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BEFORE THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re CSRBA	Subcase No. 91-7755, *et al.*
Case No. 49576	**MEMORANDUM IN SUPPORT OF HECLA'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW, Hecla Limited ("Hecla"), by and through its attorneys of record, Barker Rosholt and Simpson LLP, and submits this memorandum in support of Hecla's *Motion for Summary Judgment*. Hecla also joins in the motion filed by the State of Idaho and provides the following additional argument relative to the off-reservation instream flow claims filed by the United States of America on behalf of the Coeur d'Alene Tribe ("Tribe"). A list of the specific instream flow claims for which these arguments are applicable is included as ATTACHMENT A.[1]

INTRODUCTION

The United States' off-reservation instream flow claims seek to impose an environmental servitude on all off-reservation water users that may be tributary to Lake Coeur d'Alene by

[1] By focusing on the United States' claims for off-reservation instream flow claims in this memorandum, Hecla does not concede the validity of any of the other reserved water right claims asserted by the United States.

controlling off-reservation instream flows in order to preserve "fish habitat for fish species harvested within the Reservation." *Notice of Claim* (91-7755). These claims would turn the *Winters* Doctrine on its head. *See, Infra* Standards of Review, Part II.

If approved, the United States' instream flow claims would adversely affect the economic well-being of the entire basin.[2] Hecla is one such water user that will be impacted by these instream flow claims. Hecla has mining properties on tributaries to the Coeur d'Alene River ("CDA River") and associated water rights for mining and milling processes on those properties. The United States has filed instream flow claims in the CDA River Basin with priority dates senior to Hecla's water rights.

STATEMENT OF UNDISPUTED FACTS

I. Formation of the Coeur d'Alene Reservation.

The State of Idaho provides a thorough discussion of the undisputed facts relevant to these proceedings, which is adopted herein. *State Br.* at Part I. In addition, the following summary of undisputed facts is provided.

History shows that the creation of the Coeur d'Alene Reservation was spurred, in large part, due to the discovery of valuable mineral deposits within the aboriginal lands of the Tribe. *Arrington Aff.* Ex. B at 104 ("The one thing that has given them [i.e. the Tribe] trouble has been the fear of losing their homes. They have watched the progress of white settlement in the surrounding county, the discovery of valuable mines, the building of railroads, etc. etc."); *id.* ("It was feared in the early spring that the great rush to the Coeur d'Alene gold mines would cause considerable trespassing upon their reserve").

[2] Hecla objected to all off-reservation instream flow claims because of the precedential affect they may have on Hecla's rights and on the local public interest. Therefore, this motion is not confined to the claims made by the United States on the CDA River.

A Reservation for the Tribe was originally created through an 1867 executive order. *Idaho v. United States*, 533 U.S. 262, 265 (2001) ("*Idaho III*"). However, the Tribe was not aware of the 1867 Reservation until 1871 and refused to accept its limited boundaries. *Id.* Thereafter, Congress authorized negotiations with the Tribe in an effort to induce "the tribes 'to abandon their roaming habits and consent to confine themselves within the limits of such reservation or reservations as may be designated for their occupancy.'" *United States v. Idaho*, 95 F.Supp.2d 1094, 1095 (D. Idaho 1998) ("*Idaho I*").[3]

Following negotiations, the United States and Tribe agreed, in 1873, on a Reservation that was comprised of approx. 590,000 acres, *Andrus*, 720 F.2d at 1463, "considerably larger than the 1867 Reservation," *United States v. Idaho*, 210 F.3d 1067 (9th Cir 2000) ("*Idaho II*"). The Tribe agreed to "cede approximately four million acres of aboriginal land to the United States." *Id.*; *Idaho III*, 533 U.S. at 266 ("Following further negotiations, the Tribe in 1873 agreed to relinquish (for compensation) all claims to its aboriginal lands outside the bounds of a more substantial reservation that negotiators for the United States agreed to set apart and secure" "for the exclusive use of the Coeur d'Alene Indians, and to protect ... from settlement or occupancy by other persons"). An 1873 Executive Order from President Grant confirmed the agreed upon boundaries of the Reservation. *Idaho III*, 533 U.S. at 266. Importantly, nothing in the executive

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[3] In 1872 the Tribe submitted a petition to the Commission of Indian Affairs seeking negotiations on a reservation boundary, asserting:

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

Idaho I, 95 F.Supp.2d at 1103 (emphasis added).

order identified fishing or fish habitat (whether on or off reservation) as a purpose of the Reservation.[4] The 1873 agreement required approval from Congress "before it became binding on the parties." *Id.*

The 1873 agreement was never ratified by Congress. In 1885, the Tribe expressed concerned about "white settlement pressure" and contacted the Commission on Indian Affairs requesting confirmation of the 1873 agreement. *Idaho III, supra* at 267; *see also Arrington Dec.* Ex. A (Non-Indian interest in forest lands of northern Idaho predated the 1880s, but accelerated with the emergence of mining towns along the South Fork of the Coeur d'Alene River); *Arrington Aff.* Ex. B at 104 ("The one thing that has given them [i.e. the Tribe] trouble has been the fear of losing their homes. They have watched the progress of white settlement in the surrounding county, the discovery of valuable mines, the building of railroads, etc. etc."); *id.* ("It was feared in the early spring that the great rush to the Coeur d'Alene gold mines would cause considerable trespassing upon their reserve"). Seeking to "extinguish the Tribe's aboriginal title to lands outside of the reservation," Congress authorized additional negotiations in 1887. *Idaho III*, 533 U.S. at 267.

In 1887, the Tribe agreed to cede

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

Id. In return, the Government promised to compensate the Tribe, and agreed that

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[4] This is not to say that fishing was not important to the Tribe. *Idaho I*, 95 S.Fupp.2d at 1103-04 (discussing the importance of waterways and fishing to the Tribe). The issue here, however, is the intent of the reservation of land for the Tribe in the 1873, 1887 and 1889 agreements. Nothing in any historical documents relating to the treaties and agreements with the Tribe evidence any intent on the part of Congress to set aside land for fishing or fish habitat. Rather, as discussed herein, one primary intent of setting aside the reservation was to allow further development of mineral resources off the reservation – something that would require development of the area's water resources. *Infra.*

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

Id. at 267-68. The 1887 agreement was not "binding on either party until ratified by Congress." *Id.* As with the 1873 agreement, nothing in the 1887 agreement stated or implied that fishing or fish habitat was a purpose of the reservation.

The reservation identified in the 1873 and 1887 agreements included "the vast majority of the Lake" and valuable mineral deposits in the area. *Idaho II* at 1070; *Idaho III*, 533 U.S. at 268 ("the reservation appears to embrace all the navigable waters of Lake Coeur d'Alene, except a very small fragment"). While the 1887 agreement was pending before Congress, the United States received "pressure to open up at least part of the reservation to the public (particularly the Lake)." *Idaho II* at 1070. This non-agricultural land was very valuable to white settlers for its timber and mineral deposits. *Arrington Aff.* Ex. B at 106 ("There is great eagerness on the part of the whites to locate mining claims on the mineral portion of the reserve ... and we found mining claims numerously staked off ... and in some cases notices posted"); *id.* at 106-07 ("These mining prospectors are constantly on this portion of the reserve, and it seems next to impossible to keep them off"). These mineral deposits had little value to the Tribe. *See Id.* at 106.

Congress authorized further negotiations with the Tribe. *Arrington Aff.* Ex. D (January 23, 1888 Senate Resolution directing the Secretary of Interior to consider whether "it is advisable ***to throw any portion of such reservation open to occupation and settlement under the mineral laws of the United States***") (emphasis added); *Idaho II, supra* at 1071; *see also Idaho III*, 533 U.S. at 269 (The "northern end of said reservation, is valuable and necessary to the citizens of the United States for sundry reasons" including that "It contains numerous, extensive, and

valuable mineral ledges"); *Idaho II* at 1077 (Congress authorized new negotiations in 1889 "with few limitations aside from an instruction to acquire non-agricultural lands").

Following further negotiations, the Tribe agreed, in 1889, to "cede the approximate northern third of its 1873 reservation to the United States" – including the land containing the valuable mineral deposits desired by the white settlers. *Idaho II, supra*; *see also Arrington Aff.* Ex. C ("The commissioners report that they held frequent councils with the Indians, explored the mineral portions of the reservation lying in the northern part thereof, and finally on September 9, 1889, concluded an agreement with the Indians whereby they cede and relinquish to the United States a very considerable portion of their reservation, valuable chiefly for mineral and timber upon terms advantageous as they believe to the Indians and the Government").

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

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

Andrus, 720 F.2d at 1465; *Idaho III*, 533 U.S. at 271.

II. Subsequent Litigation Regarding the Scope of the Reservation.

Issues involving the Coeur d'Alene reservation have been litigated on at least two occasions. In *Idaho v Andrus*, 720 F.2d 1461 (9th Cir. 1983), the Tribe challenged the State of Idaho's use of certain lands that had been acquired from the Tribe in 1908. The patent conveying the land to the State included a condition that "the lands are to be by said state held, used, and maintained solely as a public park ... the title to revert to the United States ... absolutely if the said lands ... shall not be ... so used and maintained by the state." *Id.* When the State "began a

private cottage leasing practice" on the property, the Tribe and United States asserted that the action "violated the condition" of the patent. *Id.* at 1462.

The question before the Court was whether the United States had retained any beneficial interest for the Tribe. *Id.* at 1464. The court discussed, at length, the language necessary to evidence an intent to extinguish a Tribe's interest in lands or diminish the size of a reservation boundary. *See Id.* at 1466 (language such as "cede, surrender, grant, and convey" is "precisely suited to diminish reservation boundaries"). The *Andrus* Court determined that the conditional language of the patent (i.e. that the land would be used as a state park or would "revert to the United States") evidenced an intent to retain a beneficial interest on behalf of the Tribe.

In another case, the Supreme Court addressed the scope of the Reservation. *Idaho III*, 533 U.S. 262. That case involved competing claims by the State of Idaho and United States to title to the submerged lands of Lake Coeur d'Alene within the Reservation. The State asserted that, since the historical agreements and executive orders were silent as to the submerged lands, they were acquired by the State upon statehood. The United States, however, asserted that Congress intended to reserve the submerged lands for the Tribe. The Supreme Court concluded that the United States had intended to reserve the submerged lands for the Tribe. *Id.* at 281. In doing so, the Supreme Court confirmed that the Tribe agreed to "reduce" their aboriginal lands "and extinguish[] aboriginal title" to lands outside of the Reservation. *Id.* at 276.

STANDARDS OF REVIEW

I. Summary Judgment Standard.

A motion for summary judgment should be granted if the Court determines that there is no genuine issue of material fact based on the pleadings, depositions, admissions and affidavits, and the moving party is entitled to judgment as a matter of law. Idaho R. Civ. P. 56(c); *see also,*

e.g., Harris v. State Dept. of Health, 123 Idaho 295 (1992); *Farmers Insurance Co. v. Brown*, 97 Idaho 380 (1976).

Although a motion is construed in favor of the nonmoving part, the nonmoving party may not rest upon mere allegations or denials to avoid summary judgment. *McCoy v. Lyons*, 120 Idaho 765, 770 (1991); *Theriault v. A.H. Robbins Co.*, 108 Idaho 303, 306-07 (1985). Immaterial issues of fact do not preclude the granting of summary judgment. *J.R. Simplot Co. v. Dosen*, 144 Idaho 611 (2006). If the moving party asserts that there is no genuine issue of material fact, the burden shifts to the nonmoving party to "produce evidence by way of deposition or affidavit to contradict the assertions of the moving party and establish a genuine issue of material fact." *McCoy, supra* at 770. Conclusory assertions unsupported by specific facts do not create a genuine issue of material fact. *Mareci v. Coeur d'Alene School Dist. No. 271*, 150 Idaho 740 (2011). Mere speculation or a scintilla of evidence is not sufficient to create a genuine issue of material fact. *McCoy*, 120 Idaho at 769; *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84 (2000). In the absence of genuine disputed issues of material fact, only questions of law remain, and the Court exercises free review. *Stuard v. Jorgenson*, 150 Idaho 701 (2011).

II. *Winters* Doctrine and the Interpretation of Indian Treaties.

The United States' *Notices of Claim* assert, as a basis for reach claim, "the doctrine of federal reserved water rights articulated by the United States Supreme Court in *Winters v. United States* ... and its progeny, as well as the operative documents and circumstances surrounding the creation of the Coeur d'Alene Reservation."[5]

In *Winters*, the question before the Court was whether Congress had intended to reserve irrigation water when it set aside the Fort Belknap Indian Reservation. 207 U.S. at 564. Although

[5] Each of the Notices of Claim for the various off-reservation instream flow claims identify the "Basis of Claim" as the *Winters* Doctrine.

the treaty and supporting documents were silent as to irrigation water, the Court held that Congress had intended to reserve water when it set aside the reservation in order to allow the tribes to "become a pastoral and civilized people" on land that was described as "arid and without irrigation." *Id.* at 576. According to the Court, "it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste – took from them the means of continuing their old habits, yet did not leave them the power to change to new ones." *Id.* at 577. From this decision, the *Winters* Doctrine was established, whereby a Court can imply an intent to reserve water rights incidental to the reservation of land.

The *Winters* Court also addressed the interpretation of agreements and treaties with Indians, holding that in the "interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians." *Id.* at 576. This is primarily because "the Indians were [not] alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the Government." *Id.* at 577; *see also Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) (legal ambiguities in treaties are "resolved to the benefit of the Indians"); *Andrus*, 720 F.2d at 1464 ("The general rule is that doubtful expressions are to be resolved in favor of the weak and defenseless people who are wards of the nation, dependent upon its protection and good faith").

The *Winters* Doctrine, however, is not an open door that allows the United States to demand all the water they want years later. Indeed, "even though 'legal ambiguities are resolved to the benefit of the Indians,' courts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal, clearly runs counter to a tribe's later claims." *Oregon Dept. of*

Fish & Wildlife, 473 U.S. at 774; *Andrus*, 720 F.2d at 1464 ("the general rule [of interpretation] does not command a determination that reservation status survives in the face of congressionally manifested intent to the contrary"). "Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943); *see also United States v. Choctaw Nation*, 179 U.S. 494 (1900) ("the Court cannot employ any "notion of equity or general convenience, or substantial justice," to "incorporate into an Indian treaty something that was inconsistent with the clear import of its words").

The *Winters* Doctrine has been exercised only within the narrowest boundaries and only when necessary to secure the "primary purpose" of the reservation of land. *Cappaert v. United States*, 426 U.S. 128, 139 (1976) ("In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters ***are necessary to accomplish the purposes for which the reservation was created.***") (emphasis added). As the Supreme Court explained in *United States v. New Mexico*, 438 U.S. 696, 701 (1978):

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

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

"Careful examination" of a claim for a federal reserved water right is necessary to confirm that the claimed water is a "primary use" and is "necessary to fulfill the very purposes" of the reservation of land. *New Mexico*, 438 U.S. at 699. However, "where water is only valuable for a secondary use of the reservation ... ***there arises the contrary inference*** that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator." *Id.* (emphasis added).

III. SRBA Decision on Nez Perce Tribe's Off-Reservation Instream Flow Claims.

The Snake River Basin Adjudication ("SRBA") has rejected off-reservation instream flow claims filed by the United States on behalf of an Indian tribe. *See Order on Motions for Summary Judgment of the State of Idaho, Idaho Power, Potlatch Corporation, Irrigation Districts and other Objectors who Have Joined and/or Supported the Various Motions*, Cons. Subcase No. 03-10022 (Nov. 10, 1999) (the "*Nez Perce Order*").

Those proceedings involved off-reservation instream flow claims, with the asserted bases being a treaty with the Nez Perce Tribe. There, the Nez Perce agreed to cede all "right, title and interest" in "their aboriginal grounds." *Nez Perce Order* at 27. Unlike the agreements at issue here, however, the Nez Perce Treaty did discuss fishing and fishing rights:

> The exclusive right of taking fish in all streams where running through or bordering said reservation is secured to the Indians; as also the right of taking fish at all usual and accustomed places in common with the citizens of the territory.

Id. Relying on this language, the United States filed off-reservation instream flow claims to protect fish habitat. *Id.* at 12-13; *see also id.* at 30 ("This Court is being asked to view the history

of the Treaty, the Nez Perce culture, the Treaty negotiations, and then imply that the Nez Perce reserved a water right as a necessary component of their reserved fishing right or to otherwise give effect to that right"). The United States and Nez Perce Tribe asserted that "a water right must necessarily be implied to give effect to the Tribe's off-reservation fishing right." *Id.* at 37.

In rejecting the United States' off-reservation instream flow claims, the SRBA Court relied on the Supreme Court decision in *Washington v. Passenger Vessel Fishing*, 443 U.S. 658 (1979). There, reviewing the "in common with" language of a similar treaty, the Court concluded that both tribes and "non-treaty fishermen" "have a right, secured by treaty to ***take a fair share of the available fish***. That, we think is what the parties to the treaty intended when they secured to the Indians the right of taking fish in common with other citizens." *Nez Perce Order* at 31 (emphasis added). The SRBA Court rejected the notion that a right to fish "in common with" non-treaty fishermen created any water right:

> Nowhere in the Supreme Court's interpretation of the language is a water or other property right greater than an access or allocation right mentioned for purposes of giving effect to the fishing right, or as being within that scope of the fishing right. In fact, the entire decision is a remedy predicated on the assumption that the fluctuations in the fish population are completely out of the control of the parties.

Id. at 33. This is because the "off-reservation fishing right does not guarantee a predetermined amount of fish, establish a minimum amount of fish, or otherwise require maintenance of the status quo." *Id.*

> Simply put, the Nez Perce do not have an absolute right to a predetermined or consistent level of fish. In times of shortages, the Supreme Court noted that it may be necessary to reallocate proportionate shares to meet the subsistence or ceremonial needs of the Tribe. Consequently an implied water right is not necessary for the maintenance of the fishing right as it has been defined by the Supreme Court.

Id.; *see also id.* at 36, *citing Nez Perce Tribe v. Idaho Power Co.*, 847 F.Supp. 791 (D. Idaho 1994) ("the Tribe does not have an absolute right to the preservation of the fish runs in their original 1855 condition, free from all environmental damage caused by the migration of increasing numbers of the settlers and the resulting development of the land"). The SRBA Court concluded that "Based on the scope of the Nez Perce fishing right, there is no legitimate basis from which to infer that a water right is necessary to the preservation of that limited right. The Nez Perce do not have anything akin to a fish propagation right." *Id.* at 37.

The SRBA Court further discussed the intent of the United States in making the reservation.

> The purpose of the Stevens Treaties [including the Nez Perce Treaty] was to resolve the conflict which arose between the Indians and the non-Indian settlers as a result of the Oregon Donation Act of 1850 which vested title to land in settlers. It is inconceivable that the United States would have intended or otherwise agreed to allow the Nez Perce to reserve instream flow off-reservation water rights appurtenant to lands intended to be developed and irrigated by non-Indian settlers. ... it defies reason to imply the existence of a water right that was both never intended by the parties and inconsistent with the purpose of the Treaty."

Id. at 38. As such, the United States' off-reservation instream flow claims were rejected.

LEGAL ARGUMENT

I. Since the Protection of Fish Habitat was Not a "Primary Purpose" of the Reservation, there can be no Federally Reserved Water Rights for Off-Reservation Instream Flows.

A federally reserved water right may only be established when it is "necessary to fulfill the purpose of the reservation," such that "without the water the purposes of the reservation would be entirely defeated." *New Mexico, supra.* It requires a reservation of land to which the water is appurtenant. A review of the historical record relating to the Coeur d'Alene Reservation defeats the United States' claims to off-reservation instream flows.

The Coeur d'Alene Reservation was not established to protect fish habitat off the reservation. Not a single part of the historical record supports this claim. Rather, the historical documents demonstrate that the reservation was prompted by a desire of the Tribe to set aside land that would be protected from white settlement. *See, supra* Statement of Facts, Part I. There was no expression in any of the agreements or supporting documents that the purpose of the Reservation was to protect fish habitat in the areas ceded by the Tribe.

At the time, the Tribe was shifting to a more agrarian lifestyle. As stated in its 1872 petition requesting negotiations, the Tribe expressed a desire to increase agricultural practices and concluded that fishing would only be necessary for subsistence "for a while yet." *Idaho I*, 95 F.Supp.2d at 1103; *Idaho III*, 533 U.S. at 266 ("When the Tribe petitioned the Commissioner of Indian Affairs a second time, it insisted on a reservation that included key river valleys because "we are not as yet quite up to living on farming" and "for a while yet we need have some hunting and fishing"); *see also Idaho II, supra* (the 1887 negotiations which sought to acquire non-agricultural lands from the Tribe for the purpose of mineral and timber development).

Perhaps most telling is that neither the 1873, 1887 nor 1889 agreements makes any reference to tribal fishing activities or to fish habitat and certainly make no mention of fish habitat off the Reservation. At the time, it was common practice for treaties and agreements with Indian tribes in the northwest to discuss fishing – both on and off-reservation. *See, Puyallup Tribe v. Dept. of Game*, 391 U.S. 392 (1968) (Treaty in question "guaranteed the right to fish 'at all usual and accustomed places, in common with the citizens' of Washington"); *United States v. Winans*, 198 U.S. 371 (1905) (same); *Nez Perce Order, supra* (same). Had it truly intended to grant an implied water right relative to fish habitat protection – such as the off-reservation instream flow claims at issue here – the United States would have at least mentioned fishing in

the agreements with the Tribe. *See Winters, supra* (granting a federally reserved water right for irrigation where the treaty specifically mentioned that the Reservation was to be a place for the tribe to "become a pastoral and civilized people").

It is true that tribal fishing has continued. However, the mere fact that fishing continues does not mean that fishing or fish habitat protection were "primary purposes" of the reservation – particularly given the absence of any reference to fishing or fish habitat in the agreements and executive orders.

The *Winters* Doctrine only authorizes "that amount of water necessary to fulfill the purpose of the reservation, ***no more***." *New Mexico, supra* (emphasis added). It is a limited doctrine – refusing to allow the United States or the Tribe to rewrite the original agreements to "remedy a claimed injustice," *Choctaw Nation of Indians*, 318 U.S. at 432, or "incorporate into an Indian treaty something that was inconsistent with the clear import of its words," *Choctaw Nation*, 179 U.S. 494. Here, the words of the agreements do not evidence any intent to preserve off-reservation fish habitat. Rather, the intent was to preserve a land for the Tribe, free from interference from white settlers, including mineral prospectors. *See, supra* Statement of Facts, Part I. Given the clear intent of the agreements, "It is inconceivable that the United States would have intended or otherwise agreed to allow the [Tribe] to reserve instream flow off-reservation water rights appurtenant to lands intended to be developed" by white settlers. *Nez Perce Order* at 38.

The Tribe was required to relinquish all of its "right, title and claim" to off-reservation lands. They did so, and were compensated. *Andrus*, 720 F.2d at 1465. There was no mention of fishing or fishing habitat in either the agreements, executive orders or congressional approvals.

Supra. "It defies reason," therefore, "to imply the existence of a water right that was both never intended by the parties and inconsistent with the purpose of the Treaty." *Nez Perce Order* at 38.

To hold that an agreement that is otherwise silent as to fishing and fish habitat somehow implies a reserve water right would be akin to rewriting the agreements – an act that has been rejected by the Courts. *Supra*. Since fishing was not a "primary purpose" of the reservation, the *Winters* Doctrine cannot be used as a basis to claim an off-reservation instream flow right for fish habitat. Such claims should be rejected by the Court.

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

As to the Tribe's off-reservation interests, the intent of the agreements is crystal clear – the Tribe agreed to cede all interests that it might have outside of the reservation. The 1887 agreement provided that the Tribe would cede

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

Idaho I, 95 F.Supp.2d at 1096. The 1891 ratification recognized that:

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

Andrus, 720 F.2d at 1465. This language is absolute. *See Andrus*, 720 F.2d at 1466 (referring to nearly identical language as "precisely suited to diminish reservation boundaries"). There is no limitation or exception to its scope. *See Id.* ("The Tribe agreed to cede approximately four million acres of aboriginal land to the United States. In 1891 the Tribe formally ceded to the United States the tribal aboriginal land ... Appropriations bills were passed to compensate the Tribe and its members for the land ceded"). There is no evidence in the record that either the

United States or the Tribe intended to limit the scope of these agreements as to off-reservation rights, titles and/or claims. Quite simply, the Tribe agreed to cede "**all** right, title and claim" outside the Reservation.

The claims for off-reservation instream flow rights fly in the face of these agreements. Notwithstanding the agreement to cede "all right, title and claim" outside of the reservation, the United States now claims an off-reservation right to control stream flows for "fish habitat for fish species harvested within the Reservation." The attempt to tie off-reservation instream flows to actions "within the Reservation" cannot override the fact that the Tribe ceded "all right, title and claim" outside of the reservation. If anything, tying such a claim to actions "within the Reservation" is an acknowledgement that the Tribe's off-reservation rights were ceded in the agreements. Indeed, the historical documents describe the Tribe's primary goal in ceding its aboriginal lands being to create a reservation free from interference with white settlers. Had the United States intended to preserve any off-reservation "right, title and claim" – such as an off-reservation instream flow claim – it could have, and should have, done so through the agreements. *See, for example, Puyallup Tribe*, 391 U.S. 392 (Treaty in question "guaranteed the right to fish 'at all usual and accustomed places, in common with the citizens' of Washington"); *Winans*, 198 U.S. 371 (same); *Nez Perce Order, supra* (same). As it stands, however, the agreements are completely silent as to any fishing rights or fish habitat (either on or off-reservation). Yet, fishing and/or fish habitat were not even mentioned in the agreements. *See Winters, supra* (granting a federally reserved water right for irrigation where the treaty specifically mentioned that the Reservation was to be a place for the tribe to "become a pastoral and civilized people").

Even if, however, the Court were to somehow construe the historical record as recognizing or preserving some right of the Tribe to fishing, the *Nez Perce Order* clarifies that such a right does not give rise to a claim for off-reservation instream flows to protect habitat. Rather, such language would only recognize the right to "take a fair share of the available fish." *Nez Perce Order* at 31; *id.* at 33 (an "off-reservation fishing right does not guarantee a predetermined amount of fish, establish a minimum amount of fish, or otherwise require maintenance of the status quo"). As such, "there is no legitimate basis from which to infer that a water right is necessary to the preservation of that limited right" – the United States does not have "anything akin to a fish propagation right." *Id.* at 37.

Since the Tribe ceded "all right, title and claim" outside of the Reservation, there can be no off-reservation instream flow fish habitat right reserved under the agreements.

III. In Negotiating with the Tribes, the United States Understood that Non-Tribal Settlers Would Rely on the Tribe's Agreement to Cede "All Right, Title and Claim" Outside of the Reservation for Mineral Development.

In light of the Tribe's agreements to cede "all right, title and claim" outside of the reservation, and Congress' confirmation of those agreements, settlers developed the once aboriginal area. Beginning in the 1860's white settlers were developing mineral deposits throughout the once aboriginal lands. *See Arrington Aff.* Ex. B at 104 ("The one thing that has given them [i.e. the Tribe] trouble has been the fear of losing their homes. They have watched the progress of white settlement in the surrounding county, the discovery of valuable mines, the building of railroads, etc. etc."); *id.* ("It was feared in the early spring that the great rush to the Coeur d'Alene gold mines would cause considerable trespassing upon their reserve"). In the 1880's, the Tribe became concerned with the mineral development interfering with its lands and pushed for negotiations to establish a reservation. *Idaho III, supra* at 267. After the 1887

agreement, Congress received pressure from white settlers seeking further mineral development opportunities and authorized further negotiations to determine whether additional Tribal land should opened up for mineral development under the "mineral laws of the United States." *Idaho II, supra* at 1070. The "mineral laws of the United States" included the Mining Act of 1866.

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

legislation and judicial decisions of the arid land states, as the test and measure of private rights in and to the nonnavigable waters on the public domain'").

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

When considering the facts, the intent and expectations of the Tribe and United States are clear. Given that (i) the mining Acts specifically recognized mineral development and associated water needs, (ii) the Tribe was concerned over the encroachment of white settlers seeking mineral development on aboriginal lands, and (iii) the Tribe's subsequent agreement to cede "all right, title and claim" to lands outside of the reservation, it cannot be said that either the Tribe or the United States intended to maintain any off-reservation right to demand a certain stream flow for fish habitat. Such an environmental servitude was never considered and the settlers of the area developed the mineral deposits in reliance on the agreement that all "right, title and claim" outside of the reservation was ceded by the Tribe.

CONCLUSION

The United States' attempt to assert off-reservation instream flow rights for fish habitat is not supported by any historical evidence. The United States' claim to such a right is directly contradicted by the agreement to ceded "all right, title and claim" to lands outside of the

Reservation. These off-reservation instream flow claims put at risk the rights of thousands of Americans who relied on the United States' actions in opening these lands to settlement and mineral development. Therefore, Hecla's summary judgment motion should be granted.

DATED this 21st day of October, 2016.

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ATTACHMENT A

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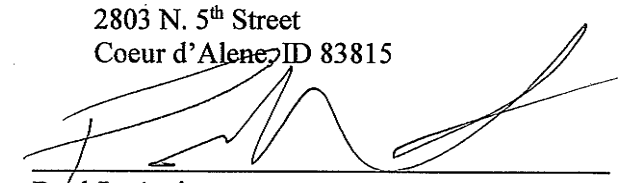

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