IN THE SUPREME COURT OF THE STATE OF IDAHO

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

RESPONDENT COEUR D'ALENE TRIBE'S RESPONSE BRIEF

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

Since 1908 when the Supreme Court decided *Winters v. United States*, 207 U.S. 564 (1908), tribal reserved water rights have been the subject of numerous adjudications and Congressional settlements involving Indian reservations in many different states,[1] including Idaho.[2] Through all this time, there has never been a determination by a court or Congress that a federally recognized tribe had no reserved water rights at all for its Reservation. The argument that the North Idaho Water Rights Group ("NIWRG") is advancing here, seeking a ruling that the Coeur d'Alene Tribe has no reserved water rights, is a fundamental attack on the very notion that Indian tribes are entitled to federally protected water rights on their reservations.

NIWRG dresses up this extreme argument in various ways, relying in large part on a strict "test of necessity," NIWRG Br. at 11-20, that is fundamentally inconsistent with the *Winters* doctrine itself. According to NIWRG, the "test of necessity" would defeat reserved water rights claims for every single purpose advanced by the Coeur d'Alene Tribe ("Tribe") and the United States. While *Winters* and its progeny assure that water is broadly reserved for the purposes of an Indian reservation, NIWRG suggests instead that the Tribe should be relegated to a bleak survival without water either for traditional purposes or for future progress—not for hunting and fishing, not for agriculture, and not even for domestic uses. NIWRG Br. at 12-16, 16-20, 23-24. In NIWRG's view, reserved water isn't "necessary" for those purposes unless the Tribe's members simply could not live on the Reservation at all without it. No court has ever suggested such an approach to tribal reserved water rights.

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[1] Tribal water rights settlements ratified by Congress through 2010 are compiled in *Cohen's Handbook of Federal Indian Law* ("*Cohen's Handbook*"), § 19.05[2] at 1247-48, n. 47 (Nell Jessup Newton, ed., 2012).

[2] Snake River Water Rights Act of 2004, Pub L. No. 108-447, div. J, tit. X, 118 Stat. 2809, 3431-41 (Nez Perce Tribe); Fort Hall Indian Water Rights Act of 1990, Pub. L. No. 101-602, 104 Stat. 3059 (Shoshone-Bannock Tribes).

NIWRG's apparent reason for advancing this absolute "necessity" argument is that the Tribe's reserved water rights claims could otherwise adversely impact junior state water right holders. NIWRG Br. at 11. Of course, that is the overall nature of water law in a prior appropriation system—in water short periods, junior users may be impacted by senior right holders, whether Indian or non-Indian. But while all water users face that basic scenario, NIWRG somehow finds that result unacceptable with respect to senior tribal water rights, and advances state law interests as a rationale to undermine the very existence of tribal reserved water rights.

NIWRG's arguments cannot be reconciled with the foundational legal principles governing tribal reserved water rights. First, the Tribe's rights are governed by federal law. This is so as a matter of constitutional law, because "[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law." *Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985). As a feature of Tribal property rights, the Tribe's water rights are unquestionably federal rights, as to which federal law governs, preempting state law. *Arizona v. California*, 373 U.S. 546, 597-98 (1963) ("*Arizona I*"); *City of Pocatello v. Idaho*, 145 Idaho 497, 503, 180 P.3d 1048 (2008) ("*Pocatello*"). Since federal law controls the determination of tribal water rights and accords them seniority over state water rights that vest after creation of the Reservation, state law cannot provide any basis for restricting the Tribe's senior rights. While NIWRG gives lip service to the primacy of federal law, NIWRG Br. at 6, it in fact complains that "[i]f allowed, the federal claims threaten future curtailment of vested, state law water rights," NIWRG Br. at 11, and implies that tribal water rights are eclipsed by "the purposeful and continued deference to state water law by Congress," *id.* (citing *California v.*

U.S., 438 U.S. 645, 653 (1978)—a case that does not involve tribal reserved water rights). NIWRG's approach would stand the supremacy clause of the U.S. Constitution on its head.

Second, NIWRG's test of absolute necessity runs afoul of the well-established principle that agreements with Indian tribes must be construed as the Indians themselves would have understood them. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999). This principle has equal application to treaties and other agreements with Tribes. *Winters*, 207 U.S. at 576; *Pocatello*, 145 Idaho at 576. In disregard of this principle, NIWRG in effect argues that the Tribe entered into agreements with the United States regarding the need for a Reservation, and that in doing so the Tribe understood that those agreements provided no reserved water at all to ensure that the Reservation would be a viable homeland for the Tribe. Particularly since the record reflects the abiding importance of water to the Coeur d'Alene Tribe, and since the very location of the Reservation turned on the Tribe's insistence on the inclusion of waterways vital to the life of the Tribe, it is simply inconceivable to suggest that the Tribe nevertheless understood that it was agreeing to a Reservation without any right to reserved water for any purpose. NIWRG offers no evidence that this was the Tribe's understanding, and there is none. The record demonstrates precisely the opposite—that water was the lynchpin of the negotiations leading to the creation of the Reservation, and so the Indians would have understood that in establishing the broad purposes of the Reservation, their right to water both for their traditional practices and for their advances in the modern world, would be protected.

We turn next to NIWRG's specific arguments.

ARGUMENT

I. *New Mexico* Does Not Apply to the Coeur d'Alene Tribe's Reserved Water Rights, and NWIRG's Reliance on *New Mexico* to Impose a Stringent "Test of Necessity" to Defeat the Tribe's Rights Must be Rejected.

As this Court has emphasized in discussing tribal reserved water rights: "American law treats Indian tribes differently than it does sovereign nations or private individuals." *Pocatello*, 145 Idaho at 506. Ignoring this fundamental principle, NIWRG assumes that aspects of the ruling in *U.S. v. New Mexico*, 438 U.S. 696 (1978), apply to defeat all Tribal water rights in this case. *See* NIWRG Br. at 7. This flawed assumption is the basis for much of NIWRG's argument. In particular, NIWRG relies on *New Mexico* to limit the Tribe's reserved water rights under federal law not only to what NIWRG deems to be the "primary" purposes for which the Reservation was established, but also to impose an overarching and impossible standard for when reserved water is necessary *Id.*

NIWRG's argument is fundamentally flawed because *New Mexico*, which determined the water rights of a national forest, has no application to the Coeur d'Alene Reservation. As this Court has recognized, the purposes of an Indian reservation must be construed according to well-established principles that apply to Indian tribes:

> First and foremost is the notion that agreements with Indians are to be interpreted to the benefit of the tribes. For example, the Supreme Court has stated,
>
> > [W]e will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection," and counterpoise the inequality "by the superior justice which looks only to the substance of the right, without regard to technical rules."
>
> *U.S. v. Winans*, 198 U.S. 371, 380-81, . . . (1905) (citing *Choctaw Nation v. U.S.*, 119 U.S. 1, 28, . . . (1886); *Jones v. Meehan*, 175 U.S. 1, . . . (1899)). Congress certainly has the power to abrogate Indian treaty rights, but its intent to do so must be clear. *See, e.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202, . . . (1999); *U.S. v. Dion*, 476 U.S. 734, 739-40, . . . (1986) (abrogation of treaty rights requires "clear evidence that Congress actually considered the conflict between its intended action on the

> one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.").

Pocatello, 145 Idaho at 506-07. It is these principles—not *New Mexico*'s approach regarding national forests—that control in this case.

Contrary to NIWRG's contention, an Indian reservation is not limited to a single purpose to the exclusion of all others, nor is it reasonable to conclude that an Indian reservation has no "need" for reserved water rights if the purposes of the reservation can be fulfilled by another source.[3] Unlike the national forest in *New Mexico*, an Indian reservation involves the ongoing life of a people on lands promised to them. As would be the case for the life for any people over time, this cannot be reduced to one formulaic purpose. Rather, as the Indians would have understood it at the time the Reservation was established, Tribal life on the Coeur d'Alene Reservation was centered upon traditional activities like hunting, fishing, and gathering, more modern economic pursuits like farming and industrial development, and everyday activities like drinking and washing—and water is needed for all of these purposes.[4] As *Winters* and its progeny hold, water for an Indian reservation is reserved broadly, consistent with the purposes of the reservation, which include providing a permanent home for the Indians to live—to raise their families, to pursue their traditions, and to advance their economies. *See, e.g.*, *Winters*, 207 U.S. at 576; *Arizona I*, 373 U.S. at 598-601.

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[3] A similar argument was rejected by the Supreme Court in *Winters*, where the Court found that the Fort Belknap Tribes were entitled to a water right in the Milk River despite the non-Indian water users' argument that sufficient water from springs and streams within the reservation could meet the Indians' water needs. *See* 207 U.S. at 570, 576; *see also In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source,* 989 P.2d 739, 747-48 (Ariz. 1999) ("*Gila III*") (holding that a right to pump groundwater under state law did not obviate a federal reserved right).

[4] The Tribe has appealed the district court's dismissal of Tribal claims for traditional activities other than hunting and fishing, as well as for industrial, commercial, and mixed municipal uses, but those are the subject of a separate appeal before this Court. *See Coeur d'Alene Tribe v. State*, Case No. 45383-2017 (*In re CSRBA*, Case No. 49576, Subcase No. 91-7755).

This is true for the Coeur d'Alene Reservation where the 1873 Agreement provided that the "Indians agree to locate and make their homes upon the reservation" and the 1887 Agreement confirmed that the "Reservation shall be held forever as Indian lands and as homes for the Coeur d'Alene Indians." R. at 4202 (Second Aff. Vanessa Boyd Willard, Ex. 5 (Agreement with the Coeur d'Alene of July 28, 1873) ("1873 Agreement"))); 1391 (Aff. of Richard J. Hart, Ex. 4 (Agreement with the Coeur d'Alene of Mar. 26, 1887 ("1887 Agreement"))). Broad homeland purposes are clearly reflected in the negotiations leading to the creation of the Reservation in 1873—in which the Indians emphasized the importance of waters to the present and future lives of their people. *See* Section II *infra*. Certainly, the Indians would have understood that in agreeing to provide the United States with the lands it coveted and with the peace it desired, they were retaining for their Reservation the waters necessary for a viable, long-term home, not one limited to a single activity.

In key respects, the purposes of Indian reservations, like the Coeur d'Alene Reservation, are the polar opposite from the purposes of national forests, like that at issue in *New Mexico*. The strong preemptive force of federal law protecting Indian present and future uses of water when Indian reservations are established is entirely absent in the case of national forests. As *New Mexico* states, "Congress authorized the national forest system principally as a means of enhancing the quantity of water that would be available to the settlers of the arid west." 438 U.S. at 713. In sharp contrast, Indian reservations were created to provide places for tribes to maintain and develop their homelands, with water for both present and future uses. Put simply, national forests were intended in considerable part to protect settlers in their uses of water under state law while Indian reservations were largely intended to protect tribes from the settlers' uses of water. This dichotomy reflects a fundamentally different relationship with state law—with national forests there is a basic deference to state law, while with Indian reservations, federal law

is strongly preemptive. *See, e.g.*, R. at 2231 (Special Master Report, *Arizona I*) (finding "[t]he suggestion is unacceptable that the United States intended the Indians would be required to obtain water for their future needs by acquiring appropriative rights under state law"); *U.S. v. McIntire*, 101 F.2d 650, 654 (9th Cir. 1939) (rejecting state law as a basis for acquiring water rights on the Flathead Indian Reservation reasoning that "the Montana statutes regarding water rights are not applicable because Congress at no time has made such statutes controlling in the reservation"); *Cohen's Handbook* § 19.03[4], at 1218 ("States have considerable power over federal lands, and Congress has generally deferred to state water law relative to federal lands. By contrast, the establishment of an Indian reservation . . . preempt[s] state jurisdiction . . . Congress has never deferred to state water law relative to Indian reservations.") (footnotes omitted).

These differences further underscore why the purposes for reserved rights for national forests are narrowly construed as in *New Mexico*, while purposes for Indian reservations are broadly construed. In *Potlatch Corp. v. U.S.*, 134 Idaho 916, 12 P.3d 1260 (2000), this Court discussed the differing goals for Indian reservations as contrasted with other federal reservations.

> [Whereas] *Winters* dealt with the creation of a reservation by treaty, a bargained for exchange between two entities[, a federal law creating other reservations, like] the Wilderness Act [which established the National Wilderness Preservation System], is not an exchange; it is an act of Congress that sets aside land, immunizing it from future development. There is no principle of construction requiring the Court to interpret [it] to create an implied water right.

Id. at 920.[5] Both the Montana Supreme Court and Arizona Supreme Court have also recognized the significant differences between the creation of Indian reservations and other kinds of

[5] *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.").

reservations and held that *New Mexico* does not apply in determining the reserved water rights on an Indian reservation.[6] *See State ex rel. Greely v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 712 P.2d 754, 766-68 (Mont. 1985) ("*Greely*"); *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 35 P.3d 68, 76-77 (Ariz. 2001) ("*Gila V*").

NIWRG also attempts to use *New Mexico* as the basis for an absolute "test of necessity" that precludes a federal reserved water right if other non-federal sources of water are available (even temporarily), because the lack of a federal reserved right would not entirely defeat the purposes of the Coeur d'Alene Reservation. NIWRG Br. at 7, 11-12. But that is not the test for finding a tribal reserved water right.

An implied reservation of water for an Indian reservation exists where water is necessary to fulfill the purposes of the reservation. *Winters*, 207 U.S. at 576; *Gila V*, 35 P.3d at 71 (quoting *Cappaert v. U.S.*, 426 U.S. 128, 138 (1976)); *see also Greely*, 712 P.2d at 762 ("reserved water rights are established by reference to the purposes of the reservation"). The standard is not, as NIWRG suggests, whether only a federal reserved water right can fulfill the purposes of the reservation, but whether the underlying purposes of the reservation envision water use. *Agua Caliente*, 849 F.3d at 1269. If water is needed for the particular purpose—i.e.,

[6] The Ninth Circuit has indicated that *New Mexico* does not directly apply to *Winters* doctrine rights on Indian reservations, but nevertheless found it provides useful guidelines. *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1269 n.6 (9th Cir. 2017) ("*Agua Caliente*") ("we have previously noted that *New Mexico* is 'not directly applicable to Winters doctrine rights on Indian reservations'") (citations omitted). While the Ninth Circuit's approach fails to give adequate consideration to the federal Indian law principles that distinguish the situation regarding national forests from that involving Indian reservations, the holding in *Agua Caliente* does not support limiting tribal reserved water rights to a single, narrow purpose. Rather, the Ninth Circuit held in *Agua Caliente* that "[t]he general purpose, *to provide a home for the Indians*, is a broad one that must be liberally construed." *Id*. at 1270 (quoting *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981) ("*Walton I*") (emphasis in original)); *see also id.* at 1265 ("The Executive Orders establishing the reservation are short in length, but broad in purpose.").

for sustaining life on an Indian reservation—reserved water is "necessarily" implied. *See, e.g.*, *Arizona I*, 373 U.S. at 598-99 (finding a reserved right to water where water was "essential to the life of the Indian people"). Therefore, the question before this Court is whether the parties in 1873 intended to establish the Reservation for purposes that need water.

NIWRG relies on the decisions of this Court in *State v. U.S.*, 134 Idaho 940, 12 P.3d 1284 (2000), and *U.S. v. State*, 135 Idaho 655, 23 P.3d 117 (2001), to support its position.[7] Neither case deals with an Indian reservation or the special principles applicable to tribal reserved water rights, nor do they support NIWRG's cramped view of when a federal reserved right is necessary even for other kinds of reservations.

In *State v. U.S.*, this Court denied reserved water rights for the Sawtooth National Recreation Area ("Sawtooth NRA") because the purpose of creating the Sawtooth NRA was "to protect [it] from the dangers of unregulated development and mining operations." 134 Idaho at 944 (emphasis added). This Court found that no water was necessary to fulfill this regulatory purpose. *Id.* at 946 (water not needed to "control the rate and manner of development of the area" or for "limiting mining operations"); s*ee also id.* at 947 ("This protection is afforded by the existence of statutes and regulations governing mining operations in the Sawtooth [NRA]."); *id.* at 946 ("[t]hese purposes are, and have been, accomplished through the promulgation of land use

[7] In addition to these two cases from this Court, NIWRG also relies on *Puyallup Tribe, Inc. v. Department of Game of Washington*, 433 U.S. 165 (1977) ("*Puyallup III*"), as a case it contends "concluded that the power of the state was adequate for protection of the fish, and a federal reserved water right was not necessary to fulfill that purpose." NIWRG Br. at 14. NIWRG's contention that *Puyallup III* found that "a federal reserved water right was not necessary" is wrong. In *Puyallup III*, there was no issue of reserved water rights before the Supreme Court, and no determination of water rights was made there. *Puyallup III* only considered the extent to which the State of Washington could regulate the Puyallup Tribe's fishing rights. *See* 433 U.S. at 167.

regulations for the recreation area which control the rate and manner of development of the area").

Similarly, in *U.S. v. State*, this Court also found that no reserved water rights were implied for islands reserved in the Deer Flat National Wildlife Refuge ("Refuge") because the purpose of reserving the islands in the Refuge "was to create sanctuaries for migratory birds to protect them from hunters and trappers so they would not become extinct and so they could continue to benefit husbandry," and a bird sanctuary does not need water because, even without water surrounding the islands, "[h]unting is still prohibited and migratory birds still have a sanctuary without a federal reserved water right." 135 Idaho at 663-64. Again, this Court found that fulfilling the purposes of the Refuge did not require water at all. The Coeur d'Alene Reservation, of course, has far broader purposes than either the Refuge or the Sawtooth NRA, as we show in Section II *infra*.

NIWRG's "test of necessity" ignores the fundamental legal principle that state law is simply not the source from which the Tribe derives its water rights—and the existence of state laws, enacted after the Reservation was created, that provide for the use or protection of water cannot be the basis on which to deny the Tribe federally reserved water rights. *See, e.g.*, *Agua Caliente*, 849 F.3d at 1269 (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"); *Gila III*, 989 P.2d at 748 (finding state right to pump groundwater would not "adequately serve to protect federal rights"); *see also Walton I*, 647 F.2d at 48 (finding that "the Tribe has a vested property right in reserved water" and "subsequent acts making the historically intended use of the water unnecessary do not divest the Tribe of the right to the water").

In sum, NIWRG's assumption that *New Mexico* applies and mandates a strict "test of necessity" must be rejected. The legal principles applicable to Indian tribes are unique, the

record here demonstrates that the purposes of the Coeur d'Alene Reservation are broad, and accordingly the *New Mexico* case, which involves a very different set of principles and statutes and a very different type of reservation, provides no basis for defeating the Tribe's claims to waters that under the *Winters* doctrine were reserved to ensure a viable future for this Tribe on its Reservation which was promised to it forever.

II. Congress Ratified the Broad Purposes of Tribe's 1873 Reservation Within the Boundaries Confirmed by the 1891 Act.

The district court properly concluded that the Coeur d'Alene Reservation was established by Executive Order in 1873 and that water rights were reserved to fulfill not only the Reservation's domestic and agricultural purposes, but also traditional fishing and hunting purposes. R. at 4320-33 (Order on Mots. S.J.).[8] Contrary to this ruling, NIWRG asserts that the only purpose for which the Tribe's Reservation was established under the 1873 Agreement and Executive Order was to "promot[e] an agrarian lifestyle on a diminishing reservation."[9] NIWRG Br. at 7-9. NIWRG's position is not supported by the historical record and is contrary to *Idaho v. U.S.*, 533 U.S. 262 (2001) ("*Idaho II*"). Rather, as we show next, the Tribe's 1873 Reservation was established for broad purposes, including hunting and fishing. And any abrogation of the Tribe's right to water for the purposes of the 1873 Reservation would require a clear statement from Congress. *U.S. v. Dion*, 476 U.S. 734, 739 (1986); *Pocatello*, 145 Idaho at 506. But here, there is nothing that remotely resembles a clear abrogation of the Tribe's rights.

[8] *See supra* n.4.

[9] NIWRG makes passing references to the "diminished Reservation" in connection with the 1891 Act. *See, e.g.*, NIWRG Br. at 4, 8. But "diminished" is a term of art in this context, which connotes a change in Reservation boundaries as a result of a statute that opened the Reservation to non-Indian settlement—which occurs only where Congress clearly and plainly intends such a result. *See Nebraska v. Parker*, 136 S. Ct. 1072, 1078-79 (2016). The Coeur d'Alene Reservation has never been held to be diminished, NIWRG did not raise any diminishment issue below, and the issue is not presented here.

In fact, the Supreme Court in *Idaho II* squarely held that in 1891 "Congress recognized the full extent of the Executive Order reservation lying within the stated boundaries it ultimately confirmed . . . ." 533 U.S. at 281.[10]

A. The Tribe's 1873 Reservation was Established for Broad Purposes Including Hunting and Fishing.

1. The Tribe's 1873 Reservation was established by Executive Order and must be treated the same as any other Indian reservation for determining its purposes.

As correctly recounted by the district court, in *Idaho II* the Supreme Court found that Lake Coeur d'Alene and its related waterways were historically important to the Tribe for "food, fiber, transportation, recreation, and cultural activities." 533 U.S. at 265; R. at 4313 (Order on Mots. S.J.). These broad purposes, each tied to the use of water, formed the backdrop to the creation of the Tribe's 1873 Reservation. When the Tribe and United States reached an agreement in 1873, the deal provided for the Tribe to relinquish claims to its aboriginal lands in exchange for an expanded reservation that accommodated the Tribe's insistence on inclusion of key water bodies within the retained Reservation. *Idaho II*, 533 U.S. at 266. Under the 1873 Agreement the Tribe agreed to "locate and make their homes upon the reservation." R. at 4202 (1873 Agreement). The 1873 Agreement also "preserv[ed] the water resource[s]" to sustain the Tribe's traditional activities, including hunting and fishing, because it "added the rivers, lake and waters . . . which they demanded remain under their control." R. at 1589-90 (E. Richard Hart, *A History of Coeur d'Alene Tribal Water Use* (Nov. 25, 2015) ("Hart Rep. 2015"))); *see also Idaho*

[10] *Idaho II* principally focused on the Tribe's traditional water uses and activities at the time the Reservation was created in 1873 through congressional ratification in 1891, because the issue in the case was title to submerged lands at the time of Idaho statehood. *Idaho II* did not look more comprehensively at the additional purposes for which the Coeur d'Alene Reservation was created but nonetheless strongly supports the intent of the United States and the Tribe in reserving water for other present and future purposes, including agriculture, commerce, and industry.

II, 533 U.S. at 274 ("[a] right to control the lakebed and adjacent waters was traditionally important to the Tribe"). In fact, the 1873 Agreement contains a provision unique to Coeur d'Alene that expressly protects the Tribe's water resources by stating that "the waters running into said reservation shall not be turned from their natural channel where they enter said Reservation." R. at 4202 (1873 Agreement). At the same time, the Tribe was beginning to advance in the arts of civilization, including agriculture and industry, and the 1873 Agreement reflects an equally important focus on ensuring that the Tribe's Reservation would sustain these more modern pursuits. *See U.S. v. Idaho*, 95 F. Supp. 2d 1094, 1105 (D. Idaho 1998) ("*Idaho II*") (1873 Reservation would include Indian farms and allow for a mill at the upper falls); R. at 4202 (1873 Agreement) (providing for school, training in commercial and industrial pursuits); R. at 1588 (Hart Rep. 2015) (Indians demanded extension of 1867 reservation to include Catholic mission and mill privileges).

Although Congress did not ratify the 1873 Agreement, the President soon acted to formalize the 1873 Reservation as set forth in the agreement. As the Supreme Court explained in *Idaho II*:

> [On November 8,] 1873 President Grant issued an Executive Order directing that the reservation specified in the agreement be 'withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians.'

533 U.S. at 266 (citations omitted); R. at 1354 (Aff. of Richard J. Hart, Ex. 3 (Exec. Order of Nov. 8, 1873)); *see also* 95 F. Supp. 2d at 1109 (finding that the 1873 Executive Order was intended to "create a reservation for the Coeur d'Alenes that mirrored the terms of the 1873 agreement").

In support of its argument that the Reservation was established solely for agriculture, NIWRG cites to statements by federal officials that reference placing the Tribe "on a reservation suitable to their wants as an agricultural people" and to the 1873 Agreement's inclusion of

agricultural and industrial tools for the Tribe. NIWRG Br. at 8. These statements must be read in context of the Agreement as whole, which as discussed above, sought to protect both the Tribe's traditional way of life and more modern advancements. Moreover, Judge Lodge in *Idaho II* explained that "[r]eports describing the Tribe's agricultural successes" did not evidence that the Tribe was no longer dependent on the Lake and rivers, and they "are in conflict with other official assessments, are not necessarily based on personal knowledge, and may be tainted by cultural and personal bias." 95 F. Supp. 2d at 1104.

NIWRG also asserts that the Tribe did not intend to preserve its traditional activities, such as hunting and fishing, because its 1872 petition for an expanded Reservation stated that "[w]e think it hard to leave at once old habits to embrace new ones; for a while yet we need to have some hunting and fishing." *Id.* The Tribe's use of the phrase "for a while yet" however, cannot reasonably be read to permanently divest the Tribe of rights it specifically sought to protect in requesting a Reservation. When reading the 1872 petition as a whole, Judge Lodge in *Idaho II* explained:

> The second petition makes three points relevant to the Court's present inquiry. 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. *Idaho II* and the historical record simply do not support a finding that the Tribe's Reservation is limited to an agricultural purpose.

NIWRG's attempt to use *Winters* to support its position is also misplaced. NIWRG Br. at 8. *Winters* was a limited suit brought by the United States "to restrain [various non-Indians] . . . from constructing or maintaining dams or reservoirs on the Milk River . . . or in any manner preventing the water of the river or its tributaries from flowing to the Fort Belknap Indian Reservation." 207 U.S. at 565. Unlike the present case, *Winters* was not a general stream

adjudication to declare and quantify the Fort Belknap Tribes' water rights for all purposes of that Reservation. The United States simply sought to enjoin certain diversions of water upstream of the Reservation that interfered with specific irrigation works that the Bureau of Indian Affairs and the Tribes intended to construct and operate on the Reservation. There was consequently no reason for the United States to introduce evidence of broader purposes, such as hunting and fishing or other traditional activities, for which the Fort Belknap Reservation may have been created. Here, by contrast, this case seeks to adjudicate and quantify all reserved water rights for the Coeur d'Alene Reservation for all purposes of the Reservation, not just protect a particular contemplated irrigation use from interference by junior users.

In sum, the issuance of the Executive Order reserved the 1873 Reservation for broad purposes, which includes hunting and fishing. *Idaho II*, 95 F. Supp. 2d at 1104. And the Tribe's reserved water rights vested no later than the date the Reservation was established. *Arizona I*, 373 U.S. at 600; *see also U.S. v. Anderson*, 736 F.2d 1358, 1362 (9th Cir. 1984) ("tribal reserved *Winters* rights vest on the date of the creation of the Indian Reservation"); *cf. Winans*, 198 U.S.at 381 (implied tribal rights predating the creation of the reservation carry a time immemorial priority date).[11]

2. The 1887 Agreement confirmed the purposes of the Tribe's 1873 Reservation.

Increasing encroachments from non-Indians caused the Tribe to be concerned that its 1873 Reservation could be jeopardized or altered. To guard against this, the Tribe sought additional negotiations with the federal government in 1885 seeking congressional ratification of its 1873 Reservation. The Tribe's petition described its aboriginal territory and noted that "all

[11] The district court correctly held that traditional fishing and hunting purposes carry a time immemorial priority date and agricultural purposes carry an 1873 Reservation establishment date. R. at 4326 (Order on Mots. S.J.).

the lands of your petitioners, so by them owned and herein described, have been taken possession of by the whites without remuneration or indemnity, except that portion now by them occupied as the present Coeur d'Alene Reservation." R. at 2041 (Aff. of Steven W. Strack, Ex. 4 (S. Exec. Doc. No. 122 (1886)) (reprinting Petition from Coeur d'Alene Tribe to President of United States (Mar. 23, 1885)).[12] In response, Congress authorized a new commission to engage in negotiations with the Tribe in 1886, and this enactment expressly recognized establishment of the Tribe's 1873 Reservation. R. at 1366 (Aff. of Richard Hart, Ex. 4, Report of Comm'r of Indian Affairs, to Sec'y of Interior, at 18 (Dec. 13, 1887)) (an act "to enable said Secretary to negotiate with the Coeur d'Alene Indians for the cession of their lands outside the limits of the present Coeur d'Alene reservation to the United States") (emphasis added); *see also Idaho II*, 533 U.S. at 262 ("Congress authorized new negotiations to obtain the Tribe's agreement to cede land outside the borders of the 1873 reservation.") (emphasis added). As the Supreme Court in *Idaho II* explained:

> Congress was free to define the reservation boundaries however it saw fit . . . [but] Congress in any event made it expressly plain that its object was to obtain tribal interests only by tribal consent. When in 1886 Congress took steps toward extinguishing

[12] The petition also described the vast resources included in the Tribe's territory and discussed various items that the Tribe needed, like "grist and saw mills, proper farming implements, and mechanics to help to teach us . . . industrial pursuits." *Id.* at 2042. These items were not in derogation of the Tribe's traditional pursuits—rather they were listed in the context of compensation to settle the Tribe's claims to lands outside its current reservation—as the petition explained it specifically sought to enter

> "proper business negotiations under and by which your petitioners may be properly and fully compensated for such portion of their lands not now reserved to them; that their present reserve may be confirmed . . . and that ample provision be made by the United States by which their compensation shall be annually made them partly in stock, tools, mills, and mechanical instruction by proper mechanics, for the permanent benefit of every member, young and old, male and female, of the Coeur d'Alene tribe of Indians."

Id.

> aboriginal title to all lands outside the 1873 boundaries, it did so by authorizing negotiation of agreements ceding title for compensation.

533 U.S. at 277 (emphasis added). In other words, the clear understanding of Congress in 1886 was that the Tribe then held a Reservation that was established in 1873 and that any "Tribal interests" that were obtained would require the consent of the Tribe.

Under the 1887 Agreement arising out of those negotiations, the Tribe once again agreed to cede lands outside the "Coeur d'Alene Reservation"[13] and the Agreement confirmed that the Reservation "shall be held forever as Indian lands and as homes for the Coeur d'Alene Indians." R. at 1391 (1887 Agreement, art. 5). The 1887 Agreement unequivocally confirms the Tribe's 1873 Reservation and shows that the cession of lands was the only "Tribal interest" that the Tribe consented to relinquish.

NIWRG cites to a handful of facts from the record that show the Tribe was engaging in agriculture prior to and during negotiation of the 1887 Agreement. NIWRG Br. at 9. The facts cited must be understood in context. In the 1887 Agreement, the United States sought a cession of land—there was no effort to strip from the Tribe the ability to use water for the broad purposes the Reservation was established in 1873. *See also*, 95 F. Supp. 2d at 1104. The facts relied upon by NIWRG merely support the continued recognition of the Tribe's efforts to engage

[13] In fact, much of the 1887 negotiating history is limited to obtaining a cession of lands outside the Tribe's Reservation and the terms of compensation for that cession. In this respect the 1887 Agreement is substantially similar to the 1873 Agreement, which the federal negotiators used as a reference. R. at 1383 (Aff. of Richard J. Hart, Ex. 4 (Report of Nw. Indian Comm'n, to Comm'r of Indian Affairs at 53 (1887))). For example, like the 1873 Agreement, the 1887 Agreement provided that the federal government would expend 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). These provisions show that it was important to the Tribe that the federal government fulfill the promises made in the 1873 Agreement and provide the resources necessary for the Tribe to realize the commercial and industrial advancements it previously sought for its Reservation economy; thereby reflecting continuity, not change, between the two Agreements.

in the agricultural and more modern pursuits that it sought to advance within its 1873 Reservation, while at the same time maintaining its traditional activities. In fact, the Tribe continued to engage in traditional activities throughout this time period,[14] and the historical record makes clear that during negotiations, Chief Seltice insisted on the continued protection of its 1873 Reservation and implored the commission to "preserve for us and our children forever this reservation . . . [because] neither money nor land outside do we value compared with this reservation. Make the paper strong; make it so strong that we and all the Indians living on it shall have it forever." R. at 2157 (Aff. of Steven Strack, Ex. 10 (Council with Coeur d'Alenes at 78 (Mar. 25, 1887)). As discussed above, the 1887 Agreement arising out of these negotiations must be construed as it would have been understood by the Indians. *Pocatello*, 145 Idaho at 506. The Tribe simply could not have understood an agreement that was fortifying its 1873 Reservation and ceding lands outside the Reservation as somehow limiting all tribal life on the Reservation to pursuing agricultural endeavors to the exclusion of all else.

Idaho II reinforces that the purposes of the Reservation remained unchanged by the 1887 Agreement. Given the Tribe's traditional reliance on its waters, the Supreme Court in *Idaho II* found that "Idaho [correctly] also conceded . . . that after Secretary of the Interior's 1888 report

[14] During the years prior to the 1887 agreement, the Tribe continued to engage in traditional activities. For example, due to increasing conflicts in the late 1870s between non-Indians and other Indian tribes, like the Nez Perce, the Coeur d'Alenes engaged in traditional gathering, sometimes under the protection of tribal soldiers. R. at 1615 (Hart Rep. 2015 ("[a]t the time of the outbreak of the Nez Perce War, the Coeur d'Alenes were digging camas near St. Maries")). Around 1878, in order to protect their land and water resources within their Reservation boundaries, the Tribe decided to move many, but not all, of their villages and homes closer to the De Smet area near their traditional camas grounds. *Id*. at 1615, 1621-23. *See also* R. at 653 (Ian Smith, *Historical Examination of the Purposes for the Creation of the Coeur d'Alene Indian Reservation* (2015)) ("Most Coeur d'Alene villages [on lakes and rivers] remained in use until at least the 1870s, with some retaining 'a permanent population as late as 1900.'"); R. at 2669-71 (Jt. Stmt. Facts) (summarizing continuance of traditional activities after 1873). Into the 1880s, "the Tribe . . . continued to use their traditional fishing spots and remain true to tribal culture." R. at 1626 (Hart Rep. 2015).

that the [1873] reservation embraced nearly 'all the navigable waters of Lake Coeur d'Alene' . . . Congress was on notice that the Executive Order reservation included submerged lands." *Id.* at 275. The Supreme Court would not have ruled that the Tribe owned the submerged lands in *Idaho II* if by the time of Idaho statehood in 1890, the Tribe no longer needed these submerged lands for hunting, fishing, and other traditional activities. *E.g.*, 533 U.S. at 274 (finding that "[a] right to control the lakebed and adjacent waters was traditionally important to the Tribe, which emphasized in its petition to the Government that it continued to depend on fishing").

3. The 1889 Agreement and 1891 Act confirmed the purposes of the 1873 Reservation within the boundaries ratified by Congress.

This same pattern was repeated two years later. The 1889 Agreement—like the 1887 Agreement—only involved a cession of land. Indeed, the Supreme Court specifically concluded in *Idaho II* that Congress "did not simply alter the 1873 boundaries unilaterally. Instead, the Tribe was understood [by Congress] to be entitled beneficially to the reservation as then defined" and Congress only sought an additional land cession within the Tribe's 1873 Reservation that the Tribe "shall consent to sell." *Idaho II*, 533 U.S. at 277. Accordingly, Congress's instructions confirm that negotiations were limited and sought only a voluntary cession of land within the Tribe's 1873 Reservation and not any effort to undermine the broad purposes of the Reservation. *See id.* at 280-81 ("[t]here is no indication that Congress ever modified its objective of negotiated consensual transfer" and "[a]ny imputation to Congress either of bad faith or of secrecy in dropping its express objective . . . is at odds with the evidence.").

Here again, NIWRG incorrectly suggests that statements made during the 1889 negotiations show that the Tribe was primarily focused on agriculture and reflect the Tribe's intention to limit its traditional activities. NIWRG Br. at 10. While the statements cited by NIWRG reflect an awareness that the Tribe was advancing in agriculture (which the district court

properly found was another purpose of establishing the 1873 Reservation), none of the statements indicate that the Tribe or the federal government understood the 1889 Agreement as abrogating or relinquishing any of the purposes for which the 1873 Reservation was created. *See Pocatello*, 145 Idaho at 506-07.

Contrary to NIWRG's suggestion that traditional activities, like hunting and fishing, were no longer important to the Tribe, NIWRG Br. at 10, the record shows that retaining their 1873 Reservation, including the Lake and associated waterways, remained a central concern for the Tribe throughout the 1889 negotiations. *See Pocatello*, 145 Idaho at 506. ("'[I]t is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties.'") (alteration in original). For example, Coeur d'Alene leaders insisted upon ratification of the 1887 Agreement, which confirmed their 1873 Reservation. *See, e.g.*, R. at 1357 (Aff. of Richard Hart, Ex. 4 (Report of Comm'r of Indian Affairs, to Sec'y of Interior, at 3 (Dec. 7, 1889))) ("[T]he Indians . . . absolutely refused to entertain any proposition [to relinquish some of their Reservation] until the old agreement was ratified."). The Tribe also expressed fears of losing their homes and the importance of their lands and waters. *See, e.g.*, *Idaho II*, 533 U.S at 270; R. at 2115 (Third Council with Coeur d'Alene Indians (Aug. 31, 1889)) (Chief Seltice stating that "I, as an Indian, like my land; am very anxious to have land; I do not care about money"). In response to the Tribe's concerns, when explaining the new boundary line under the 1889 Agreement, "General Simpson, a negotiator for the United States, reassured the Tribe that 'you still have the St. Joseph River and the lower part of the lake[,]'" 533 U.S. at 270, "and all the meadow and agricultural land along the St. Joseph River." *U.S. v. Idaho*, 210 F.3d 1067, 1071 n.6. (9th Cir. 2000) ("*Idaho II*").

And during this time the Tribe was continuing to engage in traditional activities, notwithstanding its continued agricultural, commercial, and other industrial pursuits.[15] As Judge Lodge found in *Idaho II*, "the placement of the boundary line [under the 1889 Agreement] was for the purpose of establishing the Tribe's rights to the Lake and rivers." 95 F. Supp. 2d at 1115. Certainly, there was no clear expression, or agreement of the Indians, to any loss of any Tribal rights, including water rights, within the portion of the 1873 Reservation the Tribe did not cede. *See Pocatello*, 145 Idaho at 506-07.

Idaho II underscores this same understanding—that apart from ceding certain lands, the Tribe retained all other rights on the Reservation that remained. The Supreme Court found that the 1891 Act ratifying the Tribe's Reservation "contained no cession by the Tribe of submerged lands within the reservation's outer boundaries." 533 U.S. at 278.[16] So despite agreeing to an additional cession in the 1889 Agreement, the Tribe did not relinquish any of its rights within the boundaries of its remaining 1873 Reservation.[17] *See also Idaho II*, 210 F.3d at 1076 (given the Tribe's dependence on traditional activities "[i]n 1889, the borders of the reservation were

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[15] *See, e.g.*, R. at 788 (Ian Smith, *A Response to the Expert Report of Stephen Wee Regarding the Establishment of and Purposes for the Coeur d'Alene Indian Reservation* (May 26, 2016) ("Smith Rep. 2016")) (federal officials reported that during the 1880s and 1890s the Tribe "continued to rely on hunting, fishing, and gathering activities on their traditionally occupied lands" and in 1888 Commissioner J.D.C. Atkins reported that Coeur d'Alene tribal members "occasionally go [to the Wolf Lodge district within the 1873 Reservation] hunting for elk and deer").

[16] *See also* 210 F.3d at 1077 (in the 1889 act authorizing additional negotiations, the "express reference to the reservation as the Tribe's reservation, explicit recognition that the choice to sell was the Tribe's . . . all manifest an awareness and acceptance by Congress of the boundaries of the 1873 reservation").

[17] After ratification and despite the pressures faced by the Tribe and its adaptation to civilized and industrial pursuits, the Tribe continued to rely on traditional pursuits as part of their regular lives. In July of 1891, for example, when the resident farmer at Coeur d'Alene attempted to get a census of the Indians on the Reservation he "complained about the difficulty of obtaining an 'accurate' census of the Coeur d'Alene Tribe because many tribal members had 'gone to the mountains hunting and fishing which made it impossible to see them all.'" R. at 788 (Smith Rep. 2016).

contracted and redrawn—but redrawn so as to ensure that the Tribe still had beneficial ownership of the southern third of the Lake as well as the portion of the St. Joe River within the 1873 reservation").[18]

In sum, the 1887 and 1889 Agreements, and the 1891 Act, evidence a continued recognition by both the Executive and Congress of the Tribe's dependence on its water resources for traditional purposes, and this served as the basis for the Supreme Court's decision in *Idaho II*.

III. The Tribe's Reserved Water Rights are Based on the Broad Purposes of the Coeur d'Alene Reservation and Cannot be Divested by State Law.

As discussed in Section I *supra*, the purposes of the Coeur d'Alene Reservation include agricultural, hunting, fishing and domestic purposes—and since each of these purposes requires water, the *Winters* doctrine provides that, as a matter of federal law, water was reserved for each of these purposes when the Reservation was established in 1873. NIWRG, however, argues that for each of these Reservation purposes, reserved water rights are not "necessary," because state law, in effect, provides an alternative that NIWRG deems appropriate. As discussed next, state law is not a replacement for, and cannot supplant, federal law, and each of the purposes of the Reservation is protected by a federal water right, in amounts to be determined during the quantification phase of this case. Each of NIWRG's arguments regarding water not being "necessary" for the purposes of the Reservation must be rejected.

[18] The Ninth Circuit noted that "[t]he State has not challenged the district court's factual findings, nor has it challenged the court's conclusion that executive actions reflect a clear intent to include submerged lands within the 1873 reservation." *Idaho II*, 210 F.3d at 1070. As such, the Ninth Circuit "accept[ed] the facts as given" but also found that the facts "are amply supported by the record." *Id.* at 1073.

A. Reserved Water to Fulfill the Reservation's Fishing and Hunting Purposes Cannot be Defeated by Operation of State Law.

The Tribe claims federal reserved water rights to support the fishing and hunting purposes of the Reservation, and the district court agreed. R. at 4322 (Order on Mots. S.J.) NIWRG does not dispute that water is needed to support these purposes, but argues that the Tribe does not have federally reserved water rights for fishing and hunting purposes because "the State of Idaho has provided vested water right protections for important waterways within the Reservation boundaries, making a federal water right unnecessary." NWIRG Br. at 15. This argument fails for several reasons.

First, NIWRG's suggestion is tantamount to holding that the Idaho Legislature can divest the Tribe of its federally protected water rights simply by passing a statute recognizing state protections in the same stream. However, 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. *See supra* Section I; *infra* Section III.C.2. 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). 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). Accordingly, protection of the Tribe's water rights in Coeur d'Alene Lake and other waterways on the Reservation depends on federally protected reserved water rights, not any action by the State.

Second, NIWRG's argument ignores the fundamental differences between these state law water rights and the water rights the Tribe is entitled to under federal law. *See infra* Section

III.C.2. The Tribe's reserved water rights under federal law are intended to protect the Reservation as a homeland for the Tribe, including providing water for the special federally-protected hunting and fishing rights enjoyed by the Tribe on its Reservation. The state water rights relied upon by NIWRG are not intended to protect the Tribe, its Reservation, or its special hunting and fishing rights. There is no basis that a state scheme that has no intention to protect Tribal rights will somehow achieve that result. Furthermore, the State's right under state law to preserve the St. Joe River has a priority date of 1992, *see* Water Right No. 91-7122, while the waters of Coeur d'Alene Lake has a priority date of 1927, *see* Water Right No. 95-2067. Both of these water rights are junior to the Tribe's reserved water rights for fishing and hunting purposes, which have an immemorial priority date. Moreover, the State's rights do not provide any guarantees to the Tribe because they are subject to changes in state law and uncertain state enforcement that the Tribe has no control over.

NIWRG is also wrong that the fact that Post Falls Dam "keeps the water [of the Lake] at or above natural levels" eliminates the necessity for the Tribe's reserved water rights. NIWRG Br. at 16.[19] Post Falls Dam operates pursuant to a 50-year term license under the Federal Power Act, which was effective June 1, 2009. *Avista Corp.*, 127 FERC ¶61,265, ¶62,187 (2009). The Tribe's reserved water rights exist forever and protect the Tribe's rights in perpetuity. Accordingly, the Tribe must secure those rights from any future diminution resulting from third parties, such as upstream diversions depleting the Lake.

This Court should therefore affirm the district court's determination that the Tribe holds reserved water rights to fulfill the hunting and fishing purposes of the Reservation.

[19] NIWRG mistakenly claims that this is an "upstream dam [that] prevents water level fluctuations in the lake . . . ." NIWRG Br. at 16. In fact, Post Falls Dam is downstream from the Lake. *See Avista Corp.*, 127 FERC ¶61,265, ¶62,160 (2009).

B. Reserved Water to Fulfill the Agricultural Purposes of the Reservation Cannot be Defeated Based on Past Agricultural Practices.

NIWRG concedes that the district court "appropriately concluded that 'one primary purpose of the reservation was to establish an agrarian lifestyle'" for the Tribe and its members. NIWRG Br. at 16 (quoting R. at 4320 (Order on Mots. S.J.)).[20] NIWRG then curiously faults the district court for allowing the extent of the Tribe's reserved rights for agricultural purposes to proceed to the quantification stage of this case. NIWRG Br. at 17.

Instead, NIWRG contends that the court below should have dismissed the Tribe's agricultural claims without an evidentiary showing regarding the amount of water needed for agriculture—which will occur during the quantification stage. NIWRG seeks to justify this outcome because there is "no historical documentary evidence that indicates irrigation was practiced" by the Tribe in the past. NWRG Br. at 18. NIWRG also alludes to two government reports in 1921 and 1934 concluding there was no irrigation on the Reservation at those times. NIWRG Br. at 19-20. But the historical record does reflect that the Tribe irrigated small farms and gardens around the time the Reservation was created. R. at 4261 (Hart Rep. 2106)

Even so, NIWRG's argument fails. While water rights under state law are based upon and measured by past appropriation and use, federal reserved rights include water needed to meet future as well as present tribal needs and are not limited by past irrigation practices. *E.g.*, *Arizona I*, 373 U.S. at 600 (awarding tribes water under the practically irrigable acreage standard, not simply existing uses, because "the water was intended to satisfy the future as well as the present needs of the Indian Reservations"); R. at 2232 (Special Master Report, *Arizona I*)

[20] NIWRG similarly characterizes all three Agreements with the Tribe—1873, 1887 and 1889—President Grant's 1873 Executive Order, and relevant Congressional actions between 1886 and 1891 as recognizing agriculture as a primary purpose of the reservation. NIWRG Br. at 7-10. As explained in Section II *supra*, limiting the Tribe's Reservation to an agricultural purpose is contrary to the historical record and *Idaho II*.

(tribes are entitled to reserved water rights for use in the "indefinite future to satisfy the needs of Indian tribes . . . as those needs might develop"); *id* at 2228 ("the United States may, when it creates an Indian reservation, reserve water for the future needs of that Reservation . . . ."). It would be an extraordinary denial of due process to the United States and the Tribe to foreclose them from introducing evidence of the extent of the Tribe's future needs for water to fulfill what NIWRG concedes is a "primary purpose" of the Reservation.

This Court should accordingly affirm the district court determination that agriculture is a purpose of the Reservation and that the quantity of reserved water necessary to fulfill this purpose is to be decided by the district court in the quantification stage of this case.

C. Reserved Water to Fulfill the Domestic Purposes of the Reservation Cannot be Defeated by the Source of the Water or by State Law.

The Tribe claims consumptive water rights for domestic uses, which includes water for drinking, bathing, cleaning and general household uses. R. at 9-10 (Tribal Claims Cover Letter from Vanessa Boyd Willard, U.S. Dep't of Justice, to Gary Spackman, Dir., Idaho Dep't of Water Resources (Jan. 30, 2014) ("Tribal Claims Letter")). The Tribe relies on groundwater as the source of water to meet the present and future domestic needs of homes within the Reservation. Although the district court found that "the parties do not dispute the reservation carries federal reserved water rights for domestic use," R. at 4323 (Order on Mots. S.J.), NIWRG advances two arguments on appeal to counter the common-sense proposition that the Reservation has a basic need for reserved water for domestic purposes to make it livable. NIWRG first claims that reserved water rights may not extend to groundwater. NIWRG Br. at 23. NIWRG asks this Court to rule that as a legal matter there cannot be a claim for groundwater "due to a lack of binding authority." NIWRG Br. at 25. But that is no rationale at all—there is no binding authority either way. But, there is a compelling argument supporting the inclusion of

groundwater, as the *Winters* doctrine turns on the purposes of the Reservation, not on the source from which the water is produced, and the clear weight of authority supports the extension of reserved water rights to groundwater.

NIWRG then claims that the Tribe's reserved water rights for domestic uses are unnecessary because state law provides a permitting exemption for domestic uses. NIWRG Br. at 24. This same assertion was recently rejected by the Ninth Circuit in *Agua Caliente*, 849 F.3d at 1272, and it should be rejected here as well. NIWRG's argument also fails because a permitting exemption under state law is in no way equivalent to a federal reserved water right.

1. Reserved water rights include groundwater.

NIWRG does not offer any persuasive rationale for why reserved water rights should not extend to groundwater, asserting that this Court cannot find a federal reserved water right extends to groundwater until the U.S. Supreme Court explicitly says so. NIWRG asserts that the Supreme Court "declined to apply the federal reserved water rights doctrine to groundwater" in *U.S. v. Cappaert*, 426 U.S. 128 (1976). NIWRG Br. at 23. The Supreme Court, however, did not need to decide that question in *Cappaert* because it concluded that "the water in the pool is surface water." 426 U.S. at 142; *see also Agua Caliente*, 849 F.3d at 1270 n.8 (explaining same).[21] Nevertheless, *Cappaert* found that "the implied-reservation-of-water-rights doctrine is based on the necessity of water for the purpose of the federal reservation," and held that "the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater." 426 U.S. at 143 (emphasis added). There is no practical difference between the injunction against groundwater pumping in *Cappaert* and a reserved right to groundwater

[21] In *Cappaert*, the Ninth Circuit held that "the United States may reserve not only surface water, but also underground water." *U.S. v. Cappaert*, 508 F.2d 313, 317 (9th Cir. 1974), *aff'd on other grounds* 426 U.S. 128 (1976).

because both ensure that water is available to fulfill a senior right and can limit the use of water by a junior user.

NIWRG recognizes that "[m]ore recently the Ninth Circuit found that a federal reserved water right may be sourced to groundwater," NIWRG Br. at 24 (citing *Agua Caliente*, 849 F.3d 1262). Despite this, NIWRG points to the Wyoming Supreme Court's decision in *In re the General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 99-100 (Wyo. 1988) ("*Big Horn I*"), *aff'd by an equally divided court sub nom. Wyoming v. U.S.*, 492 U.S. 406 (1989), which is the sole exception to the preponderance of case law supporting the extension of reserved water rights to groundwater. Although the *Big Horn I* Court held "that the reserved water doctrine does not extend to groundwater," because "not a single case applying the reserved water doctrine to groundwater is cited to us," 753 P.2d at 99, it nonetheless recognized that "[t]he logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater," *id*.

Much has happened since *Big Horn I*, and today there is strong authority supporting reserved rights to groundwater. The doctrinal basis for including groundwater as a source for reserved water rights is set out in the Arizona Supreme Court's carefully reasoned decision in *Gila III*, 989 P.2d 739. The *Gila III* court held that federal reserved rights may include rights to groundwater, *id*. at 746-48, and reserved right holders enjoy greater protection from groundwater pumping than do holders of state created rights, *id.* at 750. After a detailed review of relevant case law, the Arizona Supreme Court concluded that:

> if the United States implicitly intended, when it established reservations, to reserve sufficient unappropriated water to meet the reservations' needs, it must have intended that reservation of water to come from whatever particular sources each reservation had at hand. The significant question for the purpose of the reserved rights doctrine is not whether water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation.

Gila III, 989 P.2d at 747 (emphasis added).[22]

The Montana Supreme Court has similarly held in *Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Stults*, 59 P.3d 1093, 1098 (Mont. 2002), that "there is no distinction between surface water and groundwater for purposes of determining what water rights are reserved" and therefore, "no reason to limit the scope of our prior holdings by excluding groundwater from the Tribes' federally reserved water rights in this case." *Id.* at 1099.[23]

This Court should therefore follow the careful reasoning of *Agua Caliente* and *Gila III*, which represent the strong weight of authority, and affirm the district court's determination that the Tribe holds reserved rights to groundwater for domestic purposes.

2. A permitting exemption for domestic uses under state law does not render the Tribe's reserved water rights unnecessary.

NIWRG also argues that a reserved water right under federal law to pump underground water for domestic purposes is not necessary because state law permits persons to divert up to 13,000 gallons per day for domestic purposes. State law, however, is generally inapplicable to tribes on Indian reservations unless Congress has provided otherwise. *See, e.g.*, *Williams v. Lee*, 358 U.S. 217. The Tribe's reserved water rights vested no later than when the Reservation was established and are not subservient to subsequently enacted state law, which, of course, might change in the future.

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[22] In a 2001 decision by the district court in the SRBA regarding reserved water rights for the Mountain Home Air Force Base, Burdick, J. agreed with the reasoning of *Gila III* and held that federal reserved water rights may extend to groundwater. *In re SRBA*, Case No. 39576, SRBA 12, at 7 (Id. 5th Jud. Dist. Ct. 2001) (Order Disallowing Uncontested Federal Reserved Water Right Claims), *available at* http://srba.idaho.gov/FORMS/61-11783disallow.PDF (last accessed Apr. 12, 2018).

[23] *Accord Gila River Pima-Maricopa Indian Cmty. v. U.S.*, 9 Cl. Ct. 660, 699 (1986), *aff'd* 877 F.2d 961 (Fed. Cir. 1989); *Tweedy v. Texas Co.*, 286 F. Supp. 383, 385 (D. Mont. 1968); *Park Ctr. Water Dist. v. U.S.*, 781 P.2d 90, 91, 95 & n.13, 96 (Colo. 1989) (*en banc*). *See also Cohen's Handbook*, § 19.03[2][b], at 1213-14 & nn.25-26.

NIWRG's argument has been rejected most recently in *Agua Caliente*, where water agencies in that case argued that the tribe there "does not need a federal reserved water right" to groundwater because "the Tribe has correlative right to groundwater under California law." 849 F.3d at 1272. In rejecting this argument, the Ninth Circuit reasoned that "state water rights are preempted by federal reserved rights" and the dispositive issue is not whether "water is currently needed to sustain the reservation . . . [but] whether water was envisioned as necessary for the reservation's purpose at the time the reservation was created." *Id*. at 1272. (citations omitted). NIWRG's reformulation of this argument under state law fails here too, because the subsequent availability of water under state law does not eliminate the need for water to fulfill the purposes of the Reservation. *See also Walton I*, 647 F.2d at 48 ("[S]ubsequent acts making the historically intended use of the water unnecessary do not divest the Tribe of the right to the water.").

NIWRG also incorrectly seeks to substitute a federal reserved water right with a permitting exemption under state law. NIWRG claims that the Tribe's reserved water right for domestic purposes is unnecessary because "Idaho law provides an exemption from the permitting requirement for such uses," and "anyone in the State of Idaho—including a tribal member—may divert and use up to 13,000 gallons per day for domestic purposes." NIWRG Br. at 24 (citing I.C. § 42-111) (emphasis added).[24] However, a water permit "merely expresses the consent of the state that the holder may acquire a water right." *Basinger v. Taylor*, 30 Idaho 289, 165 P. 522, 524 (1917). In other words, NIWRG proposes to replace a judicially-decreed federal reserved water right with a permissive use of water for domestic purposes under state law.

[24] The statutory provision cited by NIWRG provides the definition of "domestic use" and "domestic purposes," which limits the use of such water to up to 13,000 gallons per day. *See* I.C. § 42-111. The permitting exemption for drilling domestic wells to which NIWRG refers is I.C. § 42-227.

NIWRG's proposal would subject the Tribe's domestic uses of water to state law, which is exactly the opposite of the Supreme Court's dictate that "[f]ederal water rights are not dependent upon state law or state procedures." *Cappaert*, 426 U.S. at 145; *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 400 (9th Cir. 1985) ("*Walton III*"). Critically, in times of shortage exempt uses are administered as the most junior rights in the system. I.C. § 42-607. Further, the permitting exemption would only allow the Tribe to use up to 13,000 gallons per day, I.C. § 42-111, a quantity that may be significantly different than the amount the Tribe is entitled to under federal law.[25] The permitting exemption does not exempt a domestic use of water from the limitations of the prior appropriation doctrine, and it could also be repealed by the State's Legislature at any time.

The Tribe's domestic claims are also not limited to present use but extend to future needs for water. *See, e.g.*, R. at 5575 (Notice of Claim 95-16672). Under the State's exemption, the Tribe would still need to establish a water right under Idaho law to protect its use from prior appropriators, which would require a showing of actual beneficial use and trace its priority date to the date of first use. *See City of Pocatello v. Idaho*, 152 Idaho 830, 841, 275 P.3d 845, 856 (2012) ("When one diverts unappropriated water and applies it to a beneficial use, the right dates from the application of the water to a beneficial use.") (internal quotation marks and citation omitted). The state law water right could also be lost to non-use. I.C. § 42-222(2) (all state water rights "shall be lost and forfeited by a failure for the term of five (5) years to apply it to the

[25] In ordering the commencement of the CSRBA, the district court noted that the State's Director of Water Resources testified that, "although a *de minimis* domestic . . . right is limited to a diversion of 13,000 gallons per day, the right is still limited to historical beneficial use." *In re General Adjudication of Rights to Use of Water from Coeur d'Alene-Spokane River Basin Water Sys.*, Case No. 49576, at 20 (Id. 5th Jud. Dist. Ct. Nov. 12, 2008) (Mem. Decision on Petition to Commence Coeur d'Alene-Spokane River Basin General Adjudication). By contrast, here the Tribe claims the reserved right to the full 13,000 gallons per day per well to fulfill present and future needs. R. at 5575-78 (Notice of Claim 95-16672).

beneficial use for which it was appropriated"). But tribal reserved water rights vest no later than the date the Indian reservation was established, and are quantified based on the Tribe's present and future needs, which secures the Tribe with a right to use water in the future, even though the water has not been put to beneficial use. *Arizona I*, 373 U.S. at 600.

NIWRG fails to acknowledge the fundamental differences between state water rights and federal reserved rights when it asserts that the availability of water under state law obviates the need for a reserved water right for domestic purposes. As the district court correctly held, this Court should find that the Tribe is entitled reserved water rights for domestic uses because they are necessary "to make the reservation livable." R. at 4322 (Orders on Mots. S.J.) (quoting *Arizona v. California*, 460 U.S. 605, 616 (1983)).

IV. The Tribe's Lake Claim is Valid.

The Tribe claims reserved rights to Lake Coeur d'Alene ("Lake Claim") to fulfill the broad purposes for which the Reservation was established. *See supra* Section II; R. at 11-12 (Tribal Claims Letter). The Lake's importance to supporting the Tribe's traditional activities within the Reservation was established in *Idaho II*. *See also* n.10. Nevertheless, the district court concluded that lake level maintenance was not a primary purpose of the Reservation, R. at 4328 (Order on Mots. S.J.), and disallowed all the Tribe's claimed purposes of use in the Lake except for the "fish and wildlife habitat" purpose of use, which it allowed to go to quantification, R. at 4302 (Final Order Disallowing Purposes of Use).[26]

NIWRG argues that the district court erred in allowing any portion of the Tribe's Lake Claim to proceed to quantification and asks this Court to dismiss the Tribe's Lake Claim in its entirety; or if it is not dismissed, to instruct the district court to determine the ownership of the

[26] The Tribe has separately appealed the district court's dismissal of the Lake Claim for other purposes. *See supra* n.4.

submerged lands under Lake Coeur d'Alene. NIWRG Br. at 20-22. As discussed below, NIWRG's arguments that the Lake Claim should be dismissed because it is not quantifiable, and that adjudication of the Lake Claim requires an adjudication of title to the Lake bed, are without merit. Accordingly, this Court should affirm the district court's ruling on the fish and wildlife habitat purposes of the Tribe's Lake Claim.

A. The Tribe's Lake Claim is Quantifiable.

The United States provided the method for quantifying the Lake Claim in its Notice of Claim. R. at 6279 (Notice of Claim Federal Reserved Water Right No. 95-16704) ("Notice of Claim No. 95-16704"). The Lake Claim is "for *in situ* maintenance of the Lake's natural elevation" according to average monthly elevations that take into account inflows and outflows for the Lake based on its natural hydrograph. *Id.* at 6278-79. The Lake Claim ensures that there is sufficient water in the Lake to maintain lake elevation that "reflect[s] the natural Lake processes" before the Post Falls Dam was built, to fulfill the purposes of the Reservation. *Id.* at 6279. The district court properly concluded that one of those purposes of water is to fulfill the fish and wildlife habitat purpose of the Reservation. R. at 4322 (Order on Mots. S.J.); R. at 4302 (Final Order Disallowing Purposes of Use).

Despite this, NIWRG asserts there is no standard for quantifying the claim without providing any explanation as to why the United States' and Tribe's method of quantification should be rejected. NIWRG Br. at 21.[27] Similar to the Tribe's quantification method, state law also recognizes lake levels as means to protect *in situ* water. *See* I.C. §§ 42-1502 (using lake levels to protect "fish and wildlife habitat"); 42-1503(d) (including preservation of "lake level").

[27] The district court did not address issues related to quantification because this phase of the case only involves issues of entitlement. *See* R. at 461-62 (Order Consolidating Subcases & Order Bifurcating Proceedings).

Indeed, the State claims a water right to maintain a "minimum lake level of 2125.09 feet above sea level" for Round Lake. *See* Water Right No. 96-8503, *available at* http://www.idwr.idaho.gov/apps/ExtSearch/RightReportAJ.asp?BasinNumber=96&SequenceNumber=8503&SplitSuffix=%20%20&TypeWaterRight=True (last accessed Apr. 12, 2018).

NIWRG prematurely attempts to raise a quantification issue here by misusing this Court's statement in *Potlatch*, 134 Idaho at 922, that a "standard of quantification" of water is necessary to reserve water rights. *See* NIWRG Br. at 21. In *Potlatch*, this Court found that the federal Wilderness Act does not provide a basis for implying water rights for a federal wilderness area because "the Wilderness Act does not define purposes that necessitate a reservation of water." 134 Idaho at 922. The Court's decision was based on its conclusion that reserved water was not necessary to fulfill the purposes of the Wilderness Act, not that any reserved water right was "unquantifiable." This Court used the term "standard for quantification" in *Potlatch* to contrast the Wilderness Act with other federal reservations by which a standard for quantification can be determined, such as the establishment of Indian reservations, which are for "human habitation," *id.* at 920, 922, or the creation of Devil's Hole national monument discussed in *Cappaert*, 426 U.S. 128, which was for the "preservation of a rare fish." 134 Idaho at 921, 922. In fact, this appeal involves an Indian reservation that the district court properly concluded included fishing and hunting purposes—purposes that are similar to those that this Court noted were "quantifiable" in *Potlatch.*

Moreover, *Idaho II* and the historical record show that the United States established the Reservation in 1873 as a permanent home for the Tribe and impliedly reserved water to fulfill broad purposes, including sustaining fish and wildlife habitat. *See supra* Section II. Reserved rights to water in the Lake are necessary to fulfill these purposes. Suppose for instance, that the Lake was fully drained and the lakebed was dry. In such a situation, the Tribe would not only be

without the ability to use the Lake for traditional and other purposes, but also would have lost a fundamental aspect of its homeland as defined by *Idaho II*. While this is not likely under current circumstances given the operation of Post Falls Dam under a FERC license, *see* 127 FERC at ¶61,265, ¶62,169, the Tribe's Lake Claim is important for protecting the Tribe's reserved rights from diminution by junior users today and in the future, where circumstances, including the existence of the Post Falls Dam, may someday be changed in ways that place viability of the Lake in question.[28] The Lake claim ensures that, through limiting diversions, the Lake and its waters, which were central features in the creation of the Reservation, are available to the Tribe consistent with the purposes of the Reservation.

For these reasons, NIWRG has not provided any valid reason to dismiss the Lake Claim based on an inability to quantify the claim.

B. The United States' Ownership of Submerged Lands in Trust for the Benefit of the Tribe Cannot be Adjudicated Here.

NIWRG requests that if this Court rules in favor of the Tribe's Lake Claim, it must instruct the district court to adjudicate the extent of the United States' trust title to submerged land on the Reservation. NIWRG Br. at 21-22. This request must be rejected because allowing the Tribe's Lake Claim to move forward to quantification does not—and cannot—require an adjudication of title to submerged lands within the Reservation.[29] Contrary to NIWRG's

[28] For instance, the licensee could surrender its FERC license, *see, e.g.*, 18 C.F.R. §§ 6.2, 6.4, and the license for Post Fells Dam provides that if it is surrendered, FERC can require the licensee to remove the dam. 127 FERC at ¶62,207. However, removal is not always required. *See FERC: Hydropower - How to Surrender a License or Exemption*, FERC, *available at* https://www.ferc.gov/industries/hydropower/gen-info/comp-admin/surrender.asp (last accessed Apr. 11, 2018) (Upon surrender, a decommissioning plan can include leaving project features in-place for other uses, or removal of project features and site restoration.").

[29] Contrary to NIWRG's assertion, the district court never "recognized" that land ownership is relevant here. NIWRG Br. at 22. NIWRG made that representation at oral argument, *id.* (citing Tr. at p. 140, L. 17-25, p. 142, L. 13-20, p. 143, L. 15-19), but the court never acknowledged NIWRG's contention. *See, e.g.*, *id*. In its summary judgment order the district court noted that

assertion, the extent of a party's land ownership is distinct from the scope of its water rights. NIWRG conflates these issues, by claiming that "[t]he federal government only reserves 'appurtenant water'" NIWRG Br. at 22 (quoting *Cappaert*, 426 U.S. at 138), and so "[d]etermining the extent of the submerged lands that were reserved by the United States is a prerequisite for finding what water is appurtenant to such lands." *Id.* Not so. Here, the United States has explained that the Tribe's reserved water rights are not based on its ownership of submerged lands, but rather on the purposes of the Reservation. R. at 4077 n.11 (U.S.'s Mem. in Reply to State of Idaho & Objectors).[30]

In any event, any inquiry in the ownership of submerged lands within the Reservation is barred by federal sovereign immunity.[31] NIWRG's proposed adjudication of the scope of the United States' ownership of submerged lands, which are held in trust for the benefit of the Tribe, is really an action to quiet title to land owned by the United States. *See Idaho v Coeur d'Alene Tribe*, 521 U.S. 261, 282 (1997). The McCarran Amendment does not give state courts jurisdiction to quiet title to land, *see* 43 U.S.C. § 666 (waiving United States' sovereign immunity only for "adjudication" and "administration" of "rights to the use of water in a river system or other source") (incorporated in I.C. § 42-1406B)). Although the United States has

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NIWRG "represents that the issue relates to the United States' lake level maintenance claim," R. at 4328 (Order on Mots. S.J.), but declined to take a position on this issue.

[30] This Court's recent decision in *Coeur d'Alene Tribe v. Johnson*, 162 Idaho 754, 405 P.3d 13 (2017), is not to the contrary. In *Johnson*, the appellants challenged tribal court jurisdiction over their construction of docks and pilings on submerged land on the Reservation, arguing that the submerged land was not tribal trust land. 162 Idaho at 760. Land ownership was relevant there because, unlike the determination of water rights at issue here, tribal jurisdiction is tied directly to land status, *id.* at 761-62 (discussing *Montana v. United States*, 450 U.S. 544 (1981) and *Nevada v. Hicks*, 533 U.S. 353 (2001)).

[31] Sovereign immunity can be raised at any time because it is a jurisdictional issue. *See Zylstra v. State*, 157 Idaho 457, 461, 337 P.3d 616, 620 (2014) ("jurisdictional issues" are not waived on appeal); *State. v. Kesling*, 155 Idaho 673, 676, 315 P.3d 861, 864 (Idaho Ct. App. 2013) (citing *State v. Jones*, 140 Idaho 755, 757, 101 P.3d 699, 701 (2004)).

narrowly waived its immunity for some quiet title actions, 28 U.S.C. § 2409a(a), such actions may only be brought in federal district court, *id.* § 1346(f), and this waiver expressly provides that it does not apply to trust or restricted Indian lands, *id.* § 2409a(a); *U.S. v. Mottaz*, 476 U.S. 834, 843 (1986). No additional waiver of sovereign immunity has been granted here. R. at 6280 (Notice of Claim No. 95-16704). Federal law thus precludes NIWRG's request to adjudicate land title to the submerged lands under the Lake, which the Supreme Court determined in *Idaho II* are held in trust for the Tribe. *See* 533 U.S. at 265, 281.

NIWRG also says it cannot be "presumed" that the United States owns "all of the currently submerged lands," NIWRG Br. at 22, apparently referring, as it did below, to "lands, which became submerged only after the construction of Post Falls Dam in 1907 . . . ." R. at 2436 (Mem. in Supp. of NIWRG's Mot. S.J.). Even if sovereign immunity were not a bar here, NIWRG's claims fail. NIWRG's supposed distinction between submerged lands has no basis in fact. The Lake Claim asserts the Tribe's right to the natural hydrograph of the Lake from before the dam was constructed. R. at 6279 (Notice of Claim No. 95-16704). The only difference between lands submerged under the natural hydrograph and the current Lake level, is that the Lake now retains its natural springtime water level throughout the summer months. *See* R. at 2583 (U.S.'s S.J. Mem.); *see In re Sanders Beach*, 143 Idaho 443, 450, 147 P.3d 75, 82 (2006) (describing that dam holds springtime natural water levels through the summer). Although the time of year that lands are submerged has changed, the extent of the submerged lands has not.

For these reasons, this Court should reject NIWRG's request for an inquiry into the title to submerged lands.

CONCLUSION

This Court should affirm the district court's determination (1) that the Coeur d'Alene Reservation was established in 1873 for domestic, agricultural, hunting and fishing purposes; (2) that water rights were reserved to fulfill those purposes; and (3) that the Lake Claim can proceed to quantification.

Respectfully submitted, this 13th day or April, 2018.

Counsel for the Coeur d'Alene Tribe

By: _____
Vanessa L. Kay-Hodge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by USPS Priority Mail, Postage Pre-Paid on this 13th day of April, 2018, upon the following:

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