Docket No. 45381-2017

In the Supreme Court of the State of Idaho

In Re: The General Adjudication of the Rights to the Use of Water from the Coeur d'Alene-Spokane River Basin Water System; Case No. 49576, Subcase No. 91-7755 (353 Consolidated Subcases)

STATE OF IDAHO,

Objector/Appellant,

v.

UNITED STATES OF AMERICA and COEUR D'ALENE TRIBE,

Claimants/Respondents.

REPLY BRIEF OF THE STATE OF IDAHO

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

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STATEMENT OF THE CASE

A. ADDITIONAL FACTS

1. In 1906, a major reduction in tribal land holdings occurred when the Coeur d'Alene Reservation was allotted. In conjunction with allotment of the Reservation, Congress directed the Secretary of the Interior "to sell or dispose of unalloted lands." Act of June 21, 1906, 34 Stat. 325, 335. "The rationale for the policy [of selling surplus lands] was that most lands remaining after allotment was completed were not needed by the tribes." *Cohen's Handbook of Federal Indian Law* 613-14 (Renard Strickland ed. 1982).

The Tribe accuses the State of "overstat[ing] the effect of the Coeur d'Alene Allotment Act" because while the Act caused the "Tribe to lose ownership of some land to individual Indian allottees and non-Indian purchasers of surplus lands, the Tribe still retained the Reservation's unsold and unallotted land for its beneficial use." Tribe Resp. Br. 36. This statement, while facially true, omits to disclose that the unsold lands amounted to 12,878 acres, or less than 4% of the 345,000 acres within the Reservation's exterior boundaries.[1] As a result, homesteaders occupied almost all of the land along the twelve tributary streams that provide spawning and rearing habit for adfluvial fish species harvested in Coeur d'Alene Lake. *See* R. 2214 (1911 map showing land opened to homesteading).[2]

The small amount of land held for the benefit of the Tribe along the twelve tributary streams is a critical fact in this case. It is not an overstatement to assert that the Tribe owns little,

[1] *See* Act of May 19, 1958, 72 Stat. 121 (restoring the unsold 12,878 acres to tribal ownership). The Tribe also retained 4,140-5,220 acres of submerged lands under navigable waterways as communal property. *See* R. 0548-49 (Affidavit of David B. Shaw).

[2] Adfluvial fish species live in the Lake as adults, but travel up tributary streams to spawn; juvenile fish either migrate to the Lake directly, or reside in the streams for several years before returning to the Lake. R. 0577.

and in many cases none, of the fish habitat that it seeks to preserve in the twelve non-navigable streams. Indeed, the map that the Tribe filed under Protective Order, R. 3692, amply demonstrates the lack of tribal lands along the twelve streams even after recent acquisitions of land by the Tribe, many of which have not been taken into trust by the United States.[3]

2. On those portions of the twelve streams owned by, or held in trust for, the Tribe, the United States claims water for both instream flows and wetland maintenance. In the letter accompanying its claims, the United States clarified that "[t]o the extent [the wetland] claims concern riparian areas along streams subject to Instream Flow claims . . . the United States does not intend to double a claim to the same surface water. Instead, the United States is providing two separate justifications for the same water flows that provide instream fish habitat and support riparian vegetation." R. 0011. If this Court determines that protection of fish habitat was a primary purpose of the Reservation, the wetland maintenance claims will provide such protection on those stream segments held in trust for the Tribe, regardless of what action this Court takes with regard to the State's assertion that the instream flow claims on the twelve streams dominated by non-Indian lands should be dismissed.

II.
ARGUMENT

A. THE 1887 AND 1889 AGREEMENTS SUPERSEDED THE 1873 EXECUTIVE ORDER AND EMBODIED THE PARTIES' UNDERSTANDING THAT PROMOTION OF AGRICULTURE WAS THE PRIMARY PURPOSE OF THE REDUCED RESERVATION.

[3] In *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984), the court did not consider land "reacquired," for purposes of implying reserved water rights, until the land had been "reacquired by the Tribe *and* returned to trust status." *Id*. at 1361 (emphasis added); *see also In re the General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 84, 114, (Wyo. 1988) (implying reserved water rights for lands "later reacquired, in trust for the Tribes").

In 1873, the Coeur d'Alene Reservation was set aside by Executive Order, R. 2031, using the boundaries specified in an unratified agreement with the Coeur d'Alene Tribe. R. 2141 (Agreement). In 1885, the Tribe sent a petition seeking negotiations so "that their present reserve may be confirmed to them." R. 2042. In 1887, the Tribe and the United States negotiated an agreement to set aside the lands within the 1873 Executive Order Reservation "as Indian land and as homes for the Coeur d'Alene Indians." R. 2187. Congress expressed concern about the extent of submerged lands included within the Reservation, R. 2055, and ordered new negotiations. Act of March 2, 1889, 25 Stat. 980, 1002. "[T]he main purpose of the new negotiations was to regain from the Tribe whatever submerged lands it was willing to sell." *United States v. Idaho*, 210 F.3d 1067, 1077 n.14 (9th Cir. 2000). The boundaries of the Coeur d'Alene Reservation were diminished by an agreement concluded September 9, 1889, and the 1887 and 1889 Agreements were ratified in the Act of March 3, 1891, 26 Stat. 989, 1027. [4]

The first question presented in this appeal is whether the 1887 and 1889 Agreements, considered together, established new purposes for use of the Tribe's diminished land base, or simply ratified the purposes of the 1873 Executive Order. The purposes of the 1887 and 1889 Agreements, and the implications of such purposes for establishment of water rights, are independent of the Tribe's title to submerged lands under navigable waters within the Reservation. As established in *Idaho v. United States*, 533 U.S. 262 (2001) (*Idaho II*), Congress, in its actions occurring before the date of statehood on July 3, 1890, recognized the inclusion of submerged lands in the 1873 Reservation, and affirmed the Tribe's title to such lands. Nothing in the 1887 and 1889 Agreements altered such intent, because Congress, in its pre-statehood acts,

[4] Contrary to the assertions of the United States and the Tribe, the term "diminish" applies generally to any reduction in a Reservation's boundaries. *See United States v. Idaho*, 95 F. Supp. 2d 1094, 1115 (D. Idaho 1998) ("[t]he northern boundary of the diminished reservation was drawn so as to bisect the Lake").

had indicated its intent that "they remain tribal reservation lands barring agreement to the contrary." *Id*. at 280. Such agreement occurred in 1889, when the Tribe agreed to "cede the northern portion of the reservation, including two-thirds of Lake Coeur d'Alene, in exchange for $500,000." *Id*. at 269-70.

Idaho II establishes that it was Congress's intent that the submerged lands under Coeur d'Alene Lake and the St. Joe River remain part of the Reservation. But, in reaching that decision, the Court did not find it necessary to determine whether Congress, in approving the 1887 and 1889 Agreements, ratified the hunting and fishing purposes of the 1873 Executive Order. As the United States points out (U.S. Resp. Br. 13-14), the State asserted in the *Idaho II* litigation that no such ratification occurred. But the Court never resolved the issue, as explained in more detail in the Ninth Circuit decision approved in *Idaho II*:

> The State's argument that the district court should have determined the purpose of the reservation as understood by Congress (rather than the Executive), and as so understood in 1889 (rather than 1873) lacks support in the case law. In [*United States v.*] *Alaska*, [521 U.S. 1 (1997)] where the Supreme Court relied heavily on the purpose of the reserves at issue, the Court did not require either that Congress itself apprehend the purpose or that the purpose be extant at the time of congressional action. … What mattered was that Congress recognized that the executive reservation included submerged lands, *not that it knew or acknowledged the executive purpose in reserving them*. … Thus, it is irrelevant that Congress may have believed the Tribe to have wholly or mainly converted to an agricultural lifestyle by 1889.

United States v. Idaho, 210 F.3d at 1075-76 (emphasis added). Thus, the *Idaho II* courts never determined whether the purposes of the diminished Reservation that remained after implementation of the 1887 and 1889 Agreements were the same as those of the 1873 Executive Order. It was not necessary because the submerged lands remained part of the Reservation regardless of whether the parties to the Agreements intended hunting and fishing to be a primary

purpose of the diminished Reservation or whether hunting and fishing were merely permitted activities.

Given the holdings in *Idaho II*, this Court cannot infer an intent that hunting and fishing remain a primary purpose of the Reservation merely because the diminished Reservation included submerged lands. Determination of such purpose entails two inquiries: (1) did the 1891 Act supersede the prior Executive Order, and (2) if so, did the 1891 Act encourage reliance on hunting and fishing, or merely permit hunting and fishing to continue within the 1891 boundaries?

1. The Court Need Not Find an Intent to "Abrogate" the Earlier Purpose of Hunting and Fishing in Order to Conclude that the Primary Purpose of the 1887 and 1889 Agreements was to Promote Agriculture.

The United States and the Tribe contest the notion that the 1887 and 1889 Agreements supersede the 1873 Executive Order by asserting that the Executive Order could be superseded only if Congress acted affirmatively to repudiate or abrogate it. *See*, *e.g.*, Tribe Resp. Br. 10 ("[t]here is nothing in the text of the Agreements that could have been understood by the Tribe to mean that those Agreements were abrogating the purposes of the Reservation"). In support of this assertion, the Tribe cites the statement in *United States v. Dion*, 476 U.S. 734, 738 (1986), which notes that the Court has traditionally "required that Congress' intention to abrogate Indian treaty rights be clear and plain." *Dion* and the cases cited therein, however, address unilateral congressional extinguishment of rights guaranteed to a tribe by treaty or agreement. Here, the 1887 and 1889 Agreements were not unilateral congressional actions—they were negotiated at arms-length with tribal leaders who demonstrated sophisticated bargaining techniques. Because the parties were acting for their mutual benefit, the concept of unilateral abrogation is simply inapplicable. Instead, the proper path is to apply the normal canons of construction applicable to

agreements with Indian tribes. Doing so, it is obvious that the parties mutually agreed to encourage agricultural uses on the reserved lands. In contrast, while the Tribe retained the implied right to hunt and fish on its lands, such activities were not affirmatively encouraged, either on the face of the Agreements or in the discussions leading thereto. In similar circumstances, other courts have concluded that primary purposes were those affirmatively encouraged by agreement with the Tribe, and secondary purposes are those activities merely permitted within the Reservation. *See Big Horn*, 753 P.2d at 97, (finding hunting to be merely a permissive use of reservation lands even in the face of a treaty provision mentioning hunting).

Moreover, it is hardly revolutionary to suggest that the purposes of a Reservation should be established by looking to agreements made with the Tribe rather than preceding executive orders. This principle was acknowledged, in *City of Pocatello v. Idaho*, 145 Idaho 497, 180 P.3d 1048 (2008), which held that the cession of a portion of the Fort Hall Reservation and accompanying federal legislation did not include a grant water rights. The Fort Hall Reservation was initially set aside by executive order in 1867, and "[t]he boundaries and terms of the Reservation were established the next year in the Second Treaty of Fort Bridger. *Id*. at 498, 180 P.3d at 1049. Despite the earlier executive order, the Court acknowledged that "the Tribe in this case impliedly received the water rights necessary to sustain the purposes of their reservation with the treaty establishing the Reservation." *Id*. at 507, 180 P.3d at 1058.

City of Pocatello acknowledges that when the United States and a tribe enter into an agreement addressing the purpose and use of reservation lands the terms of that agreement establish the purposes mutually agreed upon by the parties. And, as shown in *Winters v. United States*, 207 U.S. 564 (1908), such examination is particularly appropriate when the agreement is the result of a "change in conditions" affecting the Tribe's livelihood. *Id*. at 576.

Here, the 1887 and 1889 Agreements did not merely affirm and continue rights conferred by the 1873 Executive Order, but provided affirmatively that from that point forward the Reservation would "be held forever as Indian lands and as homes for the Coeur d'Alene Indians," with no part to "ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation. Act of March 3, 1891, 26 Stat. 989, 1028. While these provisions were later abrogated by Congress, *infra* at 11-12, they nonetheless represented a fundamental change in the Reservation's status, particularly when coupled with the Tribe's understanding, as expressed by Chief Seltice, that what the Tribe wanted "preserved forever" was "our homes . . . our houses [and] our farms." R. 2157.

Together, the 1887 and 1889 Agreements identify the uses of land that the parties to the Agreements mutually encouraged. In such a case, the seminal decision in *Winters* establishes that intent to reserve water must rest on such purposes. As discussed at length in the State's opening brief, the *Winters* decision examined the purposes of the Fort Belknap Reservation by looking to the terms of an agreement with the Gros Ventre and Assiniboine Tribes (ratified in the Act of May 1, 1888, 25 Stat. 113), which established a reduced reservation for the Tribes within the boundaries of an earlier, larger, reservation. The purposes of the reduced Fort Belknap reservation were clearly agricultural, while the purpose of the earlier, larger reservation had been to provide for the Tribes' hunting and fishing needs. *See Winters*, 207 U.S. at 576 (describing the earlier reservation as a "larger tract . . . adequate for the habits and wants of a nomadic and uncivilized people"). The Court ignored the purposes of the earlier reservation, and determined the purposes of the Fort Belknap Reservation solely by reference to the 1888 Agreement. 207 U.S. at 575 ("[t]he case, as we view it, turns on the agreement of May, 1888"). The Court's reasons were at least partially explained in another decision, where the Court held that the ownership of mineral rights in the Blackfeet Indian Reservation, which, like Fort Belknap, had

been carved out of the same earlier and more expansive reservation, rested "entirely on the agreements or conventions [establishing a new reservation] which were ratified and given effect by Congress" because the executive orders establishing the earlier reservation were "designed to be temporary" and were "superseded by congressional action and no longer are of any force." *British-American Oil Producing Co. v. Bd. of Equalization*, 299 U.S. 159, 163 (1936).

The United States asserts that:

> [I]f the State were correct that a court should look instead to the last federal action that changed the boundaries of a reservation when determining the scope of a water right for that reservation, the *Winters* Court would have considered an 1895 agreement (ratified in 1896) between the United States and the Fort Belknap Tribes that reduced the boundaries of the reservation. *See Gros Ventre Tribe v. United States*, 469 F.3d 801, 804 (9th Cir. 2006) (discussing the Grinnell Agreement).

U.S. Resp. Br. 22.

Unquestionably, the *Winters* court, in determining the purposes of the Fort Belknap Reservation, looked to the agreement ratified in the 1888 Act, and not the 1895 Grinnel Agreement. This is so because the 1888 Agreement, unlike the 1895 Grinnell Agreement, was a change in circumstances that included language clearly establishing the agricultural purposes of the reduced reservation by, among other things, directing that money received from the cession of lands be used to buy livestock and agricultural implements, to assist Indians in enclosing their farms, and "to promote [Tribes'] civilization, comfort, and improvement." Act of May 1, 1888, Art. III, 25 Stat. 113, 114. The 1888 Agreement also directed that preference in distribution of goods be given to Indians "who in good faith undertake the cultivation of the soil. *Id*. at Art. V, 25 Stat. at 114-15. The 1895 Grinnel Agreement (ratified in the Act of June 10, 1896, 29 Stat. 321, 350) ceded additional lands, but did not alter the purposes of the reservation—indeed, it

simply confirmed those purposes by repeating, practically word for word, the language in the 1888 Agreement encouraging agriculture.[5]

In short, *Winters*, by relying on the 1888 Agreement, applied the principle that earlier legislation or executive action is superseded by "the enactment of subsequent comprehensive legislation establishing elaborate inclusions and exclusions of the person, thing, and relationships ordinarily associated with that subject." Norman J. Singer, *Statutes and Statutory Construction* § 23:13 (6th ed. 2002). Likewise, the 1891 Act, in approving the 1887 and 1889 Agreements with the Coeur d'Alene Tribe, superseded earlier actions by comprehensively addressing, in the only documents agreed to by both the Tribe and the United States, the purposes to be served by the Coeur d'Alene Reservation.

2. Intent to Supersede the 1873 Executive Order is Apparent in the Text and History of the 1887 and 1889 Agreements.

The Claimants attempt to avoid the fact that the 1887 and 1889 Agreements are the seminal agreements with the Tribe by asserting that the 1873 Executive Order incorporated the unratified 1873 Agreement. Even if this were true, the 1887 and 1889 Agreements still superseded the earlier agreement. The parties to the 1887 and 1889 Agreements did not set out to revise the earlier agreement; rather, they negotiated a comprehensive replacement, as can be seen in the record of the 1887 negotiations. The commissioners who negotiated the 1887

[5] *Compare* Act of May 1, 1888, 25 Stat. 113, and Act of June 10, 1896, 29 Stat. 321, 350 (Grinnel Agreement). Article III of the 1888 Agreement and Article II of the Grinnel Agreement include practically identical directives regarding the expenditure of cession proceeds to buy livestock and agricultural implements, to assist Indians in enclosing their farms, and to promote the Tribes' civilization and improvement. 25 Stat. at 114; 29 Stat. at 351. Article V of the 1888 Agreement, directing that preference in distribution of goods be given to Indians "who in good faith undertake the cultivation of the soil, 25 Stat. at 114-15, is repeated word-for-word in Article IV of the Grinnel Agreement. 29 Stat. at 351.

Agreement were furnished a copy of the 1873 Agreement, R. 2141, and obviously used it as a model: both agreements establish a reservation with identical boundaries; cede all aboriginal territory outside that reservation in return for payment; promise to construct a saw and grist mill; and promise to provide "articles of comfort and civilization" (1873) or "articles as shall best promote the progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians (1887). R. 1865-66 (1873 Agreement); R. 2187-89 (1887 Agreement). One glaring omission, however, occurs in the 1887 Agreement: the parties did not include the provision from the 1873 Agreement stating that "the waters running into said reservation shall not be turned from their natural channel where they enter said reservation." R. 1865.

The omission of the provision is significant: "[i]t is a rule of law that where a revising statute, or one enacted for another, omits provisions contained in the original act, the parts omitted cannot be kept in force by construction, but are annulled." *Stewart v. Kahn*, 78 U.S. 493, 502 (1870). The 1887 Agreement was clearly enacted in place of the unratified 1873 Agreement, yet, the district court, by construction, interpreted the purposes of the Reservation to incorporate the earlier, superseded provision. See R. 4322 (citing 1873 provision to "establish that one primary purpose of the Coeur d'Alene Reservation was to provide the Tribe with the important waterways needed to facilitate its traditional hunting and fishing practices").

The district court's error in not fully considering the import of the omission of the "running waters" provision from the 1887 Agreement was exacerbated by the fact that Congress delayed ratification of the 1887 Agreement until it was able to obtain a cession of many of those same "important waterways" that the district court concluded were a primary purpose of the Reservation. R. 4322. Together, the 1887 and 1889 Agreements, combined with the lack of any mention of hunting and fishing needs in either the 1887 or 1889 negotiations, and the repeated reference in such negotiations by federal commissioners and tribal representatives of the need to

protect tribal farmlands,[6] establishes that the primary purpose of the Reservation that the Tribe ultimately bargained-for was to fulfill the Tribe's agricultural needs.

B. THE DISTRICT COURT ERRED WHEN IT FAILED TO DISALLOW INSTREAM FLOW CLAIMS WHERE THE PLACE OF USE IS ON NON-INDIAN FEE LAND.

Ultimately, with regard to the majority of the instream flow claims, it is not necessary for the Court to determine whether the 1891 Act superseded the purposes of the 1873 Executive Order, because 15 years later, in 1906, Congress ordered that the Reservation be allotted, and the surplus lands sold in fee simple to non-Indians. Act of June 21, 1906, 34 Stat. 325. Ninth Circuit case law establishes that the 1906 Act abrogated property rights previously reserved for the Tribe. In the case of *Nicodemus v. Washington Water Power Co.*, 264 F.2d 614 (1959), the court was asked to determine whether the Power Company could condemn an easement across a tribal allotment. The allottee argued that condemnation of the easement violated the terms of Article 5 of the 1887 Agreement guaranteeing "no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation." *Id*. at 616 (quoting Art. 5).

The court held that the allotment "in earlier times was part of the reservation, but following the 1906 Act, was "not part of the reservation, nor is it tribal land," so that the allotment was "not land subject to the treaty [i.e., the 1887 Agreement]." *Id*. at 617. The court

[6] During the 1887 negotiations, Chief Seltice stated that the things the Tribe wanted "preserved forever" were "our homes . . . our houses . . . our fences, our farms, our school-houses, our churches." R. 2157. In an earlier petition to their Indian agent, Chief Seltice and other tribal leaders expressed concerns about rumors that "whites were getting up a petition to have the government open the very best portion of our reservation & send us to the other side of the St. Joseph river," and asserted that "[f]rom the land they would take away, we get our food, our clothing, & whatever we are in need of[.] For we till our land, raise crops, keep herds of cattle & thus provide for ourselves." R. 3399-3400.

viewed the 1906 Act as a "change in status," allowable because "the plenary power of Congress over Indian tribes and tribal property cannot be limited by treaties so as to prevent repeal or amendment by later statute." *Id*. at 617. Because the allotment was no longer subject to the provisions in the 1887 Agreement, Congress was free to authorize condemnation of an easement without tribal consent. *Id*. at 617.

Nicodemus establishes that the 1906 Act was a fundamental change in the Reservation, so that tribal property rights in allotted and surplus lands are determined by the 1906 Act and related legislation, not by the earlier agreements with the Tribe. Admittedly, the court's statement that the allotment was no longer "part of the Reservation" was hyperbolic (though recently cited by another court as authority[7]), but the basic holding of *Nicodemus* remains intact: communal property rights conferred or reserved for the Tribe in earlier agreements were abrogated by the allotment of the Reservation and the sale of surplus lands. Indeed, any other outcome would be at odds with the purpose underlying allotment and sale of surplus lands, which was to make all parcels "fully alienable and free of all charge or incumbrance whatsoever." *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 328 (2008) (internal citations and quotation marks omitted). If allotments held in trust for tribal members cease to be "tribal land," *Nicodemus*, 264 F.2d at 617, the same must be true for lands conveyed to non-Indians, and to water rights whose claimed place of use is on those conveyed lands.

[7] *See United States v. Newmont USA Ltd.*, 504 F. Supp. 2d 1050, 1065-66 (E.D. Wash. 2007) (quoting *Nicodemus*, 264 F.2d at 618 for the proposition that "[o]nce allotted in severalty, the land was 'no longer a part of the reservation, nor [was] it tribal land.'") (addressing land in the Spokane Reservation).

1. The Place of Use for Instream Flow Claims is the Fish Habitat That the Claims Seek to Protect, Not the Downstream Waterways Where Fishing Occurs.

There are twelve non-navigable streams tributary to Coeur d'Alene Lake and the St. Joe River that provide spawning and rearing habitat for adfluvial fish harvested in the Lake.[8] When the Reservation was allotted and opened to non-Indian homesteading in 1906 the lands underlying these streams, with the exception of a few scattered parcels, were conveyed in fee to non-Indians—the Tribe only retained ownership of submerged lands underlying downstream navigable waters—namely a portion of Coeur d'Alene Lake, the lower St. Joe River, and a portion of Black Lake. If this Court concludes that a primary purpose of the Reservation was to preserve tribal ownership of fish habitat in Reservation waterways, it must then address the consequences of the fact that such ownership did not survive the allotment and opening of the Reservation.

Central to this issue is the nature of the fish habitat water rights claimed by the United States and the Tribe. The United States attempts to downplay the fact that the twelve tributary streams flow primarily, and in some cases exclusively, through non-Indian lands. In the United States' view, "the lands to which the instream flow rights at issue here are linked are the

[8] For the reasons explained in the State's opening brief, this argument is addressed to the twelve streams that are tributary to Coeur d'Alene Lake and the St. Joe River: Claim Nos. 92-10906 (Cherry Creek), 92-10907 (Alder Creek), 94-9244 (Black Creek), 94-9425 (Willow Creek), 94-9246 (Evans Creek), 95-16678 (Fighting Creek), 95-16679 (Lake Creek), 95-16680 (Plummer Creek), 95-16681 (Little Plummer Creek), 95-16682 (Pedee Creek), 95-16683 (Benewah Creek), and 95-16684 (Windfall Creek). Two other claims for Hangman Creek, Nos. 93-7469 and 93-7470, include substantial stream reaches held in trust for the Tribe or tribal members, and may require additional fact-finding to determine the applicability of any holding this Court may reach regarding the reservation of instream flows on non-tribal lands. Because the Tribe owns the submerged lands under the lower St. Joe River, any holding based on the extinguishment of tribal title to streambeds would not apply to Claim No. 91-7777.

downstream Tribal lands where the Tribe conducts its fishing, not the lands across which the waters flow." U.S. Resp. Br. 26 n.10. It then asserts that "[i]t is this use of water by the fish species subject to the Tribe's on-Reservation fishing right, and not title to land, that supports a claim to impliedly-reserved water rights under *Winters*." U.S. Resp. Br. 28. *See also* U.S. Resp. Br. 26 ("[t]hese claims are premised on the biological needs of a downstream fishery, not on underlying or abutting land ownership").

In other words, the United States and Tribe attempt to portray the fish habitat claims as a "downstream" water right appurtenant to the tribal lands underlying Coeur d'Alene Lake, and assert that "a junior water right holder upstream [cannot] by virtue of land ownership, . . . stop the water flowing over his or her land from satisfying the downstream senior right." Tribe Resp. Br. 31. Using this convoluted logic, the Tribe asserts that the claimed "water right does not require the use of alienated land," but merely requires the land owners to allow the water to flow downstream. Tribe Resp. Br. 29; *see also* U.S. Resp. Br. 25 (instream flow claims "derive from the Tribe's uncontested right to fish in Lake Coeur d'Alene and other downstream waterways"); U.S. Resp. Br. 26 ("[t]hese claims are premised on the biological needs of a *downstream* fishery") (emphasis added).

The reality, however, is that the place of use for these water rights is not the downstream tribal waters where the Tribe may exercise its fishing rights. The place of use is upstream, on those waterways flowing over private lands. This is stated on the face of the claims: the fish habitat claim for Plummer Creek (R. 6110), identifies the place of use as "all points along the stream reach located between the [stated] boundaries." The United States acknowledges that it is claiming "in situ water rights [that] allow for the Tribe's continued traditional activities on Reservation waters, which require protecting the upstream habitat upon which the Tribe's fishery

depends." U.S. Resp. Br. 6; s*ee also* U.S. Resp. Br. 2 (claims "maintain[] biological requirements of certain fish species that migrate upstream from Lake Coeur d'Alene to spawn").

By definition, the "upstream habitat" that the United States seeks to protect includes both the water and the underlying land. Federal regulations define "essential fish habitat" to include "those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity," with "substrate" further defined to include "sediment, hard bottom, structures underlying the waters, and associated biological communities." 50 C.F.R. § 600.10.

In sum, any analysis of the fish habitat claims must start from the premise that the place of use for the claims is not the tribally-owned lakebed where fishing occurs, but the non-Indian land on which the fish habitat is present. By analogy, the Tribe could not claim a reserved water right to irrigate non-Indian lands if crops raised thereon were eventually consumed by the Tribe. Likewise, the Tribe cannot claim a water right to spawn and rear fish on lands not held in trust for the Tribe merely because those fish eventually migrate to a water body where the Tribe may harvest them.

2. The Place of Use for a Reserved Water Right Must be Reserved for the Tribe's Use.

Because the place of use for the 12 fish habitat claims is the stream bed in which the fish are reared, and not the Lake where fish are harvested, the burden is on the United States to demonstrate that the stream bed is either held in trust for the Tribe, or is subject to a servitude allowing continued entry and use of the stream bed for either fishing or rearing of fish. The mere fact that water was reserved for fishing and fish habitat when the Reservation was first set aside for the Tribe's exclusive use in 1873 is not sufficient because rights implied by the setting aside of land for a Tribe's exclusive use "must be read in light of the subsequent alienation of those lands." *Montana v. United States*, 450 U.S. 544, 561 (1981).

Here, the 1906 Act provides on its face that lands opened to non-Indian homesteading were no longer reserved for the Tribe's use. The Act identifies the opened lands as "residue or surplus lands—that is, lands not allotted or reserved for Indian school, agency, or other purposes." 34 Stat. at 336. It then provides that a maximum of three sections (1,920 acres) could be reserved for "agency, school and religious purposes." *Id*. at 337. This express limitation on "reserved" lands confirms that all lands declared to be "residue or surplus" were not reserved for tribal use. This is additionally confirmed by the provision providing that "all coal or oil deposits in or under the lands on the said reservation shall be and remain the property of the United States." *Id*. at 336. The reservation of a specific incident of title implies that all other incidents of title were not reserved.

The 1906 Act is consistent with the general principle that although alienated lands may remain part of the Reservation for jurisdictional purposes, all property rights incident to title are extinguished upon conveyance to non-Indians, unless reserved explicitly. *See Montana*, 450 U.S. at 565 (conveyance to non-Indians "divested" tribe of right to prevent taking of wildlife); *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993); (loss of title "abrogated" right to regulate hunting and fishing by non-Indians); *Blake v. Arnett*, 663 F.2d 906, 910 (9th Cir. 1981) (conveyance of reservation lands to non-Indians "cut off or destroyed" tribe's right to enter to hunt and fish).

The United States and the Tribe assert that cases discussing tribal loss of regulatory authority over non-Indian lands are irrelevant, but such assertion ignores the fact that tribal regulatory authority is an incident of property ownership and the right to exclude. *Montana*, 450 U.S. at 554. As such, the cases confirm the general principle that loss of title to reservation lands includes all incidents of title unless reserved explicitly. Moreover, the decision in *Montana* presented a claim analogous to the United States' claim that the right to fish on tribal lands

includes the incidental right to prevent dewatering of fish habitat on private lands. In *Montana*, the Court recognized that after opening of the reservation, the Crow Tribe retained the right to hunt and fish on lands reserved for the Tribe's use. *Id*. at 558. As the United States does here, the Tribe asserted that its retained hunting right included the ancillary right to protect the wildlife while on non-Indian lands. *Id*. at 564-65. The Court's rejection of the asserted, ancillary right is equally applicable here: the Tribe's right to fish on tribally-owned waterways does not imply the right to protect fish, or by extension fish habitat, once those fish leave tribal lands.

Moreover, the Supreme Court has not limited the loss of incidental rights to regulatory rights: the Court has held that other incidental property rights, such as the "right to fish free of state interference," are lost when reservation land is alienated to non-Indians. *Puyallup Tribe, Inc. v. Dept. of Game of State of Wash*., 433 U.S. 165, 174 (1977) (*Puyallup III*). Likewise, the Ninth Circuit has held that the alienation of reservation lands to non-Indians abrogates the incidental property right of entry to hunt or fish. *Blake*, 663 F.2d at 911. The same principle applies to reserved water rights: once land "is conveyed to a homesteader, the purposes for which *Winters* rights were implied are eliminated," because the conveyed land is no longer subject to tribal use. *United States v. Anderson*, 736 F.2d. 1358, 1362-63 (9th Cir. 1984). This principle was applied in the *Big Horn* adjudication, where the court, discussing reserved water rights for irrigation, held that the "[w]hen the Tribes ceded their land to the United States for sale, the reserved water right disappeared because the purpose for which it was recognized no longer pertained."). *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 899 P.2d 848, 854 (Wyo. 1995).

To counter this overwhelming precedent, the United States and the Tribe cite two cases, *State v. McConville*, 65 Idaho 46, 139 P.2d 485 (Idaho 1943), and *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968), as support for the assertion that when lands are sold in fee to

non-Indians, the Tribe retains the right to use such lands as necessary to achieve the purposes of the Reservation unless Congress acts explicitly to abrogate such rights. Tribe Resp. Br. 35-36; U.S. Resp. Br. 26, 29. Both cases are easily distinguished. In *McConville*, this Court was not addressing an implied fishing right, but rather an express treaty fishing right that, as the Court noted, was explicitly reserved "in full force and effect" by the Act opening the Nez Perce Reservation to non-Indian settlement. 65 Idaho at 51, 139 P.2d at 487 (quoting Art. XI of Act of Aug. 15, 1894, 28 Stat. 331). No analogous reservation of rights appears in the 1906 Act opening the Coeur d'Alene Reservation to homesteading.

In *Menominee Tribe of Indians*, the question presented was whether the Tribe's hunting and fishing rights, implied from the setting aside of a reservation for the Tribe's exclusive use, survived the termination of the Wolf River Reservation. The Menominee Termination Act was unique, however, in that the former reservation lands were conveyed in fee simple to the Tribe. 391 U.S. at 408-09. Thus, the Menominee Tribe continued to own and occupy the same land before and after the Termination Act, and the only question was whether Congress had abrogated the Tribe's right to hunt, free of state regulation, on land owned by the Tribe.

Neither *McConville* nor *Menominee* contradict cases holding that the conveyance of reservation lands to non-Indians without a reservation of rights is an explicit indication of congressional intent to abrogate incidental property rights implied from the setting aside of lands for a tribe's exclusive use. In such cases, the Supreme Court has held that conveyance of tribal lands to non-Indians is an "abrogation" of the "right of exclusive use and occupation," and "[t]he abrogation of this greater right" implies the loss of rights implied from the reservation of exclusive use. *Bourland*, 508 U.S. at 688-89 (discussing loss of implied right of regulatory authority); see also *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903) (congressional act directing sale of reservation's surplus lands despite earlier treaty requiring tribal consent to any

sale was exercise of congress' power to abrogate treaty provisions). Likewise, in *Blake v. Arnett*, 663 F.2d 906, 908 (9th Cir. 1981), the court concluded that the tribe's fishing right, implied by the setting aside of land for the tribe's exclusive use, was extinguished on those reservation lands sold to non-Indians. Tellingly, the court rejected the tribal members' argument that the holding in *Menominee* compelled the conclusion that their fishing rights survived on alienated lands. *Id*.

Here, the Tribe attempts to avoid the consequences of alienation by analogizing its claims to the State's possession of minimum stream flow water rights, which include water flowing over land the State does not own. State minimum stream flows do not, by implication, support the Tribe's claims, because the State's police powers over water and fish are not limited to lands owned by the State. "'[P]rotection of the wild life of the State is peculiarly within the police power, and the State has great latitude in determining what means are appropriate for its protection." *Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 391 (1978) (quoting *Lacoste v. Department of Conservation*, 263 U.S. 545, 552 (1924). "[A] State's power to regulate the use of water in times and places of shortage . . . is at the core of its police power." *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Nat. Res.*, 504 U.S. 353, 366 n.6 (1992); *Speer v. Stephenson*, 16 Idaho 707, 712, 102 P. 365, 367 (1909) (Idaho Constitution "reserv[es] to the state the right to regulate and control the manner and means of appropriating the unappropriated waters of the state"). In contrast, a tribe's power to regulate the use of natural resources arises from its power to exclude: when title to reservation lands is conveyed in fee to non-Indians, tribal authority to restrict use of the resources for purposes of conservation generally ceases. *Montana*, 450 U.S. at 558-59; *see also Strate v. A-1 Contractors*, 520 U.S. 438, 456 (1997) (a tribe's regulatory jurisdiction is generally limited to lands over which tribe can "assert a landowner's right to occupy and exclude"). Hence, the fact that the State may, through its police powers, conserve waters flowing over private land does not support the Tribe's

claims; if anything, it demonstrates why they must be denied. The United States and Tribe nonetheless press this Court to craft an exception for non-consumptive fish habitat water rights flowing exclusively, or nearly so, through non-Indian lands. The precedents they cite do not support such a radical expansion of the reserved water rights doctrine. Fish habitat water rights have been recognized only where the tribe had an underlying property right, either in the form of ownership or a servitude, to use the stream at the designated place of use for fishing or fish rearing.

For example, in *Colville Confederated Tribes v. Walton*, the Tribe "claim[ed] a reserved right for water to maintain the spawning grounds in the creek." 460 F. Supp. 2d 1320, 1325 (E.D. Wash. 1978). The spawning grounds were in the lower section of the creek. *See Colville Confederated Tribes v. Walton* 647 F.2d 42, 45 (9th Cir. 1981) ("[t]he Indians cultivated No Name Creek's lower reach to establish spawning grounds"). The court took care to note that the lower section of the creek ran through three allotments held in trust by the United States "that had never passed from tribal ownership" 647 F.2d at 45 n.5; *see also* 460 F. Supp. at 1336 (map of lower allotments). The award of water was only to "maintain the spawning grounds." 460 F. Supp. 2d at 1325. No water was awarded to protect habitat on those portions of the creek running through private lands. Thus, *Walton* is consistent with the premise that the place of use for an instream flow must be either owned by a tribe or subject to a servitude allowing tribal use of the stream bed for fishing or fish rearing.

Reliance on *United States v. Anderson* as precedent for decreeing instream flow water rights to preserve fish habitat on non-Indian lands is likewise misplaced. *Anderson* affirmed a reserved water right "needed to preserve fishing in the creek below Chamokane Falls." 591 F. Supp. 1, 5 (E.D. Wash. 1982). The reach in question was a mile and a half in length. *Id*. at 4. The appellate decision indicates that "land owned in fee occupied most of the waterfront

property within the reservation," 736 F.2d 1358, 1366 n. 1 (9th Cir. 1984). The reported *Anderson* decisions do not identify whether the Tribe retained ownership of the creek bed (as opposed to the "waterfront" property), but an earlier, unreported decision in the case found that the "Spokanes had reserved the exclusive right to take fish from the part of Chamokane Creek contained within the reservation."[9]

Thus, at a minimum, the Tribe retained a property right, in the form of a servitude,[10] reserving the exclusive right to take fish from Chamokane Creek, and the place of use for the water right was limited to the lower reach where the tribal fishing right was exercised. 591 F. Supp. at 5 ("the flow from the Falls into Lower Chamokane Creek must be sufficient to maintain the water temperature at 68°F or below"). Thus, *Anderson* does not support the award of instream flows along stream reaches where the place of use is not subject to a servitude allowing entry and use for tribal fishing.

The case that is perhaps most irrelevant to the current claims is *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983). The court recognized an instream flow fish habitat water right on a river that flowed primarily through non-Indian (though mostly federally-held) lands within the terminated Klamath Indian Reservation. The basis for the court's decision recognizing instream flows independent of tribal ownership were two provisions in the Klamath Termination Act explicitly preserving on former tribal lands all fishing rights and water rights held by the Tribe pursuant to earlier treaties:

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[9] *United States v. Anderson*, No. 72-cv-3643, Memorandum Opinion and Order (E.D. Wash., July 23, 1979). A copy of the relevant portions of the Memorandum Opinion is included in the Addendum to this brief.

[10] *See United States v Winans*, 198 U.S. 371, 381 (1905) (treaty right preserving right to fish at usual and accustomed places "imposed a servitude upon every piece of land as though described therein").

> (a) Nothing in this Act shall abrogate any water rights of the tribe and its members . . . .
>
> (b) Nothing in this Act shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty.

Act of Aug. 13, 1954, §14, 68 Stat. 718, 722.[11]

In *Adair*, the State of Oregon argued that "recognition of a reserved water right to sustain the Tribe's hunting and fishing rights would impose a servitude or limitation on the use of former reservation lands in contravention of the Termination Act policy of unencumbered sale." 723 F.2d at 1411. The court, citing the Termination Act's express disclaimer of intent to abrogate water rights, rejected the argument that termination of tribal ownership extinguished water rights for hunting and fishing:

> Appellants' argument, however, overlooks the substantive language of the Termination Act, the canons of construction for legislation affecting Indian Tribes, and the implications of our decision in *Kimball I*.[12] Section 564m(a) of the Termination Act provides, "[n]othing in sections 564–564w of this title shall abrogate any water rights of the tribe and its members." 25 U.S.C. § 564m(a) (1976). This provision admits no exception, nor can it be read to exclude reserved water rights. Congress presumably was aware of the importance of such rights to Indian tribes at the time it drafted section 564m of the Klamath Termination Act. A conclusion that the Termination Act ended the Klamath's hunting and fishing water rights would impute to Congress the intention to abrogate rights guaranteed to the Tribe in the 1864 Treaty. As the Supreme Court noted in *Menominee Tribe v. United States*, 391 U.S. 404, 413, 88 S.Ct. 1705, 1711, 20 L.Ed.2d 697 (1968), it is "difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation by destroying property rights conferred by treaty." Because Congress in section 564m of the Termination Act explicitly protected tribal water rights and nowhere in the Act explicitly denied them, we can only conclude that such rights survived termination.

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[11] The *Adair* decision refers to this provision by its then-existing codification, 25 U.S.C. § 564m.

[12] In *Kimball I* (*Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974)), the court had determined that the treaty reservation of the exclusive right to fish within the Reservation "include[d], in addition, a grant of exclusive hunting and trapping rights." *Adair*, 723 F.2d at 1409.

Adair, 723 F.2d at 1412 (additional citations omitted) (emphasis added). The court's repeated citation of the provision disclaiming intent to abrogate water rights demonstrates that the provision was central to the court's holding. Such provision overcame the general principle that sales of reservation land to non-Indians are intended to "make perfect title to purchasers," *Ash Sheep Co. v. United States*, 252 U.S. 159, 165-66 (1920), so that no tribal property rights are retained on conveyed lands.

Contrary to the arguments of the United States and the Tribe, the holding in *Adair* does not support the assertion that reserved water rights for hunting and fishing would survive allotment and opening of a reservation to non-Indian homesteading. While a quarter of the Klamath Reservation had been allotted, 723 F.2d at 1398, with some allotments later sold to non-Indians, the Reservation had never been opened to homesteading. Thus, the *Adair* court never had occasion to determine whether an act opening a reservation to homesteading would preserve water rights for hunting and fishing if such act lacked an express reservation of water rights analogous to that in the Termination Act. Moreover, the holding in *Adair* that water rights were retained for hunting and fishing throughout the terminated reservation was partially based on an earlier decision holding that the Termination Act preserved hunting and fishing rights on all former reservation lands, including allotments that had been earlier conveyed to non-Indians.

In the earlier case, *Kimball v. Callahan*, 590 F.2d 768 (9th Cir. 1979) (*Kimball II*) the court distinguished the holding in *Puyallup III* that fishing rights implied from the reservation of lands for a tribe's exclusive use are lost upon sale of allotments to non-Indians, citing the provisions in the Klamath Termination Act that preserved hunting and fishing rights "on the lands constituting the ancestral Klamath Indian Reservation." *Id*. at 774. In short, the court concluded that the Tribe retained hunting and fishing rights on *all* former reservation lands, with no distinction between hunting rights on former allotments and hunting rights on lands acquired

through the Termination Act, other than to note that on private lands the hunting right would be non-exclusive. *Id*. The *Kimball II* holding explains the subsequent holding in *Adair* recognizing instream flows throughout the ancestral reservation without regard to land ownership, because "even where the Tribe transfers the land to which the hunting and fishing water rights might be said to be appurtenant, it is the Tribe and its members, not some third party, that retains the right to hunt and fish and needs water to support that right." 723 F.2d at 1418 n.31. Because the opening of the Coeur d'Alene Reservation lacks any provisions similar to those in the Klamath Termination Act preserving hunting and fishing rights on former tribal lands, the reasoning of the *Adair* court is inapplicable here.

Because *Adair* applied provisions unique to the Termination Act, the decision in *Blake v. Arnett*, 663 F.2d 906 (9th Cir. 1981), provides better guidance on whether rights implied from the primary purpose of a reservation survive the opening of the reservation to homesteading. *Blake* addressed the Klamath River Indian Reservation in California. The Reservation, which extended "one mile in width on each side of the Klamath river for a distance of approximately 20 miles up river," was clearly set aside for the purpose of providing fishing access to the Klamath River, although the Executive Order creating the Reservation made no mention of fishing rights. *Id*. at 911. Earlier litigation had held that the right to fish was implied from the purposes of the Reservation. *Arnett v. Five Gill Nets*, 121 Cal. Rptr. 906, 911 (Ct. App. 1975).

Despite the clear tie between the implied fishing right and the primary purpose of the Reservation, the court held that once the reservation was allotted, and surplus lands opened to homesteading, the Tribe's right to use the lands for the reservation's fishing purpose was extinguished. 663 F.2d. at 910. In so holding, the court rejected the tribe's assertion that it retained "some interest in the lands now held" by non-Indians, whether in the "form of an equitable servitude" or other encumbrance. *Id*.

Blake is dispositive. Once the twelve streams on the Coeur d'Alene Reservation were alienated to homesteaders, the Tribe lost the right to use those lands to fulfill the purposes of the Reservation, a fact the United States and the Tribe do not dispute. [13] If the Tribe lost the right to use the stream bed (which is a critical part of fish habitat) to fulfill reservation purposes, it likewise lost any water right implied by those same purposes. If anything, this principle was affirmed in *Adair*. The retention of a fishing right on former reservation lands meant those lands could still be used to fulfill the reservation's hunting and fishing purposes. But, "[w]here the Tribe transfers lands without reserving the right to hunt and fish on it, there is no longer any basis for a hunting and fishing water right." *Adair*, 723 F.2d at 1418 n.31.

In short, a water right may be implied to fulfill reservation purposes on alienated lands only where the Tribe retains the right to enter and use the place of use for one of the reservation's primary purposes. Nothing in *Adair*, *Anderson* or *Walton* suggests that retention of a tribal right to fish in a downstream waterway reserves all upstream fish habitat, and associated water rights, for the Tribe's use. To so hold would essentially reverse the implied-reservation-of-water doctrine to imply a right to use underlying land based on a reservation of water rights, rather than implying a right to use water based on a reservation of land.

The remaining cases cited by the United States and the Tribe in support of instream flow water rights on non-tribal lands are distinguishable for the same reasons discussed in the State's response brief in Appeal Nos. 45382 and 45383, and are only addressed summarily here. To

[13] U.S. Resp. Br. at 32 ("the instream flow rights claimed here are not based on any purported right to fish on private land. These rights are claimed to support fish populations harvested by the Tribe on tribal lands only"); Tribe Resp. Br. 38 ("this case does not involve issues related to a right of access or any other property interest on non-Indian land. As discussed above, the Tribe claims a non-consumptive use right to maintain instream flows in water that flows over non-Indian land to support fish habitat for the fish the Tribe harvests on Tribal land within the Reservation").

start, reliance on *Kittitas Reclamation Dist. v. Sunnyside Valley Irrig. Dist.*, 763 F.2d 1032 (9th Cir. 1985), is misplaced. The decision upheld a federal district court's retained authority under a prior consent decree to order the temporary release from a federal irrigation project to prevent dewatering of 60 salmon redds. *Id*. at 1033-35. No reserved water rights were recognized or awarded.

Arizona v. California, 376 U.S. 340, 344-45 (1964), does not support the award of water rights on non-tribal lands. The Court awarded water rights for the Cocopah Indian Reservation, a portion of which was two miles from the Colorado River, but, another part of the reservation was "bordered on the west by the meander line of the Colorado River as shown by a public land survey made in 1874." R. 2938 (Solicitor Opinion); R. 3495 (plat showing Reservation bordering Colorado River meander line). Moreover, the place of use, unlike here, was held by the United States in trust for the tribe.

In Dep't. of Ecology v. Yakima Reservation Irrig. Dist., 850 P.2d 1306 (Wash. 1993), (the appeal from the Acquavella Adjudication), the court recognized a reservation of water rights for fish habitat on off-reservation lands, but such recognition was the result of an agreement among "[a]ll the parties to this litigation that the Yakima Indians . . . were entitled to water for the preservation of fishing rights." *Id*. at 1317. Also, the Tribe retained a servitude allowing it to enter the place of use by virtue of a treaty right to fish at all usual and accustomed places. *Winans*, 198 U.S at 381.

The United States' and Tribe's repeated references to this Court's decision in *Joyce Livestock Co. v. United States*, 144 Idaho 1, 156 P.2d 502 (2007), do not support their assertion that use of the water by fish eventually harvested by the Tribe is a sufficient basis for a reserved water right in streams not owned by the Tribe. In *Joyce Livestock* the Court found that ranchers could hold water rights on lands not owned by them based on the fact that their cattle used the

water. But *Joyce Livestock* is distinguishable for two reasons: first, the ranchers owned the cattle that were using the water. Here, the Tribe does not own the fish. The tribal property interest in the fish ceases once those fish leave tribally-owned lands, as demonstrated by the holding in *Montana v. United States*, 450 U.S. at 561, that the Crow Tribe had no legal right to prevent the taking of wildlife on non-Indian lands within the reservation. Second, the ranchers in *Joyce Livestock,* while not the owners of the federal lands where water use was occurring, had a right to enter and use the lands by means of a federal grazing permit. Here, the United States and the Tribe admit they do not possess the right to enter and use the place of use for these twelve water rights. U.S. Resp. Br. 32 ("the Tribe makes not claim of a right to fish on non-tribal lands").

Finally, the Ninth Circuit's holding in *John v. United States*, 720 F.3d 1214 (9th Cir. 2013), suggested that reserved water rights could exist outside the bounds of a federal reservation in Alaska, but no water rights were awarded or recognized in that case. *John* addressed the validity of a federal regulation implementing the Alaska National Interest Lands Conservation Act, 94 Stat. 2371 (Nov. 12, 1980) (ANILCA). The regulation defined the scope of "public lands" in Alaska to include appurtenant reserved water rights. The Court approved the agencies' determination that under the reserved water rights doctrine "appurtenant" waters "included "all navigable and non-navigable water within the exterior boundaries of the [land units] and on inland waters adjacent to the exterior boundaries of the [land units]" 720 F.3d at 1222 (brackets in original). Because the regulatory definition of "public lands" to include appurtenant waters was used only to determine the scope of a subsistence hunting priority for rural Alaska residents, and had no impact on other water users, the court had no occasion to apply the Supreme Court's admonishment in *United States v. New Mexico*, 438 U.S. 696, 700-01 (1978), requiring "careful examination" of purpose and need before implying a reservation of water. The regulation at issue simply assumed "all" waters were reserved. *John*, 720 F.3d at

1222. And, the usefulness of the court's holding for determining the scope of reserved water rights is questionable at best, given the following admission:

> [P]revious applications of the federal reserved water rights doctrine have focused on the amount of water needed for a specific federal reservation, rather than the locations of water sources that might generally be needed for subsistence living from many such reservations. We, and perhaps the Secretaries, failed to recognize the difficulties in applying the federal reserved water rights doctrine in this novel way, and in retrospect the doctrine may provide a particularly poor mechanism for identifying the geographic scope of ANILCA's rural subsistence priority management when it comes to water.

720 F.2d at 1226.

More importantly, *John* dealt with an unqualified reservation of federal lands, with no history comparable to the Coeur d'Alene Reservation, by which reserved lands were alienated to homesteaders or otherwise sold in fee simple. The presence of such expressions of intent to extinguish tribal interests in ceded or conveyed lands make *John* inapplicable. This is amply demonstrated by the fact that in *John*, the Ninth Circuit readily implied a right to exercise federal authority over off-reservation water resources to benefit the purposes of the reservation. But, the same court had refused to do so in the context of Indian reservations. In *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006), the Tribe asserted that the United States had violated its trust obligations to the Tribe by permitting a gold mine on former tribal lands that had affected the quantity and quality of water used by the Tribe. The Tribe asserted that in its agreements with the Tribe, "the government has committed itself to specific fiduciary obligations in the management of water resources existing off of the Reservation." *Id*. at 812. The court refused to imply "a duty to regulate third-party use of non-Indian resources for the benefit of the Tribes," because "nowhere do we find the government 'unambiguously agreeing' to manage off-Reservation resources for the benefit of the Tribe." *Id*. at 812-13.

Gros Ventre confirms the central premise of the State's appeal: when title to lands is conveyed to non-Indians, the Court cannot *imply* the reservation of a right to preserve natural resources on such lands for the Tribe's benefit. Such a reservation of rights must be expressed unambiguously. Here, no such right was expressed, and water rights for the purpose of protecting fish habitat must be disallowed for all places of use not held in trust for the Coeur d'Alene Tribe.

III.
CONCLUSION

The State requests that this case be remanded to the district court with an order to disallow all claims for reserved water rights for hunting and fishing purposes. In the event this Court denies such relief, the State requests, alternatively, that this case be remanded to the district court with an order to disallow all instream flows on those twelve non-navigable streams within the Reservation that flow entirely, or primarily, through non-Indian fee lands, as identified in footnote 7 herein, with remand for additional consideration as to the applicability of such holding with regard to Claim Nos. 93-7469 and 93-7470 for fish habitat water rights in Hangman Creek.

RESPECTFULLY SUBMITTED this 21st day of May, 2018.

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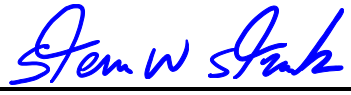

STEVEN W. STRACK
Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May, 2018, I caused to be filed with the Supreme Court by hand-delivery and email the foregoing documents, and caused copies of the same to be served by U.S. Mail and email to the persons listed on the cover page(s).

STEVEN W. STRACK
Deputy Attorney General

Addendum

United States v. Anderson, No. 72-cv-3643

Memorandum Opinion and Order

(E.D. Wash., July 23, 1979)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

SPOKANE TRIBE OF INDIANS,

Plaintiff-in-Intervention,

-vs-

BARBARA J. ANDERSON, et al,

Defendants.

No. 3643

MEMORANDUM OPINION AND ORDER

The United States brought this action on its own behalf and as trustee for the Spokane Tribe of Indians to adjudicate the rights in and to the waters of Chamokane Creek and its tributaries. The Court permitted the Spokane Tribe to intervene as a plaintiff. Defendants include the State of Washington in its governmental and proprietary capacities and all other persons and corporations that claim an interest in the waters of Chamokane Creek, its tributaries, or its groundwater basin.[1/] Jurisdiction lies in this Court under 28 U.S.C. §1345.

All parties to the litigation claim water in the

1/ In this opinion, the term "Chamokane basin" is used below to refer to the entire system, including the creek, its tributaries, and its ground water basin.

Sec. 34, T28N, R39E	NE 1/4, E 1/2 SE 1/4 T1012	7/16/45	15
Sec. 21, T29N, R40E	Lots 5 & 7, E 1/2 SW 1/4, E 1/2 SE 1/4 T 1001	2/2/42	20
Sec. 31, T29N, R40E	NW 1/4, W 1/2 NE 1/4 T1001	2/2/42	110
Sec. 2, T27N, R39E	Lots 6 & 9, NE 1/4 NW 1/4, S 1/2 NW 1/4, NW 1/4 SW 1/4, T 1001	2/2/42	48

In conclusion, this Court recognizes reserved water rights for irrigation of lands within the Chamokane basin on the Spokane Indian Reservation in the following amounts. The Tribe has a reserved right to a maximum of 23,694 acre-feet of ground or surface water from the basin each year for irrigation of the 7,898 irrigable acres with a priority date of August 18, 1877, the date of the creation of the reservation. For the 562 reacquired irrigable acres within the basin, the Tribe has a reserved right to a maximum of 1,686 acre-feet of water each year with a priority date of the date of reacquisition.

2. Reserved Water Rights for Fishing

Plaintiffs also assert a reserved right to sufficient water to preserve fish in the Creek. They therefore claim that one of the purposes for creating the Spokane Indian Reservation was to insure the Spokane Indians access to fishing areas and to fish for food. See, e.g., United States v. Winans, 198 U.S. 371 (1905).

The Court finds that maintenance of the creek for fishing was a purpose for creating the reservation. The United States acknowledged the importance of Chamokane Creek to the Spokane Indians by setting the eastern boundary of the reservation at the eastern bank of the creek, thus in-

cluding the breadth of the waterway within the reservation. Fish remain a staple food in the diet of the Spokane Indians. The Spokanes have reserved the exclusive right to take fish from the part of Chamokane Creek contained within the reservation, and many Indians catch and use the native trout as a food source.

The Court therefore holds that the Tribe has the reserved right to sufficient water to preserve fishing in Chamokane Creek.

The Court finds that the quantity of water needed to carry out the reserved fishing purposes is related to water temperature rather than simply to minimum flow. The native trout cannot survive at a water temperature in excess of 68°F. The minimum flow from the falls into Lower Chamokane Creek which will maintain the water at 68°F varies, but is at least 20 cfs. The Court therefore holds that the plaintiffs have a reserved right to sufficient water to maintain the water temperature below the falls at 68°F or less, provided that at no time shall the flow past the falls be less than 20 cfs.

Although the usual priority date for reserved water rights is the date of the creation of the reservation, the priority date for the water reserved for fishing uses arguably is even earlier. The Spokane Indians have used this creek for fishing purposes since "time immemorial," and therefore they claim a reserved water right with a priority date of "time immemorial."

The priority date for reserved water for fishing at the latest is the date of the creation of the reservation, and the Court need not rule on whether the priority date is "time immemorial." Under either priority date, the Tribe's reserved water rights for fishing uses are superior to any