IN THE SUPREME COURT OF THE STATE OF IDAHO

IN RE: CSRBA CASE NO. 49576 SUBCASE NO. 91-7755 (353 Consolidated Subcases) NORTH IDAHO WATER RIGHTS ALLIANCE, MEMBERS OF THE NORTH WEST PROPERTY OWNERS ALLIANCE, MEMBERS OF THE COEUR D'ALENE LAKESHORE PROPERTY OWNERS ASSOCIATION, RATHDRUM POWER LLC, and HAGADONE HOSPITALITY CO., Appellants, v. UNITED STATES OF AMERICA and COEUR D'ALENE TRIBE, Respondents.	**SUPREME COURT DOCKET** **45384-2017**

APPELLANTS' REPLY BRIEF

Appeal from the District Court of the Fifth Judicial District for Twin Falls County
Honorable Eric J. Wildman, Presiding

Norman M. Semanko, ISB #4761
PARSONS BEHLE & LATIMER
800 West Main Street, Suite 1300
Boise, Idaho 83702
Telephone: 208.562.4900
Facsimile: 208.562.4901
NSemanko@parsonsbehle.com
ecf@parsonsbehle.com
Attorneys for Appellants

Jeffrey H. Wood
Vanessa Boyd Willard
U.S. Department of Justice
Environment & Natural Resources Div.
999 18th Street, South Terrace, Suite 370
Denver, CO 80202
Attorneys for United States

(All counsel cont'd on inside cover)

Albert P. Barker
Barker Rosholt & Simpson LLP
P.O. Box 2139
Boise, ID 83701-3129
Attorneys for Hecla Limited

Chief Natural Resources Div.
Office of the Attorney General
P.O. Box 83720
Boise, ID 83720-0010
Attorneys for the State of Idaho

William J. Schroeder
KSB Litigation PS
221 N. Wall, Suite 210
Spokane, WA 99201-3505
Attorneys for Avista Corp.

C. H. Meyer, J. C. Fereday
J.W. Bower & M.P. Lawrence
Givens Pursley LLP
P.O. Box 2720
Boise, ID 83701-2720
Attorneys for North Kootenai Water & Sewer Dist.

Candice M. McHugh
Chris Bromley
McHugh Bromley PLLC
380 S 4th Street, Suite 103
Boise, ID 83702
Attorneys for City of Coeur d'Alene

Mariah R. Dunham
Nancy A. Wolff
Dunham & Wolff, P.A.
722 Main Ave
St. Maries, ID 83861
Attorneys for Benewah County et al.

Erika B. Kranz *(pro hac vice*)
U.S. Department of
Justice, Appellate Section
P.O. Box 7415
Ben Franklin Station
Washington, DC 20044
Attorneys for United States

Vanessa Ray-Hodge
Sonosky, Chambers, Sachse, Mielke
& Brownell, LLP
500 Marquette Ave. NW, Suite 660
Albuquerque, NM 87106
Attorneys for Coeur d'Alene Tribe

Eric Van Orden
Legal Counsel for the Coeur d'Alene Tribe
850 A Street
Plummer, ID 838951
Attorneys for Coeur d'Alene Tribe

David L. Negri
U.S. Department of Justice
Environment & Natural Resources
550 West Fort Street, MSC 033
Boise, ID 83624
Attorneys for United States

John T. McFaddin *(pro se*)
20189 S. Eagle Peak Road
Cataldo, ID 83810

Ratliff Family LLC #1 (*pro se*)
13621 S. Hwy 95
Coeur d'Alene, ID 83814

Ronald Heyn (*pro se*)
828 Westfork Eagle Creek
Wallace, ID 83873

William M. Green (*pro se*)
2803 N. 5th Street
Coeur d'Alene, ID 83815

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Members of the North Idaho Water Rights Alliance; Members of the North West Property Owners Alliance; Members of the Coeur d'Alene Lakeshore Property Owners Association; Rathdrum Power, LLC; and Hagadone Hospitality Co. (collectively, the "North Idaho Water Rights Group" or "NIWRG"), the above-named Appellants, by and through their counsel of record, Norman M. Semanko of Parsons Behle & Latimer, hereby submit their Reply Brief in this matter on appeal from the Fifth Judicial District, Coeur d'Alene Spokane River Basin Adjudication, Twin Falls County (Eric J. Wildman, Presiding).

I. ADDITIONAL ARGUMENT

A. The Doctrine of Reserved Water Rights Applies to Indian Reservations.

The United States and the Coeur d'Alene Tribe insist that certain fundamental tenets of the doctrine of reserved water rights do not apply to Indian reservations. However, this Court has long held that the doctrine of reserved water rights applies to Indian reservations and other lands reserved for a particular purpose, including parks, wildlife refuges and national forests. *United States v. State,* 131 Idaho 468, 470 (1998); *see also, Avondale Irr. Dist. v. North Idaho Properties, Inc.*, 99 Idaho 30, 35, 577 P.2d 9, 14 (1978) ("Although originating in a case concerning water rights on an Indian reservation, *Winters v. United States, supra*, this reserved water rights doctrine has been held to apply to other federal enclaves including national forests." (citations omitted)). This includes both the "primary purpose" and "necessity" tests, which were properly adopted by the district court in this matter. As it relates to this appeal, the district court erred only in its application of these fundamental tests.

Instead of following the well-established elements of the reserved rights doctrine, the United States and the Tribe ask this Court to adopt a new, more relaxed test that would imply a federal reserved water right for any and all reservation purposes – packaged as an all-encompassing "permanent homeland" purpose, which was specifically rejected by the district court – without first determining whether the purpose is a primary one for the reservation and, if so, whether a federal reserved water right is necessary to fulfill that purpose. This is not the law. "An intent to reserve water is inferred if water is necessary for the primary purposes of the reservation and if, without water, the purposes of the reservation will be entirely defeated." *State v. United States,* 134 Idaho 940, 943, 12 P.3d 1284, 1287 (2000) (*citing United States v. New Mexico,* 438 U.S. 696, 700 (1978) (emphasis added)).

The United States and the Tribe refer to the necessity test as if it is something new or novel that would require a departure from established jurisprudence to apply in this matter. The Tribe goes so far as to suggest that adherence to the test of necessity is "a fundamental attack" on tribal water rights and an "extreme argument." Tribe's Response at 1. On this point, the United States and the Tribe are simply mistaken. Application of the necessity test to federal reserved water right claims is a required – and critical – step in this Court's analysis.

The term "test of necessity" is a short-hand description coined by this Court in describing the test for evaluating federal reserved water right claims, set forth in New Mexico. *State v. U.S.,* 134 Idaho at 945. "In order to meet the test of necessity required for a federal reserved water right, the need for water must be so great that, without water, the primary purpose of the reservation will

be entirely defeated. *New Mexico,* 438 U.S. at 700, 98 S.Ct. at 3014, 57 L.Ed.2d at 1057." *Id.* (emphasis added).

Understanding that proper application of the necessity test to their claims will result in most of those claims being denied, the United States and the Tribe have pinned their hopes in this appeal on convincing this Court that the test somehow does not apply to Indian reservations. This argument can be successful only if this Court were to ignore the long list of previous decisions that it has issued interpreting and applying the reserved rights doctrine set forth by the U.S. Supreme Court. The United States contends that the primary purpose and necessity tests do "not apply to the reservation of land broadly intended to serve as a home for people." U.S. Response at 24. For this bold assertion, the United States can cite no U.S. Supreme Court precedent, only a non-binding state court opinion from Arizona and two secondary source treatises, all of which stand in stark contrast to this Court's previous interpretation of U.S. Supreme Court opinions. The Court should not accept this invitation to depart from settled, binding precedent. It is the district court's failure to properly apply the standards that are at issue in this appeal – not the standards themselves.

B. Fishing and Hunting Was Not the Primary Purpose for Creating the Reservation.

"Primary" means "of chief importance; principal." Oxford Dictionary Online (*en.oxforddictionaries.com*). While fishing and hunting were important to tribal members – and non-Indian settlers – it was not the principal reason for creation of the reservation. If it was, it would have inevitably been included in one or more of the documents creating the reservation. It was not. This is problematic, as the Court is to "consider the relevant acts, enabling legislation and

history surrounding the particular reservation under review to determine if a federal reserved water right exists." *United States v. State,* 131 Idaho at 470.

The United States and the Tribe are unable to point to any language in the pertinent agreements and acts of Congress, which contains a right to fish or hunt. President Grant's 1873 Executive Order did not identify hunting or fishing as the reason for setting aside the reservation. *Idaho v. United States,* 533 U.S. 262, 266 (2001). And the provision in the 1873 agreement, stating that "the waters running into said reservation shall not be turned from their natural channel where they enter said reservation" (R. at 4202) was never approved by Congress and was not included in the 1887 or 1889 agreements approved by Congress in 1891. None of these documents mention fishing. They contain no reservation to take fish at usual and accustomed places. And, of course, the reservation was greatly diminished in size between 1873 and 1891.

"Diminished" is an adjective meaning "made smaller or less." Oxford Dictionary Online (*en.oxforddictionaries.com*). The United States incorrectly asserts that "at no point in this adjudication has NIWRG even argued that the Reservation has been 'diminished.'" U.S. Response at 14, n.5. Likewise, the Tribe wrongly claims that "NIWRG didn't raise any diminishment issue below, and the issue is not presented here." Tribe's Response at 11, n.9. In fact, NIWRG's summary judgment briefing contained an entire section on this issue entitled, "The 1891 Act Confirmed a Diminished Reservation and the Cession of All Rights, Title and Interest Outside the New Reservation." R. at 4106-08. NIWRG's brief below also stated: "The 1873 Executive Order says nothing about fishing rights or instream flow water rights. The 1887 and 1889 Agreements are likewise silent, as is the 1891 Act of Congress ratifying the diminished reservation." R. at

4105. This subissue is fairly presented here, as well, to illustrate the reduced scope of waterways included in the Reservation, as it pertains to the "primary purpose" determination for fishing and hunting. *See, Idaho v. Andrus,* 720 F.2d 1461 (9th Cir. 1983) ("explicit language" such as "cede, surrender, grant, and convey to the United States all their claim, right, title and interest" has been held to be "precisely suited" to diminish reservation boundaries). With regard to the United States' point about "Indian Country jurisdiction" and diminishment, it is beyond dispute that "most land within the Reservation . . . is predominately owned by non-Indians." R. at 4133 (*Idaho v. U.S.,* 2001 WL 76238 *2 (2001)).

The U.S. Supreme Court found that the Tribe "depended on submerged lands." *Idaho v. U.S.*, 533 U.S. at 262, 265 (2001) (*"Idaho II"*). And the United States retained certain submerged lands on the Reservation for this purpose. But this does not equate to the primary purpose of the reservation, let alone result in a federal reserved water right. Indeed, both the United States (Response at 40) and the Tribe (Response at 36) admit that the lake level claim is not based on ownership of submerged lands. Obviously, none of the other federal claims can be based on ownership of the submerged lands confirmed in *Idaho II*. And it goes without saying that *Idaho II* was not a water rights adjudication case at all; it only determined the ownership of submerged lands, as contested between the United States and the State of Idaho. As a result, there was no "primary purpose" determination made in that case, as is required in this matter pursuant to *New Mexico*.

With nothing about hunting and fishing in the agreements and Congressional acts, much is made by the United States and the Tribe regarding the single statement by tribal leadership that

"we are not as yet quite up to living on farming . . . for a while yet we need have some hunting and fishing." R. at 700. This statement of a temporary need for hunting and fishing does not equate to a primary purpose (*i.e.*, of chief importance or principal), as it was only desired "for a while yet." The same statement contains a recognition that the "old habits" would give way "to embrace new ones." R. at 700. It is the "new ones" (farming) that were primary in importance, not the "old habits" (hunting and fishing). Obviously, they were both of importance. But only one was of chief importance. Even the United States begrudgingly acknowledges now that the United States "promoted agriculture." U.S. Response at 11–12. This case is remarkably similar to the original federal reserved rights case, in which the Court observed that the Tribe's "old habits" changed "to new ones." *Winters v. United States*, 207 U.S. 564, 577 (1908).

At the time the reservation was established, it was clear that hunting and fishing were contemplated only "for a while yet," with the primary, permanent goal being an agricultural way of life. *Idaho v. U.S.*, 533 U.S. at 266. This set of circumstances does not demonstrate that fishing and hunting were a primary purpose of the reservation, and therefore does not give rise to a federal reserved water right.

In an attempt to buttress its argument, the United States asserts that the purposes of the reservation include "maintaining biological requirements of certain fish species that migrate upstream from Lake Coeur d'Alene to spawn" and "to protect fish habitat." U.S. Response at 2, 7. Again, there is nothing in the agreements or Congressional acts to support this assertion. Rather, it is based on statements and conclusions contained in current expert reports in this matter.

It is not credible to conclude that contemporary notions of "maintaining biological requirements" and the need to "protect fish habitat" were considered by the parties at the time the reservation was set aside, well over 100 years ago. "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). "Present day desires cannot be imposed as purposes on past decisions if those purposes were not present at the time of the reservation." *U.S. v. State of Idaho*, 135 Idaho 655, 664, 23 P.3d 117, 126 (2001); *see also*, Order on Motions for Summary Judgment, Consolidated Subcase No. 03-10022 (Nov. 10, 1999) (detailing SRBA Court Judge Barry Wood's finding that the Nez Perce Tribe "did not intend to reserve a water right in 1855 because fish habitat was not contemplated"). R. at 862.

While fishing and hunting were important to tribal members and non-Indians alike, this was simply not the primary purpose for the creation of the reservation.

C. Federal Reserved Water Rights Are Not Necessary for Hunting and Fishing or Agriculture on the Reservation.

The United States and the Tribe essentially want to read "necessity" out of the reserved rights doctrine. However, it has always been a key component of the doctrine and must be applied by this Court. Doing so results in the inescapable conclusion that many of the claims should be denied. The arguments of the United States and the Tribe to the contrary are unavailing, as discussed below.

1. Hunting and Fishing on the Reservation Does Not Require a Federal Reserved Water Right.

The United States seeks to focus the Court's attention on "the centrality of the Reservation waterways to the Tribe for its hunting and fishing activities." U.S. Response at 8. The district court recognized the Tribe's "need to access the waterways" for fishing and hunting. R. at 4321. The United States claims that simply setting aside "a reservation with waterways" is sufficient to establish a federal reserved water right for hunting and fishing. U.S. Response at 7. However, "simply reserving an area of land where certain species are attracted, without more, does not constitute a reservation of water." *United States v. State*, 135 Idaho 655, 663, 23 P.3d 117, 125 (2001). This conclusion would certainly seem to apply to the submerged lands reserved for the Tribe. People fish and hunt throughout the state, without the benefit of a federal reserved water right. This includes tribal members.

This Court previously found that a federal reserved water right was not necessary for the Sawtooth National Recreation Area, despite the fact that "fish require water," because the primary purpose of the reservation, including protection of fish and wildlife values, was being accomplished through land use regulations adopted well after the reservation was established. *State v. United States*, 134 Idaho 940, 945, 12 P.3d 1284, 1289 (2000). This case stands in stark contrast to the United States' argument that the necessity of federal reserved water right claims cannot be determined in the context of "later events." The question is whether, without a federal reserved water right, the Tribe would be left with land that is not "fit for habitation." *Potlatch Corp. v. U.S.*, 134 Idaho 916, 920, 12 P.3d 1260, 1264 (2000). There is no evidence that the

reservation would not be "fit for habitation" without a federal reserved water right for fishing and hunting.

The United States maintains that "the proper question in determining the scope of this reserved water right is not whether as a practical matter a tribe's water-related needs may be met without a federal reserved water right." U.S. Response at 25. The Tribe makes essentially the same argument. Tribe's Response at 8. This is directly contrary to established precedent. In the Deer Flat National Wildlife Refuge case, which also involved in situ claims to water, this Court found: "The United States has not shown that the principal objects of the reservations will be defeated without a reserved water right." *U.S. v. State of Idaho*, 135 U.S. at 664, 23 P.3d at 126 (emphasis added). This was true even though the islands involved required water to exist for the purpose of providing a refuge and breeding ground for migratory birds and other wildlife. This Court observed that the reclamation projects (state law storage water rights) assured that there would be sufficient water to maintain the islands. *Id.* at 666. This, the Court found, was being accomplished without a federal reserved water right.

The same can easily be said in this case. To the extent water is required to fulfill the hunting and fishing purpose of the reservation, that need is filled by the state law water right held by the Governor for the preservation of Lake Coeur d'Alene (water right no. 95-2067). Contrary to the unfounded assertions by the United States and the Tribe that this right is not permanent, this is a licensed water right and is therefore permanently vested, pursuant to the Idaho State Constitution, Art. 15, § 3 and I.C. § 42-220. *Idaho Power Co. v. Idaho Dept. of Water Resources*, 151 Idaho 266 (2011). The water right exists "in trust for the people of the State of Idaho . . . to preserve the

lake . . . for all the residents of Idaho." I.C. § 67-4304. The water guaranteed by this water right has been, and will continue to be, sufficient to preserve the lake for the fishing and hunting purposes (as well as other in situ purposes) of the entire lake, including the portion that lies within the reservation. With this one water right, the United States' claimed purposes for the lake, tributary inflow and outflow, and associated wetlands, springs and seeps, gathering and other traditional uses of waterways, is satisfied. Just as in the Deer Flat National Wildlife Refuge case, these needs are being accomplished without a federal reserved water right, and such a right is therefore not necessary. This conclusion is further bolstered by the vested state law water rights and the FERC license that exist for Post Falls Dam, which the United States and the Tribe readily admit keeps the lake at sufficient levels, as well as vested minimum stream flow water rights that exist for the major tributaries to the lake.

This demonstrated lack of necessity for a federal reserved water right applies to the one (1) lake level maintenance claim, 15 instream flow claims, 24 claims to springs and seeps, and 195 wetlands claims by the United States, all located within the current reservation boundaries. The district court has previously denied 57 off-reservation instream flow claims, which are at issue in separate appeals filed by the United States (Case No. 45382) and the Tribe (Case No. 45383). As a result, the 235 federal in situ claims which have not already been denied by the district court should now be denied by this Court. They are simply not necessary.

2. The Agricultural Purpose of the Reservation Does Not Require Water for Irrigation.

The United States and the Tribe ask the Court to allow them to rush ahead to quantification of their irrigation water right claims under "the well-established practically-irrigable acreage

standard." U.S. Response at 2. Before they can do this, however, they must first satisfy the equally "well-established" requirement that water is necessary and that the agricultural purpose of the reservation will not be entirely defeated without a federal reserved water right. *New Mexico,* 438 U.S. at 701. This is not a "remarkable argument" as asserted by the United States. U.S. Response at 30. Nor is it a denial of due process, as urged by the Tribe. Tribe's Response at 26. It is the law. The test of necessity must be satisfied. *State v. U.S.,* 134 Idaho at 945.

Recognizing that they have not satisfied this burden, the United States now claims that NIWRG has waived this argument by joining in the State's motion for summary judgment, which the district court characterized as agreeing to allow the irrigation claims to go forward to the quantification stage.

This desperate argument has several major problems. First, the district court did not find that NIWRG waived its argument; indeed, this was never an issue raised with the court. To the contrary, the district court observed in its ruling that various objectors challenged the notion that satisfaction of the agricultural purpose of the reservation requires irrigation. R. at 4320–21. This included not just NIWRG, but also Hecla. R. 2841–42. Second, the joinder that the United States refers to is NIWRG's joinder in the State's motion for summary judgment. The State's motion specifically maintains that the irrigation claims are "subject to" a necessity finding. R. at 2622. "The State continues to assert that water rights are implied for irrigation purposes only where irrigation is necessary to make the land productive." R. at 4047. Even under the district court's ruling, that finding will be made – albeit erroneously during the quantification phase rather than the entitlement phase. R. at 4320–21. Also, NIWRG separately responded in opposition to the

joint motion for summary judgment filed by the United States and the Tribe (a different motion than the one filed by the State), contending that the irrigation claims required proof of necessity, that the United States and the Tribe had failed to satisfy that burden, and that the record in fact demonstrates that irrigation is not necessary. R. at 2850–51. This issue is not new, was clearly preserved by NIWRG below, was not waived, and is properly before this Court in this appeal.

The irrigation claims in this case bear no resemblance to those in other Indian water right cases. As to the lands involved in *Winters*, the facts demonstrated that "in order to make them productive, require[d] large quantities of water for the purpose of irrigating them." *Winters,* 207 U.S. at 566. And the reservation lands had previously been irrigated. *Id.* at 567–70. The necessity finding in *Winters* was that the land was "practically valueless" without irrigation in an arid climate. *Id.* at 576. The same was true in *Arizona v. California,* 460 U.S. 605 (1983). That is clearly not the case here, as demonstrated by the record.

In response to the lengthy recitation of facts set forth in NIWRG's Opening Brief, the United States and the Tribe offer no proof of the need for irrigation, just baseless assertions. This is despite the claim that their "expert reports thoroughly document . . . the Tribe's initiation of agriculture on the Reservation." U.S. Response at 7. The best the United States can seem to do is to characterize the need for irrigation as "a debatable proposition." U.S. Response at 32. This is not proof. It would indeed be a colossal waste of resources to move forward to the quantification phase, given the failure of the United States to demonstrate the necessity of irrigation to satisfy the agricultural purpose of the reservation. Accordingly, the claims should be denied. Alternatively,

the matter should be remanded for an evidentiary hearing on the necessity of the irrigation claims, provided that this Court determines that a genuine issue of material fact remains.

D. The Lake Claim Was Denied for Lake Level Maintenance Purposes and Should Therefore be Denied Altogether.

The district court rejected the United States' claim for lake level maintenance, as a matter of law. R. at 4328. It did, however, recognize fishing and hunting as a primary purpose. The United States acknowledges that "the claim for the maintenance of the level of Lake Coeur d'Alene is measured by the Lake surface's natural average elevation at different months of the year." U.S. Response at 2. In other words, there is no way to quantify the right without setting lake levels. The Tribe agrees with this, as well. Tribe's Response at 33.

The United States' response to NIWRG's argument that the claim should be denied because there is no other way to quantify it seems to rely on the fact that it is appealing the lake level issue and hoping to get a different answer. U.S. Response at 39. Of course, this circular argument is no response at all. The United States and the Tribe also argue that they should be allowed to have a lake level water right because others are allowed to do so under state law. These arguments are better made in their separate appeals of the district court's denial of their lake level maintenance claim. In any event, they do not answer the question: How will the right be quantified, if not by elevation? The fact remains that there is no other way to quantify the lake water right claim, other than with a lake elevation, which the district court has denied as a primary purpose of use. This Court has held: "Absence of any standard for quantification is indicative of the fact that quantification was not meant to be determined." *Potlatch Corp.,* 134 Idaho at 922, 12 P.3d at

1266. Stated another way, given that quantity is a required element of a water right and there is no way to quantify the right, it must be denied.

In response to NIWRG's argument that, if not denied, the claim should be remanded to determine the extent of the submerged lands to which the water right is appurtenant, the United States and the Tribe have now conceded that the lake claim is not based on ownership of submerged lands. U.S. Response at 40; Tribe's Response at 36. The federal government only "reserves appurtenant water." *Cappaert v. United States,* 426 U.S. 128, 138 (1976). This is the same conclusion reached by the district court. R. at 4325. Therefore, based upon the admission of the United States and the Tribe, the lake level claim must be dismissed for the additional reason that it is not appurtenant to federal reserved lands, as required by the reserved rights doctrine. *Cappaert,* 426 U.S. at 138.

If the lake level maintenance claim is not denied in its entirety, then NIWRG's related issue, which was not reached by the district court (R. at 4328) should be taken up on remand, regarding the extent of the submerged lands reserved and owned by the United States in trust for the Tribe. The Tribe says that no new lands were submerged as the result of Post Falls Dam, constructed in 1907. Tribe's Response at 37. However, the complaint that quieted title to the submerged lands was properly read in light of the physical situation as it existed prior to the construction of the dam. *United States v. Idaho,* 210 F.3d 1067, 1079, n.18 (9th Cir. 2000). And the Idaho Supreme Court has recognized the dam as "raising the elevation of the water . . . approximately 6½ feet . . . This increased height in the dam naturally resulted in submerging the lands adjacent to Lake Coeur d'Alene and the streams flowing into the lake." *In re Sanders Beach,*

143 Idaho 443, 147 P.3d 75 (2006). Obviously, additional lands have been submerged since the reservation was created, beyond those recognized in *Idaho II*.

E. Federal Ground Water Claims Should Not Be Recognized by the Court and These Particular Claims Are Not Necessary.

The United States concedes that no "decision of the U.S. Supreme Court has directly addressed the application of the reserved rights doctrine to groundwater." U.S. Response at 34. This lack of binding authority was first raised by NIWRG in response to the joint motion for summary judgment filed by the United States and the Tribe. R. at 2849–50.

The United States also acknowledges that the Wyoming high court has rejected application of the reserved rights doctrine to groundwater. *In re General Adjudication in the Big Horn River,* 753 P.2d 76 (Wyo. 1988).

The United States points out that the Arizona Supreme Court held that federal reserved water rights apply to groundwater. *In re General Adjudication of the Gila River,* 989 P.2d 739, 747 (Ariz. 1999). The Tribe cites an SRBA Court opinion to illustrate SRBA Court Judge Burdick's agreement with the reasoning in *Gila River*. Tribe's Response at 29, n.22. However, the United States and the Tribe both neglect to mention that the Arizona Court also held in that same opinion that "[a] reserved water right in groundwater may only be found where other waters are inadequate to accomplish the purpose of the reservation." *Gila River,* 989 P.2d at 748.

There is no reason for this Court to adopt the absolute rule of preemption from the Ninth Circuit's decision in *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.,* 849 F.3d 1262 (9th Cir. 2017), as urged by the United States and the Tribe. In particular, this decision

reads the necessity test out of the reserved rights doctrine, which is contrary to this Court's interpretation of the doctrine and established, binding precedent.

This Court could opt for the Wyoming Court's approach in *Big Horn*, refusing to extend the reserved rights doctrine to groundwater. The district court – which did not address this threshold question – observed that the use of groundwater via wells was not an aboriginal practice of the Tribe. R. at 4327. It is difficult to comprehend how the Tribe and the United States would have possibly intended such a water right to exist at the time the reservation was created, or how one could reasonably be inferred from the historical documents.

Alternatively, this Court could adopt the Arizona Court's approach in *Gila River* that a reserved right does not exist if other waters are available for the reservation needs. In the instant case, "other waters" are available to meet the domestic needs of the reservation pursuant to I.C. §§ 42-111 and 42-227. These domestic uses are exempt from administration. "A delivery call shall not be effective against any ground water right used for domestic purposes regardless of priority date where such domestic use is within the limits of the definition set forth in Section 42-111, Idaho Code." IDAPA 37.03.11.020.11. The exemption from administration has been upheld as constitutional by this Court. *American Falls Res. Dist. #2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 881, 154 P.3d 433, 452 (2007).

If the reserved rights doctrine is applied to ground water, the "test of necessity" must be applied as it is for any other claim. *State v. United States*, 134 Idaho at 945 (*citing New Mexico*, 438 U.S. at 700). "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." *New Mexico,* 438 U.S. at 701. To be successful, the United States must show "that the principal objects of the reservations will be defeated without a reserved water right." *U.S. v. State of Idaho,* 135 Idaho at 664. Applying this test, it is clear that the domestic purpose of the reservation would not be "defeated without a reserved water right." The domestic use guarantee under Idaho law assures that sufficient water is available to meet this purpose.

II. CONCLUSION

For the above-stated reasons, Appellants respectfully request that the Court reverse the district court by holding that fishing and hunting are not a primary purpose of the Coeur d'Alene Reservation or, alternatively, that there is no necessity for a federal reserved water right for these purposes.

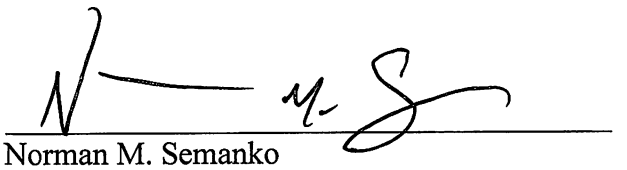
Appellants also request that the United States' irrigation claims be disallowed, as they are not necessary to fulfill the agricultural purpose of the reservation or, alternatively, that an evidentiary hearing regarding the entitlement to such claims be ordered on remand.

Appellants further request that the lake level maintenance claim be dismissed for the additional reasons set forth above or, alternatively, that the Court order additional proceedings for the district court to determine the extent of the submerged lands which have appurtenant water.

Finally, Appellants respectfully request that the domestic groundwater claims be dismissed due to a lack of binding authority recognizing such federal rights and because such federal rights are not necessary.

DATED May 21, 2018.

PARSONS BEHLE & LATIMER

By 
Norman M. Semanko
Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of May, 2018, I served a true and correct copy of the foregoing document on the parties listed below by first class mail, postage prepaid, and electronically as reflected on the contemporaneously filed Certificate of Compliance:

David L. Negri
U.S. Department of Justice
Environment & Natural Resources Div.
550 West Fort Street, MSC 033
Boise, ID 83724

Albert P. Barker
Barker Rosholt & Simpson LLP
P.O. Box 2139
Boise, ID 83701-3129

Steven W. Strack
Office of the Attorney General
State of Idaho
P.O. Box 83720
Boise, ID 83720-0010

William J. Schroeder
KSB Litigation PS
221 N. Wall, Suite 210
Spokane, WA 99201-3505

C. H. Meyer, J. C. Fereday
J.W. Bower & M.P. Lawrence
Givens Pursley LLP
P.O. Box 2720
Boise, ID 83701-2720

Mariah R. Dunham
Nancy A. Wolff
Dunham & Wolff, P.A.
722 Main Ave
St. Maries, ID 83861

Eric Van Orden
Office of Legal Counsel for the Coeur d'Alene Tribe
850 A Street
Plummer, ID 838951

Candice M. McHugh
Chris Bromley
McHugh Bromley PLLC
380 S 4th Street, Suite 103
Boise, ID 83702

Erika B. Kranz *(pro hac vice*)
U.S. Department of Justice
Appellate Section
P.O. Box 7415
Ben Franklin Station
Washington, DC 20044

John T. McFaddin (*pro se*)
20189 S. Eagle Peak Road
Cataldo, ID 83810

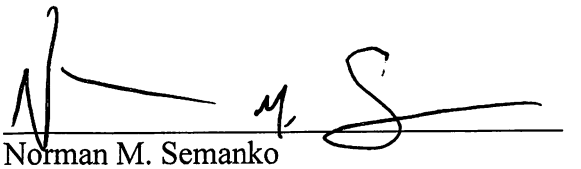
Ratliff Family LLC #1 (*pro se*)
13621 S. Hwy 95
Coeur d'Alene, ID 83814

Vanessa Ray-Hodge
Sonosky, Chambers, Sachse, Mielke
& Brownell, LLP
500 Marquette Ave. NW, Suite 660
Albuquerque, NM 87106

IDWR Document Depository
P.O. Box 83720
Boise, ID 83720-0098

Ronald Heyn (*pro se*)
828 Westfork Eagle Creek
Wallace, ID 83873

William M. Green (*pro se*)
2803 N. 5th Street
Coeur d'Alene, ID 83815



Norman M. Semanko