp. 31-32. The Tribe then bootstraps that argument to wave off the relevance of the reserved rights case of *United States v. New Mexico*, 438 U.S. 696 (1978). This argument fails for many reasons. First, the Supreme Court itself cited *Winters* in *United States v. New Mexico* as the legal basis for the United States' authority to reserve unappropriated water for use on appurtenant lands withdrawn from the public domain. 438 U.S. at 699. Second, as shown above, this Court also relies on *Winters* as the basis for the implied reserved rights doctrine for other federal land reservations. Third, this Court examined the differences between the factual background underlying creation of the Fort Belknap Reservation in *Winters* and the facts underlying the Wilderness Act. This Court held that Congress had not taken the necessary steps to allow the Court to find a reserved water right. In other words, the *Winters* test is alive, but it was not satisfied with respect to the facts behind the Wilderness Act or designation of particular areas as wilderness.

More telling is this Court's explanation that in *Winters* "there would be no consideration for the agreement if the tribes gave up land and did not receive the benefit of the water ***to make the land habitable***." 134 Idaho at 920 (emphasis added). The CSRBA district court made no finding or determination that the Coeur d'Alene Reservation land would not be "habitable" or

not "fit for habitation," with respect to any of the reserved water rights granted to the United States for the Tribe. The CSRBA district court stopped its analysis with identifying the "primary purposes" of the reservation, and did not take the next step and ask the hard question, i.e., without water for that primary purpose, would the reservation not be "fit for habitation" or "entirely defeated"? The United States and Tribe failed to offer any evidence of what water rights were necessary for a "habitable" reservation. Other than domestic use, the rest of these reserved water right claims, under the facts of this case, do not come close to meeting that "habitable" standard. Critically, the off-reservation instream flow claims are not based on an assertion that the Reservation would not be "habitable." They are based on the claim that some species of fish migrate from parts of the Lake to off reservation areas.

The *Deer Flat* decision points out several other factors that are important in evaluating reserved rights claims. This Court continued to adhere to the rule that to obtain a valid reserved water right, the United States must show that the lack of such a right would defeat the purpose of the reservation. 135 Idaho at 663, 23 P.3d at 125. Significantly, this Court also observed, "[h]owever, simply reserving an area of land where certain species are attracted, without more, does not constitute a reservation of water." *Id.* Yet, that is precisely the basis for the United States' claims for instream flow (on and off the reservation), wetlands and lake levels – reserving an area of land where certain species might be attracted. The *Deer Flat* decision also provides that even if the purpose of the reservation has evolved over time, those evolved purposes cannot be the basis for a reserved water right. As this Court has held, "[p]resent day desires cannot be imposed as purposes on past decision if those purposes were not present at the time of the reservation." *Id.* at 664, 23 P.3d at 126.

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C. The United States Supreme Court Decisions do not Support these Implied Reserved Water Rights Claims.

These reserved rights claims expressly rely on *Winters*. R. 363. Yet, the facts behind *Winters* are a far cry from the facts behind the Coeur d'Alene Reservation. In 1888, the Fort Belknap Reservation was established in Montana. *Winters,* 207 U.S. at 565. At that time, the United States and Indians grazed large herds of horses and cattle on the Reservation. *Id.* at 566. The agricultural lands were productive, but "in order to make them productive, require[d] large quantities of water for the purpose of irrigating them." *Id.* Both the United States and the Indians immediately diverted and used water to irrigate about 30,000 acres of land for crops of grain, grass and vegetables. *Id.* Thereafter, the Defendants diverted water that had previously been used to irrigate the Reservation lands. *Id.* at 567-70.

The Court held that the case "turns on" the agreement creating the Fort Belknap Reservation. *Id.* at 575. The Court noted the policy of the government at that time was to change the Indians' habits so they would become a pastoral and civilized people. *Id.* at 576. The lands reserved, without irrigation, were "practically valueless." *Id.* Under those facts, the Court held that when the Tribe ceded lands outside the boundaries, there was an implication that waters necessary for agriculture were reserved for the on-reservation lands. *Id.*

Contrast the facts of *Winters* with those of this case. On the Coeur d'Alene Reservation, the agricultural lands are, and have always been, dry-land farming. There was no large-scale effort to irrigate the Coeur d'Alene Reservation lands to grow crops. All the pastoral and agricultural efforts of the members of the Coeur d'Alene Tribe, and they were both significant and admirable, were obtained without any significant irrigation. The Reservation lands were not "practically valueless" without irrigation.

Winters also recognizes that the intent of the reservation of land arises in the context of the policies of the government at the time of the reservation. As *Winters* explains, that policy was to change the habits of a nomadic people so they would become pastoral. 207 U.S. at 576. Doing so involved a smaller tract of land, and if water was necessary to carry out that purpose on the smaller tract through irrigation, then water for irrigation would be implied. *Id.* Here, the Coeur d'Alene Tribe explained that they needed to hunt and fish for "***a while***" because they were "not as ***yet*** quite up to living on farming." *Idaho v. United States*, *supra*, 533 U.S. at 266. (emphasis added).

Members of the Tribe applied themselves to agriculture and established valuable farms, all without diverting water for irrigation. While hunting and fishing were recognized at the time of the reservation as pursuits that the members would engage in for "a while," 533 U.S. at 266, those pursuits were not the reason for the Reservation. To the contrary, hunting and fishing were transitional to pastoral and agricultural pursuits, even in the minds of the Tribe, as they expressed at the time. *Id.* Likewise, there is nothing to imply that water had to be preserved for all time to support those pursuits on or off the Reservation in order to prevent the lands set aside for the Reservation from being "practically valueless." *Winters*, 207 U.S. at 576.

Arizona v. California, 373 U.S. 546 (1963) was another case where Indian tribes were awarded implied reserved water rights under the *Winters* doctrine. Those claims involved lands along the Colorado River, and "most of the lands were of the desert kind – hot, scorching sands." *Id.* at 599. The Court again noted, citing congressional documentation from the 1860s, that "[i]rrigating canals are essential to the prosperity of these Indians." *Id.* The court in *Arizona* characterized its holding in *Winters* as concluding that the United States, in creating the reservation, "intended to deal fairly with the Indians by reserving for them the water without

which their lands would have been ***useless***." *Id.* at 600. (emphasis added). Here, the Tribe and United States do not contend that the Coeur d'Alene Reservation would have been "useless" without irrigation.

In 1976, the Supreme Court applied the reserved rights doctrine to a reservation of Devil's Hole to preserve an underground pool of water. *Cappaert v. United States*, 426 U.S. 128 (1976). The court stated that "[t]he doctrine applies to Indian reservation and other federal enclaves." *Id.* at 138. The Court held that, where the proclamation creating the reserve recited that "the pool" should be given special protection, the proclamation showed an intent to reserve a water right to protect the pool. *Id.* at 140. The Court even found this language to be an explicit reservation rather than implied. *Id.*

In *Cappaert*, the Court relied on Indian reserved water rights cases of *Winters* and *Arizona v. California*, *supra*. This reliance belies the argument that *Cappaert's* reserved water right derives from a different legal source than the Indian reservation reserved right cases. Moreover, the Court also reiterated that the amount of water was limited to the minimum amount necessary to fulfill the purpose of the reservoir, citing to the Indian reserved water rights case of *Arizona v. California*. *Cappaert*, 426 U.S. at 141. Clearly, the United States Supreme Court has determined that both Indian and other federal reservations are to be analyzed in the same way when searching for an implied reserved water right.

Yet, the Tribe argues that *United States v. New Mexico*, 438 U.S. 696 (1978), a reserved water rights case for a reservation of federal land, "does not apply." Tribe Brief, p. 31. The United States argues that this Court should "wholly reject application of *New Mexico* in the Indian water rights context." U.S. Brief, p. 14, n. 4. Before rejecting *New Mexico*, based on the United States and Tribe's imploring, the Court should revisit the opinion. The United States

Supreme Court begins its opinion by citing to *Winters* and *Arizona v. California* as the bases for the "implied reservation of water doctrine." *New Mexico*, 438 U.S. at 698-700.

In *New Mexico*, the court stated that:

> Each time this Court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated.

438 U.S. at 700. Immediately preceding this quote, the court referred to both *Cappaert, supra,* and *Arizona v. California, supra,* a non-Indian and an Indian reservation. More telling is footnote 4 to the court's opinion which sets out the cases referred to in this quote. Footnote 4 sets out a detailed summary of *Winters*, *Arizona v. California* and *Cappaert*, and draws no distinction among the legal test applied to these Indian and non-Indian reservations. After citing both types of reservations, the court concluded that Congress' express deference to State water law, that a reserved right would only arise when it is necessary for the "very purpose" of the reservation, but when there is only a secondary purpose then Congress intended that water rights be acquired for the reservation like any other appropriator. *New Mexico*, 438 U.S. at 702.

The United States Supreme Court could not be more clear. The primary-secondary purpose test applies to all claims under the "implied-reservation-of-water doctrine." There are not two separate doctrines, as the Tribe and United States claim, no matter how much some commentators would like to see a different outcome.

D. The *Winans* Decision does not Support the Implied Reserved Water Right Claims Made Here.

Both the United States and Tribe heavily rely on the United States Supreme Court decision in *United States v. Winans*, 198 U.S. 371 (1905), to support their implied reserved water right claims. *Winans* does not support these implied reserved water right claims. *Winans* is not

even a reserved water right case, or a water rights case at all. *Winans* involved an interpretation of the express language of a treaty with the Yakima Tribe. That treaty contained language common to other Columbia River tribes, including the Nez Perce Tribe, that is completely absent from any of the agreements with the Coeur d'Alene Tribe. That language preserved the right to take fish "at all usual and accustomed places" off the reservation in common with the citizens of Washington Territory. *Id.* at 378.

Fish wheels constructed by non-Indians had excluded the Yakima from access to their usual and accustomed fishing places, and suit was brought to enjoin the non-Indians from interfering with that treaty right of access. The United States Supreme Court stated that the "pivot of the controversy" was the construction of that language of the treaty. The Supreme Court observed that the treaty was a grant of rights from the Tribe, and a reservation of rights was not granted. *Id.* at 381. Thus, that treaty expressly reserved to the Tribe certain enumerable rights outside the reservation boundaries to take fish at these usual and accustomed fishing places. *Id.*

The Yakima Treaty and the Coeur d'Alene Treaty are markedly different in this respect. The Coeur d'Alene Treaty does not mention fishing on or off the reservation. It contains no reservation of the right to take fish at usual and accustomed places. It contains no reference to access to fish at all. Rather, as we have seen, the Tribe ceded "all right and claim which they now have, or ever had...except the portion of land within the boundaries of the present reservation." *Idaho v. United States*, 533 U.S. 262, 267 (2001). Thus, unlike the Yakima Tribe, the Coeur d'Alene Tribe reserved nothing off the Reservation – no instream flow rights, not the northern two-thirds of that great sheet of water – Lake Coeur d'Alene – nothing. As the court in *Winans* recognized, "[t]he extinguishment of the Indian title, opening the land for settlement, and

preparing the way for future states, were appropriate to the objects for which the United States held the territory." 198 U.S. at 384. As *Winans* recognizes, there could have been a reservation of some of the Indians' rights outside the reservation; but here there was not.

E. Protection of Fish Habitat was Not a "Primary Purpose" of the Reservation, and there are No Implied Reserved Water Rights for Off-Reservation Instream Flows.

The Coeur d'Alene Reservation was not established to protect fish habitat off the Reservation. There is not a shred of historical evidence to support such a claim. Rather, the historical record demonstrates that the Reservation was established to set aside agricultural land that was protected from white settlement. *See* Section II.A., *supra.*

At the time, the Tribe was shifting to a more agrarian lifestyle. As stated in its 1872 petition requesting negotiations, the Tribe expressed a desire to increase agricultural practices, and concluded that fishing would only be necessary for subsistence "for a while yet." *Idaho v. United States*, 533 U.S. 262, 266 (2001) ("When the Tribe petitioned the Commissioner of Indian Affairs a second time, 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.'") This temporary desire for fishing on the Reservation for a while cannot support a permanent water right, nor could the temporary, transitional phase be considered a primary purpose of the Reservation, without which the Reservation would be entirely defeated.

Most telling is that none of the 1873, 1887 nor 1889 agreements make any reference to fishing activities, fish habitat or fishing off the Reservation. At the time, treaties and agreements with Indian tribes throughout the northwest explicitly dealt with fishing – both on and off-reservation. *See Puyallup Tribe v. Dept. of Game*, 391 U.S. 392 (1968) (Treaty "guaranteed the right to fish 'at all usual and accustomed places, in common with the citizens of Washington.'"); *United States v. Winans*, 198 U.S. 371 (1905) (same); *Nez Perce Order*, *supra* (same). If the

United States, in the nineteenth century, intended to grant an implied water right for fish habitat – such as the off-reservation instream flow claims at issue here – the United States or the Tribe would have at least mentioned fishing in their agreements.

Here, the words of the agreements between the United States and Tribe are devoid of any intent to preserve off-reservation fish habitat. Rather, negotiations clearly show that both parties intended to reserve an agricultural preserve for the Tribe, free from interference from white settlers, including mineral prospectors. Section II.A., *supra*. Given the clear intent of the agreements, "[i]t is inconceivable that the United States would have intended or otherwise agreed to allow the [Tribe] to reserve instream flow off-reservation water rights appurtenant to lands intended to be developed" by white settlers. *Nez Perce Order* at 38.

The Tribe relinquished all of its "right, title and claim" to off-reservation lands. They did so and were compensated. *Idaho v. United States*, 533 U.S. 262, 266 (2001). There was no mention of fishing or habitat in either the agreements, executive orders or congressional approvals. *Supra*. "It defies reason," therefore, "to imply the existence of a water right that was both never intended by the parties and inconsistent with the purpose of the Treaty." *Nez Perce Order* at 38.

When the CSRBA district court examined the history of negotiations and the Lake case litigation, it concluded that on-reservation hunting and fishing was "a" purpose of the Reservation. The CSRBA district court also held that off-reservation hunting and fishing rights were inconsistent with the Tribe's cession of all right, title and claims to off-reservation lands. That latter conclusion is undoubtedly correct. However, under the *Winters* doctrine, the conclusion that a water right for hunting and fishing can be implied under the facts of this case is not.

Hunting and fishing was no doubt culturally important, just as it was, and remains, to many non-Indian cultures in Idaho. But *Winters* requires that the presence of a water right be necessary, and without a water right that purpose would be "entirely defeated." *United States v. New Mexico*, 438 U.S. 696 (1978); *United States v. City of Challis*, 133 Idaho 525, 529, 988 P.2d 1199, 1203 (1999). Hunting and fishing occurs all over the State without water rights. The United States and Tribe have simply failed to prove that water right is necessary, even if hunting and fishing is "a" primary purpose.

However, the historical evidence is clear, as discussed above, that hunting and fishing were contemplated only "for a while" yet, while the tribal members transitioned to a pastoral, agricultural economy. *Idaho v. United States*, 533 U.S. at 266. Even if a hunting and fishing case could give right to a water right, it is inconceivable that a temporary use of that resource would give rise to a permanent right prior in time and right to all other uses of the resource.

F. The Plain Language of the Agreements Evidences the Tribe's Intent to Cede "All Right, Title and Claim" to Lands Outside of the Reservation.

The 1887 agreement provided that the Tribe would cede

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

United States v. Idaho, 95 F.Supp.2d 1094, 1096 (D. Idaho 1998). The 1891 ratification recognized that:

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

Idaho v. Andrus, 720 F.2d 1461, 1463 (9th Cir. 1983). This language is "precisely suited to diminish reservation boundaries." There is no limitation or exception to its scope. *Id.* at 1466.

The claims for off-reservation instream flow rights are directly contrary to these agreements. If the United States had impliedly intended to preserve any off-reservation "right, title and claim" – such as an off-reservation instream flow claim – it could have, and should have, done so through the agreements. *See, for example, Puyallup Tribe*, 391 U.S. 392 (Treaty in question "guaranteed the right to fish 'at all usual and accustomed place, in common with the citizens of Washington'"); *Winans*, 198 U.S. 371 (same); *Nez Perce Order*, *supra* (same). As it stands, however, the agreements are completely silent as to any fishing rights or fish habitat (either on or off-reservation). The record is also completely devoid of any evidence that the Reservation would be "practically worthless" or "useless" without off-reservation instream flows.

G. The United States Intended that Non-Indian Settlers Would Rely on the Agreement to Cede "All Right, Title and Claim" Outside of the Reservation for Mineral Development.

In light of the Tribe's agreements to cede "all right, title and claim" outside of the Reservation, and Congress' confirmation of those agreements, settlers developed the ceded area. Beginning in the 1860s, white settlers were developing mineral deposits in this area. R. 2347 ("The one thing that has given them [i.e. the Tribe] trouble has been fear of losing their homes. They have watched the progress of white settlement in the surrounding county, the discovery of valuable mines, the building of railroads, etc. etc."); *Id.* ("It was feared in the early spring that the great rush to the Coeur d'Alene gold mines would cause considerable trespassing upon their reserve.") In the 1880s, the Tribe became concerned with the mineral development interfering with its lands and pushed for negotiations to establish a reservation. *Idaho v. United States*, 533 U.S. 262, 267 (2001). After the 1887 agreement, Congress received pressure from white settlers seeking further mineral development opportunities and authorized further negotiations to

determine whether additional Tribal land should be opened up for mineral development under the "mineral laws of the United States." *United States v. Idaho*, 210 F.3d 1067, 1070 (9th Cir. 2000). The "mineral laws of the United States" included the Mining Act of 1866.

Long before negotiations with the Tribe began, the United States codified its intent to recognize and protect mineral development and its associated water rights. The Mining Act of 1866 effectively opened public lands to mineral exploration and development. Act of July 26, 1866, 14 Stat. 253, *codified* at 50 U.S.C. §§ 51, 52 and 43 U.S.C. § 661. The Act included a provision protecting water rights associated with mineral development. Act of July 26, 1866, 14 Stat. 253 (*codified* at 43 U.S.C. § 661) ("Whatever by priority of possession rights to the use of water for mining...have vested and accrued...the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed.") A subsequent 1870 amendment again confirmed the recognition and protection of water rights associated with mineral development. Act of July 9, 1870, 16 Stat. 218 (*codified* at 43 U.S.C. § 661) ("all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or right to ditches and reservoirs used in connection with such water rights, as may have been acquired.") These statutes protect water rights associated with mineral development into the future. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 155 (1935) (The Acts of 1866 and 1870 "were not limited to recognizing pre-existing rights of possession, but '[t]hey reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid land states, as the test and measure of private rights in and to the nonnavigable waters on the public domain.'")

The United States knew of the protections afforded mineral development and water rights for mineral development under these Acts when it was negotiating with the Tribe in the 1870s and 1880s. Indeed, those negotiations were prompted, in large part, over the Tribe's concerns about mining claims by white settlers and with the specific purpose of acquiring the land from the Tribe for mineral development. R. 2359 (January 23, 1888 Senate Resolution directing the Secretary of the Interior to consider whether "it is advisable to throw any portion of such reservation open to occupation and settlement under the mineral laws of the United States.")

Considering these facts, the intent of both the Tribe and United States are clear. Neither the Tribe nor the United States intended to maintain any off-reservation right to demand a certain stream flow for fish habitat. Such an environmental servitude that would be used as a basis to impede or prevent off-reservation mining activities was never contemplated. The settlers then developed the mineral deposits, relying on the fact that all "right, title and claim" outside of the Reservation was ceded by the Tribe.

V. CONCLUSION

The miners and other settlers that came to North Idaho, came to what had previously been Indian country in the aboriginal territory of the Coeur d'Alenes. Through a series of agreements, executive orders and congressional actions, the Coeur d'Alenes gave up all claims outside their Reservation. They did so understanding that they were destined to become agricultural, pastoral and "civilized" people living on lands within specific reservation boundaries. Their agricultural lands did not and do not require irrigation. The Reservation is not desert. The Reservation is not "useless" without water rights for irrigation, hunting or fishing, or any other purpose. Hunting and fishing was a temporary measure in the process of assimilation, not the basis for water rights on, or off, the Reservation. Having failed to prove that any of their water right claims are

necessary for the purpose of the Coeur d'Alene Reservation, it is error to imply from the United States' negotiations in the nineteenth century that the United States intended to reserve any water rights for this particular reservation.

DATED this 13th day of April, 2018.

BARKER ROSHOLT & SIMPSON LLP

Albert P. Barker
Attorneys for Hecla Limited

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of April, 2018, I served true and correct copies of the foregoing **HECLA LIMITED'S CONSOLIDATED RESPONSE BRIEF** upon the following by the method indicated:

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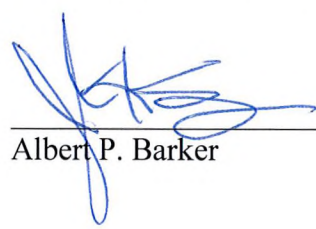

Albert P. Barker

APPENDIX A

to

HECLA LIMITD'S CONSOLIDATED RESPONSE BRIEF

Filed on April 13, 2018

United States v. State of Idaho, et al.
Supreme Court Docket No. 45382-2017

ATTACHMENT A

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