IN THE SUPREME COURT OF THE STATE OF IDAHO

IN RE CSRBA CASE NO. 49576 SUBCASE NO. 91-7755 (353 Consolidated Rights)	
COEUR D'ALENE TRIBE, *et al.* Plaintiffs-Appellants, v. STATE OF IDAHO, *et al.* Defendants-Respondents.	Supreme Court No. 45383-2017

APPELLANT COUER D'ALENE TRIBE'S CONSOLIDATED REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL CIRCUIT FOR TWIN FALLS COUNTY
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INTRODUCTION

The parties here agree that the creation of an Indian reservation reserves water under the *Winters* doctrine to serve the purposes of the reservation, but they diverge substantially on what that means for the Coeur d'Alene Tribe ("Tribe"). The Tribe contends that federal law provides strong protection for its Reservation as a place for preserving its traditions and securing its future—and that, consistent with the historical record and applicable legal principles, water has been reserved to serve the broad and enduring purposes of the Reservation. On the other hand, the State, the North Idaho Water Rights Group ("NIWRG"), and Hecla (collectively "Respondents") view the Reservation as a place where federal law has a drastically limited role with respect to Tribal water rights—providing no protection at all for traditional Tribal pursuits and supporting none of the activities necessary for the Tribe to have a viable Reservation into the future, with the possible exception (for some Respondents) of limited water for farming and domestic purposes. Overall, Respondents would leave the Tribe with little or no reserved water. The Court here is being presented with these questions:

Are the Tribe's water rights governed by principles of federal law applicable to tribes (as the Tribe contends)—or by *U.S. v. New Mexico*, 438 U.S. 696 (1978), which did not involve Tribal water rights and did not purport to overrule any federal law principles applicable to tribes (as the Respondents contend)?

Does the *Winters* doctrine protect the Tribe's water uses independent of state law (as the Tribe contends)—or can *Winters* doctrine rights be supplanted and rendered unavailable by the existence of state water rights (as the Respondents contend)?

In determining the purposes of the Reservation at the time it was created in 1873, does the Tribe's understanding matter (as the Tribe contends)—or should the Tribe's understanding be

subordinated to the Respondents' narrow construction of the views of the United States at the time (as Respondents contend)?

Did the Tribe in 1873 intend to pursue a range of activities for the present and future viability of Tribal life on the Reservation (as the Tribe contends)–or did the Tribe tacitly agree that agriculture was to be its only Reservation activity (as the Respondents contend)?

While this is not a full list of issues involved, these questions reflect that at bottom, this is a case about what happened when the Reservation was created in 1873, and the extent to which federal law protects the Tribal rights that vested then. As we discuss below, both the history and federal law support the Tribe's position on all these questions.

ARGUMENT

I. Federal Law Governing Indian Tribes Provides the Standards for Determining the Purposes of the Coeur d'Alene Reservation

The parties in this case agree that *Winters v. U.S.*, 207 U.S. 564 (1908), is the foundation for a key principle regarding implied reserved water rights for both Indian reservations and non-Indian federal reservations—that water is reserved based on the purposes of the particular reservation. But this common backdrop does not mean that Indian reservations and other kinds of federal reservations are treated in the same manner, or that fundamental principles of federal Indian law may be ignored in ascertaining the purposes of an Indian reservation. Yet that is precisely what the Respondents ask this Court to do—as they ask this Court to ignore over one-hundred years of federal Indian law precedent and seek to limit (or completely abolish) the Tribe's reserved water rights by applying *New Mexico*. State Resp. Br. at 4-7; NIWRG Resp. Br. at 4, 8-12; Hecla Resp. Br. at 15-17, 25-26.

The State for example, wrongly asserts that *New Mexico* "establishes that only purposes clearly expressed by Congress at the creation of the reservation" are entitled to reserved water

rights. State Resp. Br. at 7 (emphasis added).[1] But courts have repeatedly recognized that the documents establishing Indian reservations are often silent on the reservation's purposes. *See, e.g.*, *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1265 (9th Cir. 2017) ("*Agua Caliente*"); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 & n.8 (9th Cir. 1981) ("*Walton I*"). Thus, in determining the purposes of an Indian reservation, courts consider the history of the tribe, the documents and circumstances surrounding the reservation's creation, *Winters*, 207 U.S. at 575–76, and the Indians' need to maintain themselves in the future under changed conditions. *Walton I*, 647 F.2d at 47 (citing *U.S. v. Winans*, 198 U.S. 371, 381 (1905)). And in interpreting agreements with Indian tribes, "'it is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the [agreements].'" *See, e.g.*, *Pocatello*, 145 Idaho at 506 (quoting *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979) ("*Fishing Vessel*")); *see also id.* ("'[t]he treaty must . . . be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.'") (quoting *Fishing Vessel*, 443 U.S. at 676).

[1] Hecla goes further arguing there must be a clear intent to reserve water in the 1873 Executive Order for fishing or fish habitat. Hecla Resp. Br. at 8 n.1, 9-10. To the contrary, *Winters* recognized that reserved waters rights are usually not expressly stated so such rights are implied to fulfill the purposes of the Reservation. *See Winters*, 207 U.S. at 575-77; *see also City of Pocatello v. State*, 145 Idaho 497, 507, 180 P.3d 1048, 1058 (2008) ("*Pocatello*") ("failure to explicitly include the water right is immaterial to this question"). It is also noteworthy that Hecla chose not to file an opening brief appealing the district court's order, but now advances arguments challenging various parts of that order, including the fishing purpose of the Reservation, that are not the subject of this appeal. As such, Hecla should not be heard on issues outside the Tribe's appeal. *See State v. Fisher*, 140 Idaho 365, 372, 93 P.3d 696, 703 (2004) ("[I]f the respondent seeks affirmative relief of a judgement, order, or decree, then a cross-appeal is required rather than presenting the issue as an additional issue on appeal."); *see also Jennings v. Stephens*, 135 S. Ct. 793, 798 (2015).

Contrary to the State's contention, State Resp. Br. at 7-8, the Tribe applied these principles in demonstrating the broad purposes of the Coeur d'Alene Reservation. Tribe's Opening Br. at 21-44; *see also* Section II *infra.* Curiously, the State also suggests that all Indian reservations are limited to agricultural purposes based on *Arizona v. California*, 373 U.S. 546 (1963) ("*Arizona I*"),[2] but this notion conflicts with the fact specific inquiry into the purposes of each reservation that the State recognizes is necessary. State Resp. Br. at 4

New Mexico does not address—much less overrule—these principles. *New Mexico* determined the purposes of a national forest, not an Indian reservation. *See* Tribe's Opening Br. at 31-35 (explaining why *New Mexico* is not applicable).[3] While this Court has applied *New Mexico* when determining the purposes of establishing national forests and other non-Indian federal enclaves, *see, e.g.*, *U.S. v. City of Challis*, 133 Idaho 525, 988 P.2d 1199 (1999), it has also recognized that Indian reservations are fundamentally different. *See Potlatch Corp. v. U.S.*, 134 Idaho 916, 920, 12 P.3d 1260, 1264 (2000). *New Mexico*'s citations to *Winters* merely reflects a recognition that *Winters* was a foundational reserved water rights case but does not signify any abandonment of established principles applicable to federally protected tribal rights.

[2] In *Arizona I*, the Special Master concluded that based on the historical record, the five Indian reservations had an agricultural purpose, R. at 2230 (Special Master Report, *Arizona I*), which resulted in those tribes receiving almost 1 million acre-feet of reserved water under the practicably irrigable acreage ("PIA") standard. *Arizona I*, 373 U.S. at 596.

[3] For example, the strong preemptive force of federal law protecting Indian present and future uses of water when Indian reservations are set aside is entirely absent in the case of national forests, which were intended partly to augment waters available for appropriation under state law. *Compare New Mexico*, 438 U.S. at 702 (noting that congressional deference to state water law is a reason for a "contrary inference" that water for secondary uses would need to be obtained under state law), *with* R. at 2231 (Special Master Report, *Arizona I*) (finding "[t]he suggestion is unacceptable that the United States intended that the Indians would be required to obtain water for their future needs by acquiring appropriative rights under state law"). *See also* Tribe's Resp. Br. at 3-9 (*State v. Coeur d'Alene Tribe*, Appeal No. 45381-2017); Tribe's Resp. Br. at 4-11 (*NIWRG v. Coeur d'Alene Tribe*, Appeal No. 45384-2017).

Relying on *New Mexico*, NIWRG and Hecla advance a stringent "test of necessity" that would deprive the Tribe of virtually any reserved water rights for any purpose. NIWRG Resp. Br. at 8-12; Hecla Resp. Br. at 15-22.[4] They argue that tribal reserved water rights are eclipsed by the "purposeful and continued deference to state water law by Congress," NIWRG Resp. Br. at 8 (quoting *California v. U.S.*, 438 U.S. 645, 653 (1978)—a case that does not involve tribal reserved water rights). NIWRG Resp. Br. at 8; Hecla Resp. Br. at 16. Under their "test of necessity" a reserved water right is precluded if other non-federal sources of water are available (even temporarily) on the theory that in such circumstances the lack of a reserved right would not entirely defeat the purposes of the Reservation. NIWRG Resp. Br. at 11-12; Hecla Resp. Br. at 20-22. But that is not the test for finding a tribal reserved water right.

Instead, water is reserved to fulfill the purposes of the Indian reservation. *Winters*, 207 U.S. at 576-77; *State ex rel. Greely v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 712 P.2d 754, 762 (Mont. 1985) ("*Greely*") ("[r]eserved water rights are established by reference to the purposes of the reservation").[5] This means that if water is needed for a particular purpose, reserved water is "necessarily" implied. *See, e.g.*, *Arizona I*, 373 U.S. at 598–99. The standard is not whether some substitute water source—one that was never contemplated at the time of the Reservation's creation, and which does not provide the Tribe with the protections

[4] Hecla presents an argument slightly different from NIWRG, contending that reserved rights are only "necessary" if required to make the land habitable and that "[o]ther than domestic use, the rest of [the Tribe's] reserved water right claims . . . do not come close to meeting th[e] 'habitable' standard." Hecla Resp. Br. at 22. While Hecla uses different terminology, it appears that Hecla's "habitable" standard is, for all intents and purposes, the same as NIWRG's strict "test of necessity."

[5] The State disparages *Greely* arguing that "the only issue it considered was whether 'the Montana Water Use Act [is] adequate to adjudicate reserved water rights.'" State Resp. Br. at 7 n.3. But to answer that question, the *Greely* court had to describe the nature and scope of Indian reserved rights to determine if state law allowed the water court to treat those rights "differently from state appropriative rights." *Greely*, 712 P.2d at 763. *Greely* did so in an adversarial case to which the State of Montana, the United States and Montana Indian tribes were parties.

of federal law—can potentially fulfill the purposes of the Indian reservation, but whether the underlying purposes of the reservation envision water use. *Agua Caliente*, 849 F.3d at 1269. For Indian reservations to be viable, Indian people need water for domestic purposes and to develop their economies, just as water is necessary for the survival of plants, fish and animals that support agricultural and traditional Tribal activities like hunting, fishing, and gathering. As such, reserved water rights are "necessary" to fulfill these purposes.

The State has no authority over the Tribe or Tribal rights, including its reserved water rights—either to protect such rights or to regulate or diminish them. Instead, "[t]he Constitution vests the Federal Government with exclusive authority over relations with Indian tribes." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985) (citing U.S. Const. art. I, § 8, cl. 3). The Tribe's reserved water rights are created by federal law and are "dependent on, and subordinate to, only the Federal Government, not the State[]." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980); *Agua Caliente*, 849 F.3d at 1269 ("Congress does not defer to state water law with respect to reserved rights."). Except as authorized by Congress, states have "no power to regulate the affairs of Indians on a reservation," *Williams v. Lee*, 358 U.S. 217, 220 (1959); *Bryan v. Itasca Cnty.*, 426 U.S. 373, 376 n.2 (1976).

These principles were firmly established in the late 19th century, during the period when the Coeur d'Alene Reservation was established. *See, e.g.*, *The Kansas Indians*, 72 U.S. 737, 757 (1866) (Shawnee Indians on their reservation "are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws"); *U.S. v. Kagama*, 118 U.S. 375, 384 (1886) ("Indian tribes . . . owe no allegiance to the states, and receive from them no protection."); *accord Worcester v. Georgia*, 31 U.S. 515 (1832). Given this established legal framework, it is inconceivable that Congress or the federal executive would have contemplated

that the Tribe's water rights for any purposes of the Coeur d'Alene Reservation would be under the control of the State, rather than under exclusive federal protection.

In sum, the stringent "test of necessity" urged by NIWRG and Hecla ignores the fundamental differences between state law water rights and the reserved water rights of the Tribe. State water rights are not designed to protect the Tribe, its Reservation, or its federally protected rights. *See, e.g.*, *Agua Caliente*, 849 F.3d at 1272 (rejecting the argument that a tribe "does not need a federal reserved [water] right" because "the Tribe has a correlative right to groundwater under California law"); *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 989 P.2d 739, 748 (Ariz. 1999) ("*Gila III*") (finding state right to pump groundwater would not "adequately serve to protect federal rights"). The Tribe's reserved water rights are intended to protect the Reservation as a homeland for the Tribe, including providing water for the special federally-protected uses enjoyed by the Tribe on its Reservation. *See* Section II *infra*.

II. The Coeur d'Alene Reservation was Established as a Permanent Home to Protect Traditional Activities, and to Encourage Both Agriculture and the Arts of Civilization

The Coeur d'Alene Reservation was established as a permanent home for the Tribe. *See* Tribe's Opening Br. at 24-26. The State contends that the Tribe "seek[s] to avoid *any* further inquiry into the Reservation's purposes once it is established that the Reservation was to serve as a 'homeland' for the Tribe." State Resp. Br. at 7 (emphasis in original). This is not so. The Tribe's opening brief extensively discusses the historical record, providing greater specificity about the nature of the permanent home and the particular purposes for which water was reserved.[6] Tribe's Opening Br. at 24-44.

[6] The district court upheld the Tribe's claims for domestic and some municipal purposes which are not appealed here. However, the district court also denied certain municipal use claims, presumably because the court considered them commercial claims. Those claims are addressed in Section II.B *infra*.

The Arizona Supreme Court's decision in *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 35 P.3d 68 (Ariz. 2001) ("*Gila V*"), embracing the homeland standard, is not, as the State asserts, wholly "inconsistent with this Court's precedents and that of most jurisdictions." State Resp. Br. at 8. *Gila V* applied the Supreme Court's decision in *Winters* and the Ninth Circuit's decision in *Walton I* in finding a homeland purpose. 35 P.3d. at 76. Like this Court, *Gila V* also recognized that Indian reservations are different than other federal reservations. *Compare Gila V*, 35 P.3d at 73-74, *with Pocatello*, 145 Idaho at 505-06.[7] *Gila V* questioned the utility of only examining historical documents in determining the purposes of an Indian reservation, 35 P.3d at 74-75, but it did not hold that history was irrelevant. *Id*. at 79 ("A tribe's history will likely be significant."). Further, *Gila V* does not suggest that tribes are entitled to water for "every conceivable future use," as the State contends, State Resp. Br. at 4, 11, but recognizes that agriculture may not result in sufficient water to meet present and future needs of all tribes on all reservations. 35 P.3d at 78. As such, *Gila V* required the consideration of various factors in determining tribal reserved water rights. *Id.* at 79-80 (*e.g.*, tribal histories, economic base, and geography). The flexibility embodied by the homeland purpose is consistent with the principle that reserved rights must meet the present and future needs of Indian tribes. *See also Walton I*, 647 F.2d at 47.

A. The Coeur d'Alene Reservation was established for a myriad of traditional purposes

Idaho II conclusively demonstrates that a central purpose for which the Reservation was established in 1873—and which encompassed the Lake and related waterways—was to preserve

[7] *See also Goodman Oil Co. of Lewiston v. Idaho State Tax Comm'n*, 136 Idaho 53, 57, 28 P.3d 996, 1000 (2001) ("Indian reservations are different; distinct from every other type of reservation, i.e., national parks, wilderness areas, military reservations, and even further, Indian reservations are a distinct entity within the law.").

the Tribe's right to continue traditional activities, which include gathering, transportation, recreation and cultural uses in addition to hunting and fishing. *Idaho v. U.S.*, 533 U.S. 262, 265-66 (2001) ("*Idaho II*"); *see also U.S. v. Idaho*, 95 F. Supp. 2d 1094, 1103 (D. Idaho 1998) ("*Idaho II*").[8] Protecting these uses was vital to both sides—in petitioning for the Reservation, the Tribe emphasized that it "continued to depend on fishing," and in seeking Tribal consent and a lasting peace, federal officials had been warned that "[s]hould the fisheries be excluded there will in my opinion be trouble with these Indians." *Idaho II*, 533 U.S. at 274, 277. *Idaho II* examined the history leading to the creation of the Reservation and concluded that the submerged lands were retained by the Tribe in large measure to protect the traditional activities that had ongoing significance to the Tribe and to buy the peace that the United States sought. 533 U.S. at 275–76.

Respondents do not directly address *Idaho II*'s significance in this regard. Instead, they argue that the district court properly rejected gathering and other traditional uses as "primary" purposes of the Reservation because there is no language expressly reserving such rights and "the Claimants do not identify any contemporaneous evidence that preservation of gathering opportunities [and other traditional uses] was a primary purpose of the 1873 Executive Order." State Resp. Br. at 15.[9] But express language in the Executive Order creating the Reservation is not necessary. Section I *supra*; *Walton I*, 647 F.2d at 47. In any event, *New Mexico*'s "primary" purposes test has no application here. *See* Section I *supra*; Tribe's Opening Br. at 31-35.

[8] The Supreme Court in *Idaho II* noted that the State of Idaho "did not challenge the District Court's factual findings on appeal." 533 U.S. at 265 n.1 (citing *U.S. v. Idaho*, 210 F.3d 1067, 1070 (9th Cir. 2000) ("*Idaho II*")). *See also* Tribe's Opening Br. at 29 n.18 (showing that the State is precluded from arguing the Reservation purposes are limited to agriculture); Tribe's Resp. Br. at 22-25 (*State v. Coeur d'Alene Tribe*, Appeal No. 45381-2017).

[9] NIWRG and Hecla go further than the State and take the position that the Reservation was not established for traditional purposes and therefore the Tribe is not entitled to reserved water rights for these uses. NIWRG Resp. Br. at 5-8; Hecla Resp. Br. at 28. For the reasons discussed here, *Idaho II* and the record do not support that position. *See also* Tribe's Resp. Br. at 11-22 (*NIWRG v. Coeur d'Alene*, Appeal No. 45384-2017).

Moreover, the Tribe's references to "fishing" or "hunting and fishing" during negotiations cannot be interpreted to exclude other traditional activities. The principles governing construction of agreements with Indian tribes require that the terms be understood as the Indians would have understood them. At the time of its 1872 petition, the Tribe explained that it thought as "a matter of course" any reservation would include the Lake and other important waterways because of its dependence on those resources. *Idaho II*, 95 F. Supp. 2d at 1103. By referring to hunting and fishing, the Tribe made clear the importance of its water resources to all its traditional activities, which the Supreme Court in *Idaho II* found were much broader than hunting and fishing. *Idaho II*, 533 U.S. at 265 (the Lake and its waterways sustained virtually every aspect of tribal life, including "food, fiber, transportation, recreation, and cultural activities"), *id.* at 274 ("A right to control the lakebed and adjacent waters was traditionally important to the Tribe"). *See also* Tribe's Opening Br. at 30 (discussing same).

Hecla is also wrong in arguing that *Winans*, 198 U.S. at 381, is not a basis for the Tribe's water rights claims for traditional activities. Hecla Br. at 19, 26-28. This Court recognizes the *Winans* principle that treaties and agreements with Indian tribes are "a grant of rights *from* [the Indians], not a grant of rights from the United States *to* the Indians." *Pocatello*, 145 Idaho at 506 (emphasis in original). This means that the Tribe retained all traditional rights within its 1873 Reservation—which predate the Reservation's creation—and associated reserved water rights have a time immemorial priority date. *See* Tribe's Opening Br. at 21 (citing *U.S. v Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983)).

A central focus in creating the Tribe's Reservation was the preservation of traditional Tribal activities associated with the Lake and other waterways, as *Idaho II* demonstrates. *See* Tribe's Opening Br. at 26-30. And contrary to the State's assertion, the Tribe also relies on its history and contemporaneous federal documents, much of which is presented in the Tribe's expert

report by Richard Hart, to show that a purpose of creating the Reservation was to protect the Tribe's traditional activities.[10] *See, e.g.*, *id.* at 28 n.16; *see also* Tribe's Resp. Br. at 12-22 (*NIWRG v. Coeur d'Alene Tribe*, Appeal No. 45384-2017). Although the State attempts to cast doubt on the Tribe's reliance on modern day expert analyses regarding the Tribe's history and subsistence practices, State Resp. Br. at 15-16, the reports are relevant here and the district court properly relied on the Hart Report in its summary judgment order. R. at 4321-22 (Order on Mots. S.J.).

Moreover, in *Idaho II*, the Supreme Court found that the Tribe rejected the smaller 1867 reservation because it did not include Coeur d'Alene Lake and other important waterways. 533 U.S. at 266. In seeking an expanded Reservation that included key waterways and water resources the Tribe's 1872 petition stated:

> 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.

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[10] The Tribe's traditional activities have never been limited to hunting and fishing and include a broad range of other activities that were inextricably linked to the watercourses and their associated riparian areas within the Reservation. For example, plant material, such as "Indian hemp, which grew along the St. Joe River" was used in daily life for rope and "[b]ags and baskets were made from materials along the edge of rivers and lakes." R. at 1476 (E. Richard Hart, *A History of Coeur d'Alene Tribal Water Use: 1780-1915* (Nov. 25, 2015) ("Hart Rep. 2015")). An important part of the Tribe's diet included food collected from plants that grew along the shorelines, the most important of which is the water potato or "sqigwts." *Id.* at 1477-78.

Traditional tribal burial grounds were closely associated with Coeur d'Alene Lake and river and marked with slender red poles and rock piles. *Id.* at 1479. The Lake and waterways were also a principal means of transportation within the Tribe's territory. *Id*. at 1470-74. "Coeur d'Alenes traditionally traveled over Coeur d'Alene Lake, the St. Joe and the Coeur d'Alene River by canoe, for purposes of trade, communication, hunting, and to reach gathering locations. Every family had at least one canoe." *Id*. at 1470. Tribal recreation was also focused on the Lake and waterways. *Id*. at 1475 (describing canoe races as a favored sport).

Idaho II, 95 F. Supp. 2d at 1103. Although Respondents attempt to minimize the importance of the Tribe's traditional activities by pointing to the phrase "for a while yet" in the petition, NIWRG Resp. Br. at 6; Hecla Resp. Br. at 24, Judge Lodge in *Idaho II* correctly focused on the petition as a whole and found:

> First, the Tribe never entertained the possibility of withdrawing to a reservation that did not include the river valleys. Second, the Tribe considered the area adjacent to the waterways its home. Third, and most important, in 1872 the Tribe continued to rely on the water resource for a significant portion of its needs.

95 F. Supp. 2d at 1103; *see also* Tribe's Resp. Br. at 14 (*NIWRG v. Coeur d'Alene Tribe*, Appeal No. 45384-2017) (discussing same).

The federal government and Tribe agreed in 1873 to establish—at the Tribe's demand—an expanded Reservation that included the Tribe's key waterways and water resources necessary to sustain traditional activities. *Idaho II*, 533 U.S. at 266, 275-76. The 1873 Agreement even contained an express provision that protects the Tribe's water resources: "the waters running into said reservation shall not be turned from their natural channel where they enter said Reservation." R. at 4202 (Agreement with the Coeur d'Alene of July 28, 1873, art. 1 ("1873 Agreement")); *Idaho II*, 95 F. Supp. 2d at 1108 ("[t]he 1873 agreement guarantees 'that the water running into said reservation shall not be turned from their natural channel where they enter said reservation.'").

Judge Lodge determined that the 1873 Executive Order establishing the Reservation was intended to mirror the terms of the Agreement. *Idaho II*, 95 F. Supp. 2d at 1109. The State's suggestion that Judge Lodge only meant that the Executive Order mirrored the boundaries of the Reservation, State Rep. Br. at 2, is without support. In fact, Judge Lodge found that the Executive

Order had a "much broader purpose" that required the court to look to the 1873 Agreement. *Idaho II*, 95 F. Supp. 2d at 1109.[11] Judge Lodge then concluded that:

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

Id. It is these broad purposes, which are encompassed in the 1873 Agreement, that Judge Lodge was referring to when he concluded that the Executive Order was intended to mirror the terms of the 1873 Agreement.

The Tribe's traditional dependence on and protection of these water resources remained a central factor in subsequent land cessions made by the Tribe in the 1887 and 1889 Agreements, which were ratified by Congress in 1891. *See* Tribe's Resp. Br. at 14-22 & nn.12, 15, 17 (*State v. Coeur d'Alene Tribe*, Appeal No. 45381-2017) (demonstrating continuity of the 1873 Reservation's purposes, which have never been abrogated). The Tribe flatly refused to agree to land cessions under those Agreements without the federal government's promise that it would retain the right to use its Reservation lands and water resources for the broad purposes established in 1873, which include traditional activities. *Id* at 14-22. *See also Idaho II*, 533 U.S. at 278, 280-81. The Supreme Court would not have held that the Tribe owned submerged lands within its Reservation in *Idaho II*, were it not for the Tribe's continued dependence on traditional activities that were integrally related to the Coeur d'Alene Lake and other waterways. In sum, *Idaho II*, as

[11] In an earlier part of his opinion, Judge Lodge separately noted that the Executive Order "[i]ncorporate[ed] the legal description from the 1873 agreement." *Id.* at 1105. If Judge Lodge meant to only refer to the boundaries of the 1873 Agreement, he would have ended his discussion with this finding. Even assuming the State were correct, which it is not, the 1873 Agreement is still relevant to determining the intent behind the 1873 Executive Order because it is part of the surrounding circumstances concerning the Reservation's establishment.

well as the Tribe's history and the circumstances surrounding the Reservation's creation, clearly confirm that the Reservation was established to support broad traditional purposes—which included gathering, transportation, recreation, and cultural uses, in addition to hunting and fishing.

B. The Reservation was also equally established to promote agriculture and the arts of civilization

In creating the Reservation, both the Tribe and federal government also sought to ensure that the Tribe would have an opportunity to modernize and become self-sufficient. The federal government's policy of encouraging agriculture and "civilizing" the Tribe was as central to the Reservation's creation as protecting the Tribe's traditional activities.[12] The Tribe understood those goals and undeniably also bargained for the resources within its Reservation to adapt to modern civilization.

None of the Respondents dispute that agriculture is a purpose of the Reservation.[13] Rather they argue that the Tribe has no reserved rights to sustain current and future commercial and industrial activities. *See, e.g.*, State Resp. Br. at 11-15. This position is at odds with the principle that ensures that water was reserved for tribes to maintain themselves in the future under changed circumstances. *Arizona I*, 373 U.S. at 600; *Walton I*, 647 F.2d at 47 (citing *Winans*, 198 U.S. at 381). Moreover, the 1873 Agreement, which was the basis for President Grant's Executive Order establishing the Reservation, focused on ensuring that the Tribe would be successful in pursuing

[12] The federal government's Indian policy between 1871 and 1928 was one of assimilation and allotment, which was aimed at "civilizing" Indians to ensure self-sufficiency on reservations. *See, e.g.*, *Cohen's Handbook of Federal Indian Law*, § 1.04 at 71-72 (Nell Jessup Newton, ed., 2012) ("*Cohen's Handbook*").

[13] Hecla argues that, even though agriculture is a purpose of the Reservation, the Tribe has no reserved rights to water for agriculture. Hecla Resp. Br. at 23-25. As discussed in Section I *supra*, the only question before this Court is whether the agricultural purpose of the Reservation contemplates water use—since crops need water to grow, this Court should affirm the Tribe's reserved rights claims for agriculture. How much water is needed for agriculture will be determined in the quantification phase of this case.

not just agriculture but also arts of civilization. *See* R. at 4202 (providing "for the civilization" of the Tribe) (1873 Agreement, art. 3). The phrase arts of civilization is not synonymous with agricultural pursuits as the State suggests, State Resp. Br. at 12-13, but is separately addressed in the 1873 Agreement,[14] and had a broader meaning than agriculture alone. *See, e.g.*, *Winters*, 207 U.S. at 576 (noting that the Reservation purposes included agriculture and the "arts of civilization") (emphasis added).[15]

The term arts of civilization is used to describe the federal government's goal of "civilizing" the Indians by educating and training them in commercial and vocational trades, in addition to agriculture, and generally providing them with skills for adapting to modern society and becoming self-sufficient within their reservations. *See, e.g.*, *An Act making provision for the civilization of the Indian tribes adjoining the frontier settlements*, Ch. 85, 3 Stat. 516b (1819) ("for introducing among [the Indians] the habits and arts of civilization . . . instruct them in the mode of agriculture . . . and for teaching their children in reading, writing, and arithmetic") (emphasis added); *Greely*, 712 P.2d at 765. (reserved water rights may include consumptive uses for industrial purposes under "acts of civilization"); *In re Crow Water Compact*, 364 P.3d 584, 589 (Mont. 2015), *cert. denied sub nom. Abel Family Ltd. P'ship v. U.S.*, 136 S. Ct. 2472 (2016) ("under *Winters* and its progeny the tribe has a right to water for development of industrial interests"). It cannot be that the federal government intended Tribes to advance in both agriculture and the arts of civilization, but not have the water resources to sustain the enterprises that would make their economies self-sufficient. Indeed, the Supreme Court has recognized that a reservation

[14] *Idaho II*, 95 F. Supp. 2d at 1109 (1873 Executive Order was intended to mirror the terms of the 1873 Agreement). *See also* n.11 *supra* and accompanying text.

[15] Although *Winters* only addressed the specific question presented—reserved rights for agriculture—the Court differentiated between agriculture and the arts of civilization. Indeed, the State agreed below that *Winters* found that water could be reserved for both "agriculture and the arts of civilization." *See* R. at 2504 (State Mem. in Support Mot. S.J.).

established with a purpose of assisting a tribe "advance to the ways of civilized life" necessarily included the "opportunity for industrial and commercial development." *Alaska Pac. Fisheries Co. v. U.S.*, 248 U.S. 78, 88-89 (1918).

The meaning of arts of civilization as applied to the Coeur d'Alene Tribe is further illuminated in the historical record. Even prior to the creation of the Tribe's Reservation, when Governor Stevens met with the Coeur d'Alene in 1855, he explained that the federal government intended to place the Tribe on a reservation where it would have "farms and school and mills and shops of various kinds, and teachers and farmers and mechanics to instruct you in the arts of civilization." R. at 1527 (Hart Rep. 2015). Thus, the arts of civilization to which Governor Stevens referred included not just making Coeur d'Alene Indians farmers, but also educating the Indians and providing instructors to train them in vocations so that they could participate in commercial and industrial businesses that would sustain a modern economy.

Although rejected by the Tribe because it did not include the Lake and important waterways, the 1867 Reservation included "agricultural & grazing lands, with hunting fishing, berries & roots & suitable locations for mills & c." R. at 2649 (Jt. Stmt. Facts ¶ 42). Then, in examining the Tribe's negotiations for an expanded Reservation in the 1873 Agreement, Judge Lodge found that the federal government could not meet the "Tribe's demand for its fishing grounds and a mill site . . . without an agreement that included within the reservation the land under the Lake and rivers." *Idaho II*, 95 F. Supp. 2d at 1109 (emphasis added); *see also* R. at 4202 (1873 Agreement, art. 3) (providing schools and a smith shop, saw miller and blacksmith who were required to train the Indians). The government also touted that the expanded Reservation would include not only Indian farms but also would allow for a water powered mill. *Idaho II*, 95 F. Supp. 2d at 1105. These purposes were consistently carried forward in the 1887 and 1889 Agreements ratified by Congress in 1891, which not only confirmed the Tribe's 1873 Reservation

but sought to ensure that, in exchange for land cessions, the Tribe received the compensation and goods that would aid the Tribe in continuing to advance in agriculture and the arts of civilization.[16] *See, e.g.*, R. at 1382 (noting that the "reservation is one of the best we have visited" and that "[t]he Indians are industrious, thrifty, provident, and good traders") (Report of Northwest Indian Comm'n at 50 (June 1887)). The State attempts to minimize this history by pointing to cases regarding other Indian reservations with different histories, State Resp. Br. at 13-15, but those are irrelevant to the creation of the Coeur d'Alene Reservation.

The State conceded below that the Tribe's Reservation "unequivocally" included industrial and commercial activities, R. at 2504 (State Mem. in Support Mot. S.J.),[17] but argues that this concession applies only if the 1891 Act is construed to supersede the original purposes of the Tribe's 1873 Reservation. State Resp. Br. at 12 n.4. The State's reasoning is flawed. The 1891 Act, in fact, confirms the 1887 and 1889 Agreements and then repeats the terms of both Agreements verbatim. Act of Mar. 3, 1891, Ch. 543, 26 Stat. 989, 1027-29 (1887 Agreement), 1029-32 (1889 Agreement). The 1887 Agreement provides that the Tribe is to receive federal funds to "erect[] on said reservation a saw and grist mill, to be operated by steam, and an engineer and miller . . . [and to] best promote the progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians . . . ." R. at 1391 (1887 Agreement, art. 6). The State agreed that this language established that the Reservation was created for "commercial and

[16] *See also* Tribe's Resp. Br. at 14-22 (*State v. Coeur d'Alene Tribe*, Appeal No. 45381-2017) (purposes of the 1873 Agreement were confirmed through the 1887 and 1889 Agreements and in the 1891 Act); Tribe's Resp. Br. at 15-22 (*NIWRG v. Coeur d'Alene Tribe*, Appeal No. 45384-2017) (same).

[17] Although the State conceded this point below, it asserted that the Tribe's commercial and industrial activities must be limited by what was specifically anticipated at the time of the Reservation's creation. R. at 2506 (State Mem. in Support Mot. S.J.). Reserved water rights, however, are not limited to past uses and must include water for future needs and uses. *See, e.g.*, *Arizona I*, 373 U.S. at 600; R. at 2232 (Special Master Report, *Arizona I*).

industrial activities." R. at 2504 (State Mem. in Support Mot. S.J.). Similar provisions are found in the 1873 Agreement which was the basis of the 1873 Executive Order. *Compare* R. at 4202 (1873 Agreement, art. 3) ("to furnish . . . for the use of said Indians 1 grist and saw mill combined; 1 School House . . . 1 smith shop . . . payment of the salaries of the millers and blacksmith . . . and for such articles of comfort and for the civilization of said Indians"). There can be no difference in how the nearly identical provisions in both Agreements—which establish that a purpose of the Reservation was to promote commercial and industrial activities—are interpreted.

Ultimately the federal purpose of advancing the arts of civilization in some measure foreshadowed what the Coeur d'Alene Tribe has accomplished over time—the Tribe, as noted by the Respondents, continued to progress in its agricultural pursuits, but in addition, with education and training, the Tribe has developed its own modern economy that thrives on the Reservation today. Indeed, the Tribe's consumptive use claims relate to current and future agriculture and domestic, commercial, municipal, and industrial ("DCMI") uses that are directly tied the purposes of the 1873 Agreement. Those claims include 17,815 acre-feet a year ("afy") of water for present and future agricultural purposes and 7,453 afy of water, plus 979 domestic groundwater wells, for DCMI uses. R. at 12 (Tribal Claims Cover Letter from Vanessa Boyd Willard, U.S. Dep't of Justice, to Gary Spackman, Dir., Idaho Dep't of Water Res. (Jan. 30, 2014) ("Tribal Claims Letter")), and amount to less than one percent of the total outflow of the Basin. R. at 2675-76 (Jt. Stmt. Facts ¶ 99).

C. The Lake Claim should be sustained to fulfill all the purposes of the Reservation, including "fish and wildlife habitat"

The Lake Claim seeks confirmation, and subsequent quantification, of reserved water needed in the Lake to fulfill the Reservation's purposes. Respondents ask this Court to affirm the district court's disallowance of the Lake Claim because, among other things, "[l]ake level

maintenance was not a primary purpose of the Reservation." R. at 4328 (Order on Mots. S.J.).[18] But that ignores the unique history of this Reservation, where the Tribe and United States agreed that the Tribe would retain the Lake within its Reservation. *See* Tribe's Opening Br. at 39-44 (discussing the Lake Claim). Reserved water in the Lake is important to fulfilling the broad purposes of the Reservation, including those already recognized by *Idaho II*, 533 U.S. at 265; *see also* Sections II.A and B *supra*.[19] The monthly Lake levels claimed by the Tribe are also critical to protecting wetlands, seeps, and springs in and around the Lake that support traditional activities.[20] This Court should sustain the Lake Claim for all purposes claimed by the United States and the Tribe and allow the Claim to proceed to the quantification phase of the case.

The Tribe's claim to reserved water rights in the Lake is supported by the 1873 Agreement. That Agreement contains a provision—unique to treaties and agreements with Indian tribes—ensuring that there will be sufficient water in the Lake and the St. Joe River to fulfill the purposes of the Reservation by providing that "the water[s] running into said reservation shall not be turned from their natural channel where they enter said reservation." *Idaho II*, 95 F. Supp. 2d at 1105

[18] The district court allowed the Lake Claim to proceed to quantification only on the "fish and wildlife habitat" purposes of the Reservation. R. at 4302 (Final Order Disallowing Purposes of Use). Both the State and NIWRG also argue that the Tribe's entire Lake Claim should be disallowed because fishing is not a "primary purpose" of the Reservation. State Resp. Br. at 16-21; NIWRG Resp. Br. at 5-8. *See also* NIWRG Opening Br. at 21 (*NIWRG v. Coeur d'Alene Tribe*, Appeal No. 45384-2017). This argument is addressed in Sections I and II *supra*.

[19] The Tribe claims reserved water rights to water within Coeur d'Alene Lake based on the following purposes of use: food, fiber, transportation, recreation, religious, cultural, ceremonial, fish and wildlife habitat, lake level and wetland maintenance, water storage, power generation, and aesthetics. R. at 6278 (Notice of Claim No. 95-16704). The Tribe's Lake Claim is further buttressed by the Tribe's sovereign ownership of the submerged lands on the Reservation. *See* Tribe's Opening Br. at 42-43.

[20] NIWRG agrees that "steady water levels [in the Lake] also provide for maintenance of wetlands, springs and seeps, gathering and other traditional uses of the waterways" but argues that State water rights in the Lake make federal reserved rights here unnecessary. NIWRG Resp. Br. at 11-12. As discussed later in this Section, state law cannot defeat a federal reserved water right. *See also* Section I *supra*; Tribe's Resp. Br. at 8-11, 22-24, 29-32 (*NIWRG v. Coeur d'Alene Tribe*, Appeal No. 45384-2017).

(emphasis added); R. at 4202 (1873 Agreement, art. 1). This language expressly protects the natural flows of waters coming into the Reservation, ensuring that they remain unimpaired and ultimately reach the Lake through, for example, the St. Joe River. *Idaho II* also supports the Tribe's Lake Claim. 533 U.S. at 274 ("[a] right to control the lakebed and adjacent waters was traditionally important to the Tribe"); *see also Idaho II*, 95 F. Supp. 2d at 1104 ("in 1873 the Lake and rivers were an essential part of the 'basket of resources' necessary to sustain the Tribe's livelihood").

The State's argument that the Tribe's "claim to maintain 'natural Lake elevations and outflows' . . . leaves little to no water available for appropriation by other water users within the Basin," State Resp. Br. at 3, is not relevant here where only the purposes of the Reservation are at issue. In any event, the fact that a senior water right holder's rights may impact junior users is a natural consequence of the prior appropriation doctrine and its relation to reserved water rights. *See Colville Confederated Tribes v. Walton*, 752 F.2d 397, 405 (9th Cir. 1985) ("*Walton III*") ("*Winters* rights arise without regard to equities that may favor competing water users"). Moreover, the State's argument is an exaggeration, since sustaining the Lake Claim would require lake levels no greater than the levels currently required in the license for operation of the Post Falls Dam issued by the Federal Energy Regulatory Commission ("FERC"). In fact, the Tribe's claim only establishes a floor for lake elevation. As such, satisfaction of the Tribe's claim would not require any additional water in the Lake than presently occurs.

The State argues that the Tribe's cession of land in the 1889 Agreement silently abrogated the Tribe's right to reserved water in the Lake within the Reservation boundaries ratified by Congress in 1891. State Resp. Br. at 17-19. But as the Supreme Court determined in *Idaho II*, when Congress authorized the negotiations leading to the 1889 agreement "Congress understood its objective as turning on the Tribe's agreement to . . . any reduction of the 1873 reservation's

boundaries." 533 U.S. at 277-78. The Court then held in *Idaho II* that the Tribe retained title to submerged lands on the portion of its Reservation that Congress ratified. *Id.* at 278-79. The Tribe similarly retained all other rights on that portion of the Reservation, including its reserved water rights to fulfill the purposes of the Reservation. *See Idaho II*, 533 U.S. at 281 ("Congress recognized the full extent of the Executive Order reservation lying within the stated boundaries it ultimately confirmed"); Tribe's Resp. Brief at 9-21 (*State v. Coeur d'Alene Tribe*, Appeal No. 45381-2017) (discussing the broad purposes of the 1873 Reservation and Congress's ratification of those purposes in 1891). This is so because tribal rights within an Indian reservation remain unless abrogated by clear action by Congress. *U.S. v. Dion*, 476 U.S. 734, 739 (1986); *Pocatello*, 145 Idaho at 506. The Lake Claim simply quantifies the reserved water needed in the Lake to fulfill the Reservation's purposes. *See* R. at 6278-82 (Notice of Claim No. 95-16704); Tribe's Resp. Br. at 33-35 (*NIWRG v. Coeur d'Alene Tribe*, Appeal No. 45384-2017).

The State asserts that the Tribe's claim must be measured in accordance with state law. State Resp. Br. at 19 (citing I.C. § 42-1409(1)(c)(ii)). However, the Tribe is not limited to state law in defining its federal reserved right. *Avondale Irrigation Dist. v. N. Idaho Properties, Inc.*, 99 Idaho 30, 39–41, 577 P.2d 9, 18-20 (1978). The CSRBA court has also decreed—pursuant to agreement with the State of Idaho—federal reserved water rights in other lakes for sufficient water "to maintain the lake at its natural level." *See, e.g.*, Water Right No. 21-11966 (reserved right to lake level maintenance for Buffalo Lake). The State's own claim for its purported rights in Coeur d'Alene Lake is, in practical effect, the same: to maintain "the lake water surface elevation at a point not higher than the natural water level of the lake."[21]

[21] Legal Guideline Letter from Patrick J. Kole, Chief, Legislative & Public Affairs Div., Office of the Attorney General, to Hon. Dean Haagenson, State Representative at 3 (Feb. 8, 1988) ("AG Legal Guideline Letter"), *available at* http://www.ag.idaho.gov/publications/op-guide-cert/1988/g020888.pdf (last accessed May 16, 2018).

The State complains that since the Lake has "split ownership, one party cannot claim the unilateral right to maintain a specific lake elevation" because that "necessarily imposes a Lake elevation upon" both owners. State Resp. Br. at 18.[22] The State concedes that the district court has no jurisdiction to conduct an "equitable apportionment" of the rights of the State and Tribe to water in the Lake, but it nevertheless urges the Court to disallow the Tribe's Lake Claim based on equitable apportionment principles. State Resp. Br. at 19 (citing *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982) and *Fishing Vessel*, 443 U.S. at 684). *Colorado* held that the doctrine of "equitable apportionment" applied to apportion water between Colorado and New Mexico; it did not involve an Indian tribe. The Supreme Court in *Arizona I*, 373 U.S. at 596-97, specifically rejected the applicability of the judicial doctrine of equitable apportionment to tribal reserved water rights. The State also misuses *Fishing Vessel*, to support its argument that the State is entitled to a "fair share" of the water in the Lake. *Fishing Vessel* involved the allocation of fish under a treaty allowing tribes the right to take fish "in common with" non-Indians. *See* 443 U.S. at 661. Based on the treaty language, the Court noted that "treaty and nontreaty fishermen hold 'equal' rights. For neither party may deprive the other of a 'fair share' of the runs." *Id.* at 684 The *Fishing Vessel* Court cited to *Arizona I* and *Winters* not for the "fair share" principle, but for the principle that water rights were "implicitly secured to the Indian by treaties reserving land . . . ." *Id.* (citing *Arizona I*, 373 U.S. at 598-601; *Winters*, 207 U.S. at 576).

Even assuming arguendo that the State became the owner of the northern two-thirds of the Lake after the 1891 Act, its water rights in the Lake are junior and subordinate to the Tribe's senior reserved water rights to maintain water in the Lake to fulfill the purposes of the Reservation, which

[22] The State presumes it is the owner of the northern portion of the Lake, State Resp. Br. at 18-19 & n.7, but there has been no adjudication of title to that portion of the Lake since the State successfully asserted its Eleventh Amendment immunity to defeat the Tribe's attempt to litigate that question in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) ("*Idaho I*").

carry a priority date of time immemorial for traditional purposes and 1873 for other purposes. Accordingly, the Tribe's senior water right gives it and the United States a right superior to any junior right to water in the Lake—just like the water rights of the United States and the tribe in the *Winters* case prevailed over non-Indian irrigators upstream of the reservation who were consumptively using water but held junior priority dates. To the extent the State seeks to maintain the Lake at or above its natural level, it may not be in conflict with the Tribe's reserved right. However, if there is any conflict, the Tribe's senior right would prevail.[23]

The State also argues that the Tribe has no reserved water rights to maintain outflows from the Lake because those occur at Post Falls Dam, which is outside the Reservation. State Resp. Br. at 20-21. The State cites to the 1891 Act conveying the dam site to Frederick Post and the federal government's issuance of licenses in 1909 and 2009 to operate and maintain the dam. *Id*. at 20-21. Once again, however, the State does not point to any action by Congress abrogating the Tribe's reserved water rights in the portion of the Lake that remains a part of the Reservation—and there are no such actions. The State mistakenly argues that when FERC relicensed the Post Falls Hydroelectric Project in 2009, the Tribe raised no objection to the Project's operation. *Id*. at 21. But the Tribe and the Interior Department participated in those FERC proceedings, and pursuant to 4(e) of the Federal Power Act,[24] entered into agreements with Avista Corporation specifying the conditions under which the Project would operate the Dam to protect the Reservation and the Tribe's reserved water rights in the Lake. *Avista Corp.*, 127 FERC ¶ 61,265, 62,169-70 (June 18,

[23] The State's 1927 water right in the Lake prevails only over "junior appropriators," which the Tribe is not. AG Legal Guideline Letter at 4, 6.

[24] Section 4(e) of the Federal Power Act requires FERC to ensure a license "will not interfere or be inconsistent with" the purposes of a federal reservation and authorizes the relevant federal agency to impose conditions "necessary for the protection and utilization of such reservation." 16 U.S.C. § 797(e).

2009).[25] Nothing in the decision or settlement agreements waives the Tribe's reserved water rights in the Lake.

The State's focus on the outflow component is simply misplaced. The Tribe's Lake Claim provides that "[s]o long as there is a sufficient flow into the Lake" the lake levels and outflows outlined in the Tribe's claims will be met. R. at 6279 (Notice of Claim No. 95-16704). The claim includes measurement of outflows at a gauge near Post Falls, Idaho, because that is where the United States Geological Survey ("USGS") already has a gauge that can be utilized to monitor the Lake. The State's references to the location of the USGS gauge is a misguided attempt by the Respondents to convince this Court that the Tribe is, in effect, asserting regulatory or property rights outside the Reservation. This is not so—the Tribe is not asserting any right to property or regulatory control outside the Reservation. Rather the Lake Claim is based on quantification components (which include outflow considerations) that are required to ensure that the portion of the Lake within the Reservation provides a viable ecosystem to sustain the Reservation's purposes. Accordingly, the outflow component is necessary to preserve on-Reservation water rights in the Lake.

Lastly, NIWRG argues that the State's claimed water rights within the Lake are sufficient to protect the Tribe's uses of water and obviate the need for the federal reserved right. NIWRG Resp. Br. at 11-12. But state law, which is subject to change, is not a basis for and cannot supplant the Tribe's property rights, of which its water rights are an integral component. *See* Section I *supra*. The State's water right claim within Lake Coeur d'Alene, which was appropriated "to

[25] The essence of that agreement—developed by the Interior Department in consultation with the Tribe—was that maintaining a summer-time elevation that is higher than the natural level would not be inconsistent with the purposes of the Reservation. 127 FERC ¶ 61,265, 62,169. Contrary to the State's contention, nowhere does the FERC license indicate that allowing Lake elevation to drop below its natural level would be consistent with the purposes of the Reservation.

preserve the lake for scenic beauty, health, recreation, transportation and commercial purposes," NIWRG Resp. Br. at 11 (citing I.C. § 67-4304), does not protect the Tribe's uses of water to fulfill the purposes of the Reservation. *See* Tribe's Resp. Br. at 23-24 (*NIWRG v. Coeur d'Alene Tribe*, Appeal No. 45384-2017). The Tribe's reserved water rights are subject to monitoring and enforcement by the United States and the Tribe. The State has no authority on Tribal lands within the Reservation. Nor is the State required to make enforcement decisions of its state water right based on the Tribe's present or future needs. Just the opposite, in managing its own state water rights, the State would be legally obligated to resolve any conflicting purposes in favor of the public rather than the Tribe. *See Kootenai Envtl. All., Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 632, 671 P.2d 1085, 1095 (1983) ("The public trust doctrine at all times forms the outer boundaries of permissible government action with respect to public trust resources.").

In sum, Coeur d'Alene Lake is the centerpiece of the Reservation established by the 1873 Agreement and President Grant's Executive Order. The Tribe flatly rejected a smaller reservation established in 1867 by President Johnson "due in part to [its] failure to make adequate provision for fishing and other uses of important waterways." *Idaho II*, 533 U.S. at 266. The Reservation was established for not only the traditional purposes determined in *Idaho II*, but for agricultural, commercial and industrial purposes. *See* Section II.A and B *supra*. The 1873 Agreement and Executive Order reserved a water right in the Tribe to maintain the Lake for all these purposes.

III. The Tribe is Entitled to Reserved Water Rights for Instream Flows Outside the Reservation

The relationship between the Tribe and traditional uses of water, including fishing, was at the heart of the Supreme Court's ruling in *Idaho II*, and the district court in this case correctly identified fishing as a Reservation purpose entitled to *Winters* rights. R. at 4322 (Order on Mots. S.J.). Nevertheless, the district court disallowed the Tribe's claim that certain off-Reservation

waters, *id.* at 4324, are necessary to meet the biological needs of fish that sustain the Tribe's fisheries on the Reservation. *See Walton I*, 647 F.2d at 48 (recognizing *Winters* rights are inferred to support the biological needs of fish that sustain tribal fisheries); *U.S. v. Anderson*, 591 F. Supp. 1, 5 (E.D. Wash. 1982) (same), *rev'd in part on other grounds* 736 F.2d 1358 (9th Cir. 1984). While this Court should affirm the district court in upholding fishing as a Reservation purpose, questions concerning the extent to which waters outside the Reservation are needed to sustain the fishing purpose are properly addressed in the quantification phase. For the reasons discussed below, the Tribe should not be foreclosed from demonstrating in the quantification phase the extent to which flows in certain off-Reservation streams are necessary to sustain the fishing purpose of the Reservation.

A. *Winters* rights may include waters outside the Reservation when necessary to fulfill a purpose of the Reservation

The State argues that the district court was correct in creating a limitation on the *Winters* doctrine to only those waters in, on or under the Reservation. State Resp. Br. at 22-25; R. at 4326 (concluding that *Winters* rights in water outside the Reservation "are not supported by case law") (Order on Mots. S.J.). The State then suggests that there must be an "express reservation of water rights," State Resp. Br. at 22, for the Tribe's to have off-reservation instream flow rights. The State is wrong. *Winters* established that reserved rights are implied when necessary to fulfill the purposes of a reservation and does not require an express reservation of such rights. *See* Section I *supra.*

The State then asserts that absent such express statement, "water rights are reserved by implication only when the subject waterway is within or bordering the reservation." State Resp. Br. at 22. The State cites to *Winters*, 207 U.S. at 565, *Conrad Inv. Co. v. United States*, 161 F. 829, 831 (9th Cir. 1908), and *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 325 (9th

Cir. 1956), State Resp. Br. at 23-24, for support simply because those cases mention that surface waters formed part of a reservation boundary. However, those cases do not discuss or even suggest that reserved water rights are limited to only the water that physically or geographically borders the reservation. Moreover, the State's position is contrary to the Supreme Court's decision in *Arizona I*, which confirmed a tribe's reserved water rights in the Colorado River—which was not in, on or under—the Cocopah Reservation. *See* Tribe's Opening Br. at 48-49 (discussing same). The State tries to brush off *Arizona I* by asserting that the relevant fact in that case was that the land was adjacent to the Colorado River "*as surveyed*" in 1874. State Resp. Br. at 26 (emphasis in original). But the 1917 Executive Order established the Cocopah Reservation and reserved water rights for the tribe, not the 1874 survey (which was completed some 43 years prior to the Executive Order). *See also* Tribe's Opening Br. at 48-49 n.25 (*Arizona I* was decided based on the federal government's position that the Cocopah Reservation was not adjacent to the Colorado River). More generally, in *Winters* the Supreme Court affirmed an injunction against legally junior uses of water outside the Fort Belknap Reservation to protect senior tribal water rights on the Reservation.

The State also relies upon *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 765-68 (1985), for the proposition that the Tribe's reserved water rights "do 'not exist independently of the reservation itself.'" State Resp. Br. at 23. *Klamath* is not instructive here because the Tribe does not claim that its water rights exist "independently of the reservation," nor is it asserting any rights to use off-reservation land in this case. The Supreme Court has also since limited *Klamath* to its facts, which are not similar to the facts here. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 201-02 (1999).

The Ninth Circuit's decision in *John v. U.S.*, 720 F.3d 1214, 1229 (9th Cir. 2013), discussing reserved water rights and appurtenancy, is instructive here. Contrary to the State's

argument, State Resp. Br. at 25 n.8, the *Winters* doctrine was central to the Ninth Circuit's decision. *John*, 720 F.3d at 1224. *John* held that *Winters* "underlies" the regulations at issue, and noted the prior panel "approved the Secretaries' use of the federal reserved water rights doctrine to identify which waters are 'public lands' for purposes of [the regulations'] rural subsistence priority." *Id.* at 1224. Then in rejecting the State of Alaska's argument that reserved water rights "exist only in the waters that are within the boundaries of the reservation," *id.* at 1229, the *John* court stated:

> The reserved water rights doctrine holds that the government impliedly withdrew its consent to creation of private rights each time it earmarked public lands for a specific federal purpose to the extent necessary to fulfill that purpose. Thus, the fact that a reservation was detached from water sources does not prove an absence of intent to reserve waters some distance away. Judicial references to such rights being "appurtenant" to reserved lands apparently refer not to some physical attachment of water to land, but to the legal doctrine that attaches water rights to land to the extent necessary to fulfill reservation purposes.

John, 720 F.3d at 1229–30 (quoting David H. Getches, *Water Law* 349-50 (4th ed. 2009)).

John held that appurtenancy "does not mean physical attachment," *id.* at 1229, but rather concerns "'the relationship between reserved land and the use of the water, not the location of the water.'" *Id.* at 1230. *See also* Black's Law Dictionary at 103 (6th ed. 1990) ("A thing is 'appurtenant' to something else when it stands in relation of an incident to a principal and is necessarily connected with the use and enjoyment of the latter."). *John* concluded the relevant question was not "where these waters are located, but rather whether these waters are 'appurtenant' to the reserved land," meaning that the water is necessary to fulfill the purposes of the reservation. *Id.* at 1230.[26] The State attributes significance to the fact that the subsequent panel in *Agua Caliente* failed to cite *John*. State Resp. Br. at 25 n.8. However, in *Agua Caliente* neither party

[26] *John* declined to hold that reserved waters extend "upstream and downstream" of the federal reservations involved, because the plaintiffs sought "a generalized declaratory judgment" and did not seek a determination of the "actual purposes of any of the reservations." *Id.* at 1241. Nevertheless, *John* recognized "that the federal reserved water rights doctrine might apply upstream and downstream from reservations in some circumstances." *Id.*

"dispute[d] appurtenance" and the panel was not presented with a question of whether an off-reservation water source was necessary to fulfill the purposes of the reservation. *See Agua Caliente*, 849 F.3d at 1271 n.10.

While the Tribe must still prove during the quantification stage of this case that specific instream flows outside the Reservation are necessary to preserve an on-Reservation fishery, there is no legal impediment that requires dismissal of the claim at this stage.

B. The Tribe's instream flow claims are not based on rights to land outside the Reservation

Respondents also argue that the Tribe has ceded its water rights to instream flows off the Reservation to serve Reservation purposes. State Resp. Br. at 28, 30-31; Hecla Resp. Br. at 30-31; NIWRG Resp. Br. at 14; *see also* R. at 4325 (Order on Mots. S.J.). But in this context, lands outside the Reservation are different from the waters necessary to serve the fishing purposes on the Reservation—the former were ceded, but the latter were not. This is so because the Tribe's *Winters* doctrine rights vested in 1873 with the creation of the Reservation, and those rights remained appurtenant to—that is, legally connected to—the Reservation, to serve the purposes of the Reservation. The Tribe's cession of lands outside the Reservation did not purport to, and did not, divest the Tribe of any rights, including water rights, within the Reservation. Certainly, the Tribe could not have understood that in ceding lands outside the Reservation, it was also silently losing its right to waters necessary to preserve its traditional right to fish on its Reservation.

The State incorrectly views the Tribe's instream flow claims as being based on a "property right in fish . . . [and] fish habitat" outside the Reservation. State Resp. Br. at 29. Likewise, Hecla erroneously argues that the claims are based on a purpose to protect fish habitat outside the Reservation. Hecla Resp. Br. at 28-30. But as previously noted, the legal basis for the Tribe's instream flow claims is based solely on the Reservation's purpose to sustain tribal fisheries within

the Reservation, not a property right in fish. *See* Tribe's Opening Br. at 45-46 (discussing *Walton I*, 647 F.2d at 45, 48; *Anderson*, 591 F. Supp. at 5).[27]

For its mistaken assertion that reserved rights must be expressly retained when it concerns water outside the Reservation, the State can only cite to cases which considered tribal claims to physically enter and hunt and fish on ceded lands. State Resp. Br. at 31 (citing *e.g.*, *Oregon Dep't. of Fish & Wildlife*, 473 U.S. at 766 (involving tribe's claim to a special right to use the ceded lands for hunting and fishing); *W. Shoshone Nat'l Council v. Molini*, 951 F.2d 200, 203 (9th Cir. 1991) (involving tribe's claim to "hunting and fishing rights on the ceded lands") (emphasis added)). In contrast, here the Tribe's instream flow rights attached as appurtenances to the Reservation land when it was established in 1873, *John*, 720 F.3d at 1229-30, and do not require the use of water outside the Reservation. For that reason, the Tribe's instream flow water rights are not rights to land outside the Reservation. *Cf. Joyce Livestock Co. v. U.S.*, 144 Idaho 1, 11, 13, 156 P.3d 502, 512, 514 (2007) (recognizing that a ranch's "[l]ivestock must have adequate forage and water" and the appurtenant stock water rights "would be of little use apart from the operations of their ranches").[28]

The State is wrong in asserting that state law, which requires a description of a "place of use" for noticing all claims to water rights, I.C. § 42-1409(1)(h), provides a basis to limit the

[27] Hecla and NIWRG's reliance on a non-binding decision by the district court involving the Nez Perce Tribe in the Snake River Basin Adjudication is also misplaced, NIWRG Resp. Br. at 13-14; Hecla Resp. Br. at 2-3, 28-29, because the Tribe's instream flow claims are not based on fishing rights outside the Reservation. *See* Tribe's Opening Br. at 49-50 n.26 (discussing *Order on Motions for Summary Judgment*, In Re SRBA Case No. 39576, Consol. Subcase No. 03-1002 (Nov. 10, 1999)).

[28] The State incorrectly suggests that this Court based its decision in *Joyce* on the premise that the ranch had a right to use the federal property. State Resp. Br. at 25. But *Joyce* more broadly recognized that in determining whether a valid appropriation had been made, "the law does not concern itself with disputes relative to the title to the lands for which it is claimed the water was appropriated," and the appropriator's "right to possession . . . is not in issue." 144 Idaho at 10 (quoting *Sarret v. Hunter*, 32 Idaho 536, 541-42, 185 P. 1072, 1074 (1919)).

Tribe's reserved water rights. State Resp. Br. at 22. The protected reserved water is for fishing purposes on the Reservation. Moreover, the Tribe's non-consumptive water right is "used" only by requiring junior appropriators not to use water when that use conflicts with the senior right. *Adair*, 723 F.2d at 1411. Thus, the Tribe's instream flow water rights to support the Reservation's fishing purpose are not "used" outside the Reservation any more than the reserved rights at issue in *Cappaert v. U.S.*, 426 U.S. 128, 143 (1976)—which enjoined a junior appropriator's groundwater pumping outside the reservation based on "the necessity of water for the purpose of the federal reservation"—were used outside the federal monument.[29] *Cappaert*, 426 U.S. at 143. This Court has also held that the application of I.C. § 42-1409 to the "peculiar claims" for reserved water rights cannot "change . . . the nature and scope of those claims." *Avondale Irrigation Dist.*, 99 Idaho at 41; *see also Adair*, 723 F.2d at 1411 (tribe's reserved water right to support fishing and hunting "has no corollary in the common law of prior appropriations").

Even on their own terms, the Tribe's cessions of land cannot be construed to include instream flow water rights outside the Reservation that are necessary to sustain the Tribe's traditional fishing practices within the Reservation. This Court recognizes that it "must interpret these treaties differently than ordinary conveyances, keeping in mind the probable understanding of the Indians." *State v. Tinno*, 94 Idaho 759, 763, 497 P.2d 1386, 1390 (1972) (internal citations omitted). And the Tribe's water rights cannot be abrogated without a clear statement of congressional purpose. *Pocatello*, 145 Idaho at 506-07.

[29] Hecla's mischaracterization, Hecla Resp. Br. at 33, of the Tribe's instream flow water rights as "an environmental servitude" ignores that these water rights are no different in their effect on junior appropriators than any other senior water right. *See Bennett v. Twin Falls N. Side Land & Water Co.*, 27 Idaho 643, 150 P. 336, 339 (1915) ("A water right is an independent right and is not a servitude upon some other thing . . . .").

There is no mention of the Tribe ceding or abrogating any water rights in either of the 1887 and 1889 Agreements or the 1891 Act. The only relevant mention of water is the 1873 Agreement's provision guaranteeing that "the waters running onto said reservation shall not be turned from their natural channel where they enter said [R]eservation." R. at 4202 (1873 Agreement, art. 1). This provision is unique to the Tribe and is a clear recognition of the interrelationship between Tribal activities on the Reservation, such as the Tribe's traditional fishing practices, and a continued flow of water from outside the Reservation. The Tribe simply could not have understood that it was giving up rights to the flow of water outside the Reservation that sustained those very practices.

Respondents' emphasis on Congress's restoration of land ceded and restored to the public domain through the 1891 Act is also misplaced and ignores the pre-existing nature of the Tribe's *Winters* doctrine rights. *See* State Resp. Br. at 33; Hecla Resp. Br. at 31-33. The Mining Acts and Desert Lands Act did not affect already vested federal reserved water rights. *See, e.g.*, *Cappaert*, 426 U.S. at 143 n.8 (Mining Act of 1866), 144-45 (Desert Lands Act) (1976). Those Acts also expressly protected any existing rights. 43 U.S.C. §§ 321, 661. Congress's directive to restore the ceded land to the public domain simply meant that the patentees would "acquire only title to land through the patent and must acquire water rights in nonnavigable water in accordance with state law." *Cappaert*, 426 U.S. at 143. Congress did not need to reserve the Tribe's water rights a second time and certainly did not need to do so with "explicit" language. *See* State Resp. Br. at 33. The State's position simply ignores that the *Winters* doctrine is one of "two restrictions on the States' exclusive control of water." *Pocatello*, 145 Idaho at 503.

Accordingly, this Court should hold that water was reserved to fulfill the fishing purpose of the Reservation, and allow the Tribe the opportunity to prove, in the quantification phase of this

case, that specific instream flows in off-reservation locations are necessary to preserve fish stocks within the Reservation.

IV. The Priority Date for the Tribe's Water Rights on Reacquired Lands is Unaffected by Intervening Non-Indian Ownership

The priority date for water on reacquired lands is important in this case because in 1906 Congress authorized allotment of the Coeur d'Alene Reservation and part of the Reservation was opened to non-Indian homesteaders. *See* Tribe's Opening Br. at 13-14. Since then, Congress has restored certain lands to Tribal ownership[30] and the Tribe has reacquired certain lands previously lost to allotment and homesteading. As discussed below, the priority dates for the Tribe's water rights on reacquired lands is not affected by intervening non-Indian ownership and the State's arguments supporting the district court's ruling to the contrary, *see* State Resp. Br. at 35-42, should be rejected.[31]

A. The Tribe's reserved water rights for consumptive uses on reacquired lands retain their original priority dates

The State urges this Court to conclude that the dispositive factor here is that reacquired lands "have not been in continuous federal ownership since the creation of the Reservation." State Resp. Br. at 36. But this ignores the fact that such lands have always remained part of the Reservation, *Mattz v. Arnett*, 412 U.S. 481, 504–05 (1973) (allotments and homesteads retain reservation status). Moreover, preserving the Tribe's priority date for reserved water rights on lands reacquired by the Tribe in this case effectuates Congress's goals, established in the Indian

[30] The State concedes that lands that never left federal ownership and were restored to the Tribe retain their original priority date. State Resp. Br. at 36 n.12.

[31] The State's responses to the U.S. and Tribe's opening briefs are substantively identical. NIWRG incorporated by reference the State's arguments on the priority date for reacquired lands, without raising any of its own arguments. *See* NIWRG Resp. Br. at 15 (citing I.A.R. 35(h)). Therefore, NIWRG has waived all arguments that the State did not make, and its response on reacquired lands fails for all the reasons that the State's response fails. Hecla did not address the priority date for on-reservation reacquired lands at all in its consolidated response brief.

Reorganization Act of 1934 ("IRA"), Pub. L. No. 73-383, 48 Stat. 984, of reestablishing reservation land bases to support the purposes of Indian reservations. *See* Tribe's Opening Br. at 55-57. The reacquired lands at issue here were only temporarily lost to the Tribe due to the failed allotment policy that has been repudiated by Congress. *Id.* at 56-57. These lands are now being used to fulfill the purposes of the Reservation and the priority date of consumptive water rights on these lands should not be affected by intervening non-Indian ownership and use of water, as the Wyoming Supreme Court held in *In re Gen. Adjudication of All Rights to Use Water in Big Horn River Sys.*, 753 P.2d 76, 114 (Wyo. 1988) ("*Big Horn I*").

It would be antithetical to these principles to subject the Tribe's reserved water rights to rules governing non-Indian water use on specific parcels during the time they were lost from tribal ownership through a forced allotment policy that the Tribe adamantly opposed. *See Pocatello*, 145 Idaho at 506-07 (background of tribal opposition to abrogation of its rights and absence of any express action by Congress supports the conclusion that Congress did not intend to abrogate Indian reserved water rights on Reservation). As a practical matter, reserved water rights cannot be lost due to nonuse and would exist the same today as they did in 1873, regardless of past use, had the lands never been temporarily lost to non-Indians.

The district court applied *U.S. v. Anderson*, 736 F.2d 1358, 1362-63 (9th Cir. 1984), and held that it governs the priority date on reacquired lands. R. at 4327-28 (Order on Mots. S.J.), 4474 (Order Granting Mot. to Reconsider). *Anderson* recognized that "*Winters* rights do not cease to exist merely because the land passes out of Indian ownership," but nevertheless held that the Spokane Tribe's priority date for water rights on reacquired lands within the Reservation depended on the intervening non-Indian's water use. *Anderson*, 736 F.2d at 1362. Thus, if the non-Indian perfected a water right on a parcel reacquired by the Tribe, the Tribe would acquire the non-Indian's priority date, but if the non-Indian failed to perfect the right, the Tribe would get a priority

date of when the land was reacquired. *Anderson* wrongly subjected the Spokane Tribe to state law prior appropriation principles (use or lose) and failed to recognize the fact the reacquired lands always remained part of the Reservation. *See* Tribe's Opening Br. at 55-58.

The State supports reliance on *Anderson*, State Resp. Br. at 37-38, and erroneously claims that *Big Horn I* is consistent with *Anderson* based on a mistaken belief that *Big Horn I* only involved reacquired allotments purchased from non-Indians and not homesteads. State Resp. Br. at 41-42.[32] This is not so. *Big Horn I* found that reacquired allotments and homesteads on the Reservation held their original priority date and established the proper rule that should apply here.

Big Horn I considered two types of reacquired land on the Wind River Reservation. One was land the Tribes reacquired in the "ceded portion" of the Reservation, which had previously been sold to the United States and opened for sale to non-Indians "under the provisions of the homestead, townsite, coal and mineral land laws . . . ." 753 P.2d at 84. The other was land reacquired by the Tribes in the portion of the Reservation that was allotted to individual Indians. *Id.*; *see also Wise v. U.S.*, 297 F.2d 822, 824 (10th Cir. 1961) (discussing the allotment history of the Wind River Reservation). The United States not only subsequently returned unclaimed land in the ceded portion to tribal ownership, but also "reacquired, in trust for the Tribes, additional ceded land [that had been homesteaded] and certain lands within the [allotted portion of the] reservation which . . . passed into private ownership [after allotment]." *Big Horn I*, 753 P.2d at 84. The *Big Horn I* court found that upon reacquisition by the Tribe, lands in both the ceded and allotted portion "again became part of the existing Wind River Reservation." *Id.*

[32] The State never addressed the Tribe's argument that *Anderson* only applies to agricultural uses of water. *Compare* Tribe's Opening Br. at 55 n.33, *with* State's Resp. Br. at 36-37. Thus, the State's reliance on *Anderson* must be confined to consumptive uses for agricultural purposes.

In determining the priority date for reserved water rights associated with these lands, the court in *Big Horn I* found that the date the reservation was established applied to both reacquired homesteads and allotments. The court explained that: "because all the reacquired lands on the [homesteaded] portion of the reservation are reservation lands, the same as lands on the [allotted] portion, the same reserved water rights apply. Thus, reacquired lands on both portions of the reservation are entitled to a [date of reservation] priority date." *Id.* at 114 (emphasis added). The court later confirmed its ruling applied to all reacquired lands without qualification for non-use of water or status as allotments or homesteads. *In re Gen. Adjudication of All Rights to Use Water in Big Horn River Sys.*, 899 P.2d 848, 855 (Wyo. 1995) ("*Big Horn IV*") (all "restored, retroceded, undisposed of, and reacquired lands owned by the Tribes" hold a date of reservation priority date).[33]

Thus, unlike *Anderson*, *Big Horn I* awarded all reacquired tribal lands the same, original priority date, despite intervening non-Indian ownership, because they were "reservation lands" that had been reacquired for tribal use, without regard to intervening water use and without regard to whether they had been allotted or homesteaded.[34] This Court should reverse the district court and apply *Big Horn I* to hold that the Tribe has a priority date of no later than 1873 for consumptive uses on reacquired lands.

[33] The *Big Horn I* court's citation to *Walton I*, to find that non-Indian successors of Indian allottees could lose their original priority date for water rights through non-use, is therefore irrelevant as to tribally-reacquired lands, *see* 753 P.2d at 112-13 (citing *Walton I*, 647 F.2d at 50-51), and the State's observation that *Big Horn I* cited *Walton I* favorably is of no consequence, *see* State Resp. Br. at 42.

[34] The State mistakenly claims that *Big Horn I* "cited with approval the *Anderson* district court holding." State Resp. Br. at 41-42. But that citation was made by the dissent. *Big Horn I*, 753 P.2d at 133 (Thomas, J., dissenting) (citing *Anderson*, 591 F. Supp. 1, for the proposition that reserved water rights "are not subject to state law concerning the abandonment or extinguishment of a water right").

B. Reserved rights to sustain wetlands, seeps, and springs on lands reacquired by the Tribe have a time immemorial priority date

The State also relies principally on *Anderson* to limit the Tribe's non-consumptive water rights for wetlands, seeps, and springs to a priority date of when the lands were reacquired by the Tribe. State Resp. Br. at 35-41.[35] *Anderson*, however, did not address non-consumptive rights. The State also posits that because the Tribe claims water rights only for specific parcels the Tribe actually owns, it is internally inconsistent for the Tribe to take the position that these non-consumptive water rights are unaffected by years of intervening non-Indian ownership of those parcels. State Resp. Br. at 40. There is no inconsistency. The Tribe's claims for wetlands, seeps, and springs are limited to Tribal lands because some of the uses, *e.g.*, gathering or cultural activities, require access to land for traditional activities.[36] But unlike lands, non-consumptive water rights, by virtue of their very nature, may never be transferred to or held by a non-Indian (unlike the consumptive rights at issue in *Anderson*). *See, e.g.*, *Adair*, 723 F.2d at 1418. *Adair* supports the principle that these rights are held for the communal benefit of the Tribe and survive changes in land ownership within the Reservation. *Id.* at 1411 (non-consumptive water right reserved for the Tribe to hunt and fish "has no corollary in the common law of prior appropriations").

[35] The State also mentions instream flows, State Resp. Br. at 35-36, but the district court's decision was limited to the Tribe's claims for wetlands, seeps, and springs on reacquired lands. R. at 4474 (Order Granting Mot. Reconsider). To the extent that the State suggests that the Tribe's on-Reservation instream flow claims are affected by allotments or homesteads, the Tribe's response brief in the State's appeal addresses that position. Tribe's Resp. Br. at 27-38 (*State v. Coeur d'Alene Tribe*, Appeal No. 45381-2017).

[36] The Tribe claims non-consumptive water rights to maintain wetlands, seeps, and springs to support the hunting, gathering, traditional, cultural, spiritual, ceremonial and/or religious purposes of the Reservation, and, when located in riparian areas, instream fish habitat and riparian vegetation. *See* R. at 11-12 (Tribal Claims Letter); R. at 28 (Map of Wetlands, Seeps, and Springs Claims by On-Reservation Watershed).

The State argues that the Tribe lost its original priority date for non-consumptive water rights on reacquired lands because "rights incidental to ownership of tribal property" are "'lost,' 'excluded,' or 'eliminated' upon conveyance of reservation lands in fee to non-Indians." State Resp. Br. at 38. The State cites two cases in addition to *Anderson*; neither case involves reacquired lands or reserved water rights. State Resp. Br. at 38-39 (citing *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993); *Blake v. Arnett*, 663 F.2d 906, 911 (9th Cir. 1981); *Anderson*, 736 F.2d at 1363). *Bourland* dealt with a tribe's authority to apply tribal law to regulate the activities of non-Indians on non-tribal lands within a reservation, 508 U.S. at 681-82, and *Blake* considered whether individual Yurok Indians were authorized to enter non-Indian land to exercise tribal treaty rights, 663 F.2d at 910-11. With respect to *Anderson*, as the Tribe argued in its opening brief, Tribe's Opening Br. at 51-52, and in Section IV.A *supra*, that the case was wrongly decided and is not consistent with federal policy.

By citing *Adair*, 723 F.2d at 1413, the State seeks to support its argument that a time immemorial right for non-consumptive water uses is limited only to circumstances in which the Tribe has held "*uninterrupted use and occupation* of land and water," and non-Indian ownership therefore prevents an original priority date by interrupting the tribe's use of land and water. State Resp. Br. at 39 (emphasis in original). But *Adair* is directly contrary to this principle. *Adair* concerned the Klamath Reservation, which was established in part to protect the Tribe's non-consumptive use of water to support its traditional fishing and hunting practices. 723 F.2d at 1398, 1412. *Adair* held that the Tribe's water rights to support hunting and fishing were not abrogated by allotment, even though allotment "fundamentally changed the nature of land ownership on the

Klamath Reservation." *Id.* at 1398;[37] *see also Walton III*, 752 F.2d at 400;[38] *State v. McConville*, 65 Idaho 46, 139 P.2d 485, 487 (1943) ("[p]rivate ownership of some lands is not inconsistent with the [Tribe]'s] right to fish . . . .").

As a practical matter, the wetlands, seeps, and springs continued to exist on reacquired lands throughout the period of non-Indian ownership. Now that the lands on which these features are located have returned to tribal ownership, they once again support the Reservation's purposes. Intervening non-Indian ownership therefore does not affect the Tribe's priority date for those claims. *See Adair*, 723 F.2d at 1413-14; *Walton I*, 647 F.2d at 45, 48; *Walton III*, 752 F.2d at 400; *McConville*, 139 P.2d at 487.

CONCLUSION

As requested in the Tribe's opening brief, this Court should:

1. Affirm the district court's determinations that the Tribe holds reserved water rights for agricultural uses on the Reservation with a priority date of November 8, 1873; hunting and fishing uses and related wildlife and plant habitat on the Reservation with a priority date of time immemorial; and domestic uses (including some municipal uses) but hold that these rights have a time immemorial, not November 8, 1873, priority date.

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[37] After allotment, Congress terminated the Klamath Reservation, which ended tribal ownership of former reservation land entirely, but the Termination Act contained a savings clause protecting the Tribe's water rights. *Id.* at 1411-12. Prior to the Termination Act, however, the Ninth Circuit in *Adair* determined that the Tribe's reserved water rights for hunting and fishing within its Reservation survived allotment.

[38] The State argues that *Walton* only upheld the tribe's right to a "*quantity* of non-consumptive water right . . . for use on its lands" and "does not recognize a tribal right to retain and hold non-consumptive water rights on non-Indian lands." State Resp. Br. at 41 (emphasis in original). But *Walton I* held that the tribe held a reserved right to instream flows to support the fishing purpose of the reservation in a creek system basin that had been allotted and included several non-Indian-owned allotments. 647 F.2d at 44-45, 48. In a later opinion, the court in *Walton III* emphasized that the tribe's non-consumptive right was not affected by allotment and the passage of title out of the Indian's hands because it was "unrelated to irrigation." 752 F.2d at 400.

2. Reverse the district court's dismissal of the Tribe's reserved water rights claims for:

   a. gathering, recreation, transportation, cultural uses and aesthetics

   b. industrial and commercial uses; and all other municipal uses

   c. Lake elevations in Lake Coeur d'Alene.

3. Reverse the district court's dismissal of the Tribe's off Reservation instream flow claims and allow them to proceed to quantification.

4. Reverse the district court's determination of the Tribe's priority date for reserved water on reacquired lands and hold that such rights have a priority date of no later than November 8, 1873 for consumptive uses and a priority date of time immemorial for non-consumptive uses.

Respectfully submitted this 21st day of May, 2018.

Counsel for the Coeur d'Alene Tribe

By: 
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by Priority Mail, Postage Pre-Paid on this 21st day of May, 2018, upon the following:

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