

**THE RECENT IDAHO SUPREME COURT RULING ON THE
RESERVED RIGHTS OF THE COEUR D’ALENE
RESERVATION: ANALYSIS OF THE CONSISTENCY OF THE
STATE COURT CASE WITH FEDERAL LAW ON RESERVED
WATER RIGHTS**

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I. INTRODUCTION

On September 5, 2019, by rejecting the application of a strict primary purpose test that would have limited the Coeur d’Alene tribe’s water rights, the Idaho Supreme Court rendered a major decision in the field of Indian water rights.¹

The Coeur d’Alene case was a matter of first impression for the Idaho Supreme Court. Indeed, even if the Idaho Supreme Court has “extensive experience resolving water law matters, including decisions on federal reserved water right claims in the Snake River Basin Adjudication,” the Idaho Supreme Court never had the occasion “to expressly determine whether and to what degree a tribe is entitled to reserved water rights.”²

1. *In re* CSRBA Case No. 49576 Subcase No. 91-7755, 448 P.3d 322, 165 Idaho 517 (2019).

2. Duane T. Mecham, *The Winters Reserved Water Rights Doctrine in the 21st Century: Further Definition Through Litigation*, ROCKY MTN. MIN. L. INST., 65th Annual Proceedings (2019).

Should the homeland purpose theory be used when a court is assessing the reserved water rights of federal Indian reservations? Or should the primary purpose test—that, according to the United States Supreme Court, applies to federal non-Indian reservations—be also applied to federal Indian reservations? This issue has not been decided by the United States Supreme Court yet.

First, this paper will focus on the state of law prior to the Coeur d’Alene decision and will explain the distinction between the homeland purpose theory and the controlling case law’s rule of “primary-secondary” distinction. Then, this paper will take a close look at the Coeur d’Alene decision itself. Finally, this paper will explain why the homeland standard makes sense in the context of Indian reservations.

II. BACKGROUND

Between 1908 and 1978, the United States Supreme Court articulated the “federal implied reserved water rights doctrine” in several decisions.³ According to this doctrine⁴, “when the United States ‘withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.’”⁵

Unlike state water rights, which historically required a diversion of water from a stream, and which today usually require state sanction of some sort, federal reserved rights are not dependent on state approval.

3. Jeffrey C. Fereday & Christopher H. Meyer, *What Is the Federal Reserved Water Rights Doctrine, Really? Answering This Question in Idaho’s Snake River Basin Adjudication*, 52 IDAHO L. REV. 341, 343 (2019) (quoting *United States v. New Mexico*, 438 U.S. 696 (1978) (interpreting the 1899 federal land withdrawal for the Gila National Forest); *Cappaert v. United States*, 426 U.S. 128 (1976) (interpreting the 1952 Proclamation by President Truman that created the Devil’s Hole National Monument); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) (holding that the 1952 McCarran Amendment provided consent to determine in state courts federal reserved water rights held on behalf of Indian tribes); *United States v. Eagle Cty.*, 401 U.S. 520 (1971) (interpreting a 1905 withdrawal of land to create the White River National Forest); *Arizona v. California*, 373 U.S. 546 (1963) (interpreting several treaties that created Indian reservations in Arizona, California, and Nevada, all of which predated 1929, along with several federal land withdrawals for National Recreation Areas, National Wildlife Refuges and National Forests, all of which predated 1955); *Fed. Power Comm’n v. Oregon*, 349 U.S. 435 (1955) (holding that the 1877 Desert Land Act provision making water on public land subject to private appropriation under state law was inapplicable to federal lands reserved for hydroelectric projects); *United States v. Powers*, 305 U.S. 527 (1939) (interpreting an 1868 treaty setting aside a tract of land for the Crow Indians in what is now Montana); *Winters v. United States*, 207 U.S. 564 (1908) (interpreting the 1888 treaty creating the Fort Belknap Indian Reservation)).

4. In this paper, we will refer to it as “the Winters doctrine.”

5. *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1268 (9th Cir. 2017) (citing *Cappaert v. United States*, 426 U.S. 128, 138 (1976); *Winters v. United States*, 207 U.S. 564, 575–78 (1908); and *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 46 (9th Cir. 1981)).

Instead, they spring from federal decisions to reserve federal land for specific purposes, such as national forests, parks, wildlife refuges, and wilderness areas, as well as Indian reservations.⁶

But what does the “purpose” of the reservation exactly mean? And what kind of test should we be using to determine this “purpose”?

A. The *Winters* Case

In May of 1888, the government reserved a tract of land and created the Fort Belknap Reservation.⁷ Neither the agreement with the Indians, nor the act of Congress, ratifying that agreement, mentioned any kind of reservation of the waters of the Milk River and its tributaries for use on the reservation.⁸ Later in time, a few individuals acquired some land under the desert land laws of the United States: “[s]ome of them had appropriated different quantities of water from the West Fork of Milk river, and others from the North Fork of Milk river, and all claim that at the time the waters were appropriated and diverted by them the lands along the bank of said stream above the point of said diversions were unappropriated public lands. Large amounts of money exceeding \$100,000, had been expended by them in diverting the water and in making other improvements on their lands.”⁹ According to these landowners, the reservation was not entitled to any water because the agreement with the Indians and the act of Congress did not expressly reserve any water rights.¹⁰ The Court disagreed.¹¹

Indeed, the Court stated that Congress created the reservation for the purpose of converting the tribe to an agrarian lifestyle.¹² Because the reservation in question would have little value without irrigation, Congress must have intended to reserve water rights for the tribe so that it could develop the reservation land for livable and productive agrarian use.¹³ Therefore, the tribe was entitled to a sufficient amount of water to fulfill the reservation’s purpose, as evidenced by Congressional creation of the reservation.¹⁴ The logic behind the Court’s reasoning was the fact that the agreement between the Indians and the government was a

6. Michael C. Blumm, *Reversing the Winters Doctrine?: Denying Reserved Water Rights for Idaho Wilderness and Its Implications*, 73 U. COLO. L. REV. 173, 174 (2005).

7. *Winters v. United States*, 207 U.S. 564, 575 (1908).

8. *Id.* at 573.

9. *Winters v. United States*, 143 F. 740, 742 (9th Cir. 1906).

10. *Id.*

11. *Id.*

12. *Id.* at 576.

13. *Id.*

14. *Id.*

grant of rights *from* the Indians *and not to* the Indians.¹⁵ Therefore, it was impossible to think that the Indians would have given up the water rights necessary to their own survival.¹⁶ The Court applied the canon of construction under which ambiguities are resolved to the detriment of the drafters and therefore here in favor of the Indians.¹⁷ The Court ruled that the creation of an Indian reservation implies the reservation of water: “The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not, and could not be. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years.”¹⁸ The take-away of the *Winters* case is the fact that the power of the federal government to reserve the waters for use by an Indian reservation and exempt them from appropriation under the state laws cannot be denied.

B. The New Mexico Case

Seventy years after the *Winters* case, the United States Supreme Court considered reserved right claims for a national forest.¹⁹ The Court established its now famous “primary-secondary purpose” distinction, holding that water is impliedly reserved for a reservation’s “primary” purposes; it is not, however, reserved for its secondary purposes.²⁰

Where water is necessary to fulfill *the very purposes* for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress’ express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable *for a secondary use* of the reservation, however, 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.²¹

Because a national forest is a non-Indian federal reservation, one can wonder whether or not the Court’s “primary-secondary purpose” test should be applied to Indian reservations as well. This question has not been decided by the United States Supreme Court yet. And the Idaho Supreme Court addresses this issue for the first time in Idaho in the *Coeur d’Alene* case.

15. *Winters*, 207 U.S. at 578.

16. *See id.*

17. *Winters*, 207 U.S. at 576–77.

18. *Id.* at 577 (citing *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 702 (1899); *United States v. Winans*, 198 U.S. 371 (1905)).

19. *United States v. New Mexico*, 438 U.S. 696 (1978).

20. *Id.* at 702.

21. *Id.* (emphasis added).

III. PRIOR TO THE COEUR D'ALENE DECISION

Without any current ruling by the United States Supreme Court, courts are applying two different theories when assessing the reserved water rights of federal Indian reservations.²² On one side, there is the rule of “primary-secondary” distinction (the “narrow view”) that is currently the controlling case law, applied by the Ninth Circuit of Appeals at the federal level and by the Wyoming Supreme Court at the state level.²³ On the other side, there is the homeland purpose theory (or “broader view”) followed by the Supreme Court of Arizona and the Supreme Court of Montana.²⁴

A. The “Broader View”: The Homeland Purpose Theory

“The concept of a reservation as a homeland is not new.”²⁵ As explained by Professor Cosens,

Tribes have long asserted a homeland purpose in quantification of water rights. Courts have either rejected the approach: *Big Horn I* at 94-97, rejecting the finding of the Special Master that treaty language stating “[t]he Indian herein named agree . . . they will make said reservations their permanent home,” indicated that a primary purpose of the Reservation was to provide a permanent homeland, or relied on quantification for irrigation to provide sufficient water to account for future needs implicit in a homeland purpose: *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47-48 (9th Cir. 1981) holding that “one purpose for creating this reservation was to provide a homeland for the Indians to maintain their agrarian society” and then concluding that the

22. See, e.g. *State ex rel. Greely v. Confederated Salish & Kootenai Tribes*, 712 P.2d 754 (1985), see also *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 35 P.3d 68 (2001); *In re the Gen. Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources*, 753 P.2d 76 (Wyo. 1988).

23. See, e.g. *In re the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources*, 753 P.2d 76 (Wyo. 1988).

24. See, e.g. *State ex rel. Greely v. Confederated Salish & Kootenai Tribes*, 712 P.2d 754 (1985), see also *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 35 P.3d 68 (2001).

25. Barbara Cosens, *The Legacy of Winters v. United States and the Winters Doctrine*, One Hundred Year Later 9 (Sept. 17–20, 2008) (unpublished article presented to the American Bar Association, Section of Environment, Energy, and Resources, 16th Section Fall Meeting in Phoenix, AZ).

amount of water necessary to irrigate all practicably irrigable acreage is the appropriate measure of water for that purpose).²⁶

In 1985, the Montana Supreme Court held that Indian reservations, and their reserved rights, differ from other reservations and their reserved rights.²⁷ One of the main differences that the court emphasizes is the fact that “[f]ederal reserved water rights are created by the document that reserves the land from the public domain. By contrast, aboriginal-Indian reserved water rights exist from time immemorial and are merely recognized by the document that reserves the Indian land. Federal reserved water rights, on the other hand, are created by and cannot predate the document that reserved the federal land from the public domain.”²⁸ The Montana Supreme Court recognizes multiple purposes including aboriginal rights not established by Congress but retained by the tribe. This interpretation, while not directly addressing the issue of a homeland purpose, suggests that the primary purpose test should be inapplicable to Indian reservations.

In 2001, the Arizona Supreme Court expressly declined to apply the primary purpose test in the Gila River adjudication.²⁹ The Court clearly stated that “while the purpose for which the federal government reserves other types of lands may be strictly construed, the purposes of Indian reservations are necessarily entitled to broader interpretation if the goal of Indian self-sufficiency is to be attained.”³⁰ According to Professor Cosens,

The Arizona Supreme Court is *the first state court to squarely adopt a homeland standard* [at the time] and to further articulate a method of quantification consistent with that standard by indicating “is specific to the needs, wants, plans, cultural background, and geographic setting of the particular reservation, and cannot be defined by a single measure such as PIA. In reaching its decision, the Arizona Supreme Court distinguished Indian reservations from other federal reservations on the basis of the canons of construction requiring liberal interpretation of treaties, statutes, and executive orders pertaining to Indian affairs, and the federal fiduciary relationship with tribes. [emphasis added]³¹

26. *Id.* at 16 n.80.

27. *State ex rel. Greely v. Confederated Salish & Kootenai Tribes*, 712 P.2d 754, 766 (1985).

28. *Id.* at 767.

29. *Id.* at 754.

30. *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 35 P.3d 68, 77 (2001).

31. Barbara Cosens, *The Legacy of Winters v. United States and the Winters Doctrine*, One Hundred Year Later 9.

B. The “Narrow View”: The Controlling Case Law's Rule of “Primary-
Secondary” Distinction

i. The Ninth Circuit Court of Appeals Approach

The Ninth Circuit Court of Appeals has applied the primary purpose test to the Colville and Agua Caliente reservations.³²

In 1981, in the famous *Colville Confederated Tribes* case, the Ninth Circuit cited *New Mexico* and explained that the Supreme Court had applied the primary purpose test to determine “the extent of an implied reservation of water for a national forest.”³³ By clearly identifying that *New Mexico* was assessing the water rights related to a national forest (and therefore non-Indian federal reserved rights), there is no doubt that the Ninth Circuit could have distinguished *New Mexico* and held that the primary purpose test was *not* applicable to Indian reservations. However, the Ninth Circuit did not follow this path.³⁴ Instead, the Court clearly mentioned: “[w]e apply the *New Mexico* test here.”³⁵

Thirty-six years later the Ninth Circuit reiterated its analysis. In the *Agua Caliente* case, the Ninth Circuit expressly stated:

We have previously noted that *New Mexico* is “not directly applicable to Winters doctrine rights on Indian reservations.” *United States v. Adair*, 723 F.2d 1394, 1408 (9th Cir. 1983). However, it clearly “establish[es] several useful guidelines.” *Id.*³⁶

Once again, instead of distinguishing *New Mexico*, the Ninth Circuit applied the *New Mexico* test to the Agua Caliente Indian reservation.³⁷

Each time though, the court found that the primary purpose was to provide a homeland for the tribes. In *Colville*, the court stated that, “[t]he general purpose, to provide a home for the Indians, is a broad one and must be liberally construed.”³⁸ The Court reached this conclusion after considering “the document and circumstances surrounding [the reservation’s] creation,” and “the history of the

32. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47, 49 *cert. denied*, 454 U.S. 1092 (1981), *modified*, 752 F.2d 397 (9th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986); *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1270 (9th Cir. 2017).

33. *Colville Confederated Tribes*, 647 F.2d at 47 (emphasis added).

34. *Id.*

35. *Id.*

36. *Agua Caliente*, 849 F.3d at 1269 n.6. (emphasis added).

37. *Id.*

38. *Colville Confederated Tribes*, 647 F.2d at 47.

Indians for whom it was created".³⁹ In *Agua Caliente*, the court held that "the primary purpose underlying the establishment of the reservation was to create a home for the Tribe, and water was necessarily implicated in that purpose."⁴⁰ Once again, the court reached this conclusion after considering "the document and circumstances surrounding [the reservation's] creation, and the history of the Indians for whom it was created."⁴¹

ii. The Supreme Court of Wyoming Approach

In *Big Horn I*, the Supreme Court of Wyoming expressly rejected the homeland standard.⁴² According to Special Master Roncalio, the principle purpose of the treaty was "to provide the Indians with a homeland where they could establish a permanent place to live and to develop their civilization just as any other nation throughout history has been able to develop its civilization."⁴³ However, the district court did not follow the Special Master view.⁴⁴ And the majority of the Supreme Court of Wyoming followed the district court judge: "Considering the well-established principles of treaty interpretation, the treaty itself, the ample evidence and testimony addressed, and the findings of the district court," explained the majority, "we have no difficulty affirming the finding that it was the intent at the time to create a reservation with a sole agricultural purpose."⁴⁵

In contrast, dissenting Justice Thomas stated that,

[t]he purpose of establishing an Indian reservation, such as the Wind River Indian Reservation, is to provide a homeland for Indian peoples. If one is to assume that, pursuant to the reserved rights doctrine relating to water, there is an implied reservation of those waters essential to accomplish the purpose of the reservation of land, then I cannot agree that the implied reservation of water with respect to the Wind River Indian Reservation should be limited, as the majority has held in approving the judgment of the district court.⁴⁶

Similarly, dissenting Judge Hanscum would have held that "the implied reservation of water rights attaching to an Indian reservation should assume any use that is appropriate to the Indian homeland as it progresses and develops."⁴⁷

39. *Id.*

40. *Agua Caliente*, 849 F.3d at 1270.

41. *Id.* (citing Colville Confederated Tribes, 647 F.2d at 47).

42. *In re the General Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76, 94 (Wyo. 1988) [hereinafter *Big Horn I*].

43. *Id.* at 94.

44. *Id.* at 95 ("On the very face of the Treaty, it is clear that its purpose was purely agricultural.").

45. *Id.* at 96.

46. *Id.* at 119 (emphasis added).

47. *Id.* at 135 (Hanscum, J. dissenting).

In the *Coeur d'Alene* case, the trial court in the Coeur d'Alene-Spokane River Basin Adjudication (CSRBA) strictly applied the primary purpose test, rejecting any general or permanent homeland purpose that could warrant additional water rights.⁴⁸

In order to determine the claims to which the Tribe was entitled, the district court first determined reserved water rights could be implicitly reserved for only the primary purposes of the Reservation. The district court found that agriculture, fishing and hunting, and domestic purposes were the primary purposes of the Reservation, and therefore limited the Tribe's claims to those purposes. The district court further found in its summary judgment order that the Tribe was not entitled to the following water rights claims: claims based on a homeland purpose theory; claims based on secondary purposes (including industrial, commercial, aesthetics, recreation, and others); claims outside of the boundaries of the Reservation; and the claim for lake level maintenance of Lake Coeur d'Alene.⁴⁹

It is interesting to note that neither the Ninth Circuit decisions nor the decisions rendered by the Montana and the Arizona Supreme Courts were analyzed by the trial court, despite the fact that all of these decisions had ruled specifically on this issue.⁵⁰

IV. THE COEUR D'ALENE DECISION

A. Background

In 2008, Idaho commenced the Coeur d'Alene-Spokane River Basin Adjudication (CSRBA) in northern Idaho where the Coeur d'Alene Reservation is located.⁵¹ “The CSRBA is a ‘comprehensive determination of the nature, extent, and priority of’ all surface and ground water rights in the Coeur d'Alene-Spokane River

48. *In re* CSRBA Case No. 49576 Subcase No. 91-7755, 448 P.3d 322, 333, 165 Idaho 517, 528 (2019).

49. *Id.*

50. Mecham, *supra* note 2.

51. See Commencement Order for the Coeur d'Alene-Spokane River Basin General Adjudication, *In re: The Gen. Adjudication of Rights to the Use of Water From the Coeur D'Alene-Spokane River Basin Water System* (Idaho 5th Jud. Dist. Nov. 12, 2008) (No. 49576), <https://idwr.idaho.gov/files/adjudication/20081112-csrba-commencement-order.pdf> [hereinafter Commencement Order], at 1.

Basin water system in Idaho.”⁵² Pursuant to Idaho Code section 42-1406B, the Director of the Idaho Department of Water Resources filed a petition with the district court to initiate the CSRBA; the district court granted the petition and initiated the general adjudication on November 12, 2008.⁵³

On March 26, 2014, the United States filed in the CSRBA 353 claims as trustee on behalf of the Tribe for water rights associated with the reservation.⁵⁴

These claims were premised on the federal government's assessment that the Coeur d'Alene Reservation required all water reasonably necessary to provide a permanent homeland for the Tribe, including instream flows to protect fisheries (fishing purpose), wildlife and native plant habitat (hunting and gathering purpose), minimum lake levels (hunting, fishing, gathering, recreation, and cultural and spiritual uses), current and future irrigation, and domestic, municipal, commercial, and industrial water needs.⁵⁵

The Tribe was granted intervention.⁵⁶ Initially, consideration of the Tribe's claims proceeded on dual litigation and negotiation tracks, but when negotiations hit an impasse, the parties proceeded to litigate the claims, bifurcating the case into two phases: entitlement and then quantification.⁵⁷ Under the CSRBA process, the State and several local parties filed objections to the tribal entitlement to reserved water.⁵⁸ After hearing arguments on summary judgment motions, which focused primarily on the issue of the purposes for which the reservation was established as the basis for the Tribe's entitlement to reserved water rights, CSRBA Presiding Judge Eric J. Wildman issued a ruling on May 3, 2017.⁵⁹

Basically, the main arguments can be summarized as follows. The United States and the Tribe argued that *New Mexico* does not apply to Indian reservations, “because the reservation being considered in *New Mexico* was a national forest, it is distinguishable. . . .”⁶⁰ On the contrary, the State of Idaho argued that “*New Mexico's* primary-secondary analysis applies to Indian reservations because it is

52. *In re* CSRBA Case No. 49576 Subcase No. 91-7755, 448 P.3d at 330 n.1, 165 Idaho at 525 n.1.

53. Commencement Order, *supra* note 5, at 4–6.

54. 448 P.3d at 330, 165 Idaho at 525.

55. Brief of Appellant United States, *In re* CSRBA Case No. 49576 Subcase No. 91-7755, 448 P.3d 322, 165 Idaho 517 (2018) (No. 45382-2017), 2018 WL 1762783.

56. *In re* CSRBA Case No. 49576 Subcase No. 91-7755, 448 P.3d at 330, 165 Idaho at 525.

57. Order on Motions for Summary Judgment at 1, *In re* CSRBA Case No. 49576 Subcase No. 91-7755, No. 49576 (Idaho 5th Jud. Dist. May 3, 2017) [hereinafter CSRBA Order] (explaining that the trial court on February 17, 2015, bifurcated the “matter between issues of entitlement and quantification, with the issue of entitlement to be addressed first”), <http://www.srba.state.id.us/Images/2017-05/9107755x01037.pdf>. For documents relating to the negotiation track, see <http://www.srba.state.id.us/CSRBA10.HTM>.

58. CSRBA Order, *supra* note 57, at 1–3.

59. CSRBA Order, *supra* note 57, at 20.

60. *In re* CSRBA Case No. 49576 Subcase No. 91-7755, 448 P.3d at 342, 165 Idaho at 537.

derived from United States Supreme Court decisions addressing reservations, which included Indian reservations.”⁶¹

B. The Trial Court Decision

The trial court applies the *New Mexico* primary purposes test: “[a]s a matter of law, the scope and nature of claims the United States may seek under the reserved rights doctrine is defined by the primary purposes of the reservation.”⁶²

First of all, the court rejects the federal and tribal positions that the primary purpose of the reservation was to provide a “permanent homeland” for the Tribe.⁶³ Then, the court holds that the homeland theory “eliminates the primary-secondary purposes distinction set forth by the U.S. Supreme Court by proposing that all water use associated with an Indian reservation serves the primary purpose of that reservation.”⁶⁴ Additionally, the court notes that the United States Supreme Court “has never adopted or applied a homeland theory primary purpose.”⁶⁵ For all of these reasons, the court declines to apply the homeland theory.⁶⁶

Having rejected the homeland theory, the trial court then based its review of the asserted claims on its reading of the relevant historical documentation. The court found that the primary purposes for which water was reserved were “to promote an agrarian lifestyle for its inhabitants,”⁶⁷ “to provide the Tribe with waterways for fishing and hunting,”⁶⁸ and, “water rights for domestic use.”⁶⁹ Therefore, the district court specifically allowed reserved water rights for agriculture, fishing, hunting, and domestic purposes.⁷⁰

C. The Idaho Supreme Court Decision

Justice Stegner of the Idaho Supreme Court (writing for the majority) begins its analysis by mentioning the *Winters* doctrine, stating that “[i]ntent to reserve

61. *Id.*

62. CSRBA Order, *supra* note 58, at 8.

63. *Id.*

64. *Id.* at 10.

65. *Id.*

66. *Id.* at 10–11.

67. *Id.* at 11.

68. *Id.* at 12.

69. *Id.* at 13–14.

70. *Id.* at 11–14.

water is inferred if the waters are necessary to accomplish the reservation's purposes."⁷¹

Then, the court lists a number of criteria that need to be taken into consideration in order to assess the purposes of a reservation. First, the reservation's purposes are determined at the time surrounding the reservation's creation.⁷² Second, "[r]eservation purposes are derived from 'the document[s] and circumstances surrounding [a reservation's] creation, and the history of the Indians for whom it was created.'"⁷³ Third, the Court reiterates the principle under which Indian rights cannot be abrogated by Congress without "clear intent and an express agreement from the Indians."⁷⁴

The Court relies on the *Greely* decision rendered by the Montana Supreme Court in 1985 and the *Gila* decision rendered by the Arizona Supreme Court in 2001.⁷⁵ In both of these decisions, the Supreme Courts have decided that the *New Mexico's* primary-secondary analysis was not applicable to Indian reservations.⁷⁶

The Supreme Court of Montana held that Indian and non-Indian reservations are to be distinguished from one another. That court held that Indian reservations, and their reserved water rights, differ from other reservations and their reserved water rights in at least two important ways. First, the two rights have different origins. Non-Indian "federal reserved water rights are created by the document that reserves the land from the public domain. By contrast, aboriginal-Indian reserved water rights exist from time immemorial and are merely recognized by the document that reserves the Indian land." Second, Montana found ownership to be an important distinction. "The United States is not the owner of Indian reserved rights; it is a trustee for the benefit of the" tribes. In contrast, the United States owns federal reserved rights in all other reservations and has the power to "lease, sell, quitclaim, release, encumber or convey its own federal reserved water rights." Bearing these distinctions in mind, the Montana court held that Indian rights "are given broader interpretation in order to further the federal goal of Indian self-sufficiency."⁷⁷

71. *In re* CSRBA Case No. 49576 Subcase No. 91-7755, 448 P.3d 322, 335, 165 Idaho 517, 530 (2019).

72. *Id.*

73. *Id.* (quoting *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1270 (9th Cir. 2017)).

74. *Id.* at 536 (quoting *Pocatello v. State*, 180 P.3d 1048, 1057, 145 Idaho 497, 506 (2008)).

75. *State ex rel. Greely v. Confederated Salish & Kootenai Tribes*, 712 P.2d 754 (Mont. 1985); *In re* Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source, 35 P.3d 68 (2001).

76. *Id.* at 343, 165 Idaho at 538.

77. *Id.* (internal citations omitted) (quoting *State ex rel. Greely v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 712 P.2d 754, 767–68 (Mont. 1985)).

The court also relies on the *Winters* decision itself: “Language in *Winters* suggests a homeland purpose theory may arise in certain reservations. In *Winters*, the Supreme Court lent support to the idea that the reservation at issue was established as a ‘home and abiding place of the Indians.’”⁷⁸

The Idaho Supreme Court indicates that it “has also previously noted a distinction between non-Indian reservations and Indian reservations.”⁷⁹

Then, the Court holds that, because of all of the above considerations, a broader purpose—the homeland purpose—is “more consistent with both Supreme Court precedent and the well-established canons of construction regarding Indian reservations.”⁸⁰

Finally, the Court overturned the trial court and ruled that the Tribe’s claims should be analyzed from the perspective of what the Tribe needed to establish a homeland on the reservation.⁸¹ Basing its analysis on the formative documents and historical context surrounding the Reservation’s creation, the court found that the homeland purpose for this reservation covers the following uses: domestic, agriculture, hunting and fishing, plant gathering, and cultural uses.⁸² The court held that the Tribe’s reserved rights included groundwater as well as instream flows on the reservation.⁸³ The court declined to find a reserved right for industrial and commercial uses of water, off-reservation instream flows, or lake level maintenance for Lake Coeur d’Alene.⁸⁴

In a nutshell, the Court held that the district court improperly applied the controlling case law’s rule of “primary-secondary” distinction and instead should have allowed aboriginal purposes of plant gathering and cultural uses under the homeland purpose theory.⁸⁵ The court found that “[t]he reasons given by the Montana and Arizona courts are persuasive as to why the purposes of Indian reservations should not be construed similarly to non-Indian federal

78. In re CSRBA Case No. 49576 Subcase No. 91-7755, 448 P.3d at 344, 165 Idaho at 539 (quoting *Winters v. United States*, 207 U.S. 564, 565 (1908)).

79. *Id.* (citing *Potlatch Corp. v. United States*, 12 P.3d 1260, 1264, 134 Idaho 916, 920 (2000)) (“*Winters* dealt with the creation of a reservation by treaty, a bargained for exchange between two entities. . . . To the contrary, the Wilderness Act is not an exchange; it is an act of Congress that sets aside land, immunizing it from further development. There is no principle of construction requiring the Court to interpret the Wilderness Act to create an implied water right. The opposite inference should apply.”).

80. *Id.*

81. *Id.* at 342–46, 165 Idaho at 537–41.

82. *Id.* at 348–50, 165 Idaho at 543–45.

83. *Id.* at 355, 165 Idaho at 550.

84. *State*, 448 P.3d at 350–51, 359, 165 Idaho at 545–46, 554.

85. *State*, 448 P.3d at 362, 165 Idaho at 557.

reservations.”⁸⁶ “Even more to the point,” the court continued, “the primary-secondary distinction runs counter to the concept that the purpose of many Indian reservations was to establish a ‘home and abiding place’ for the tribes.”⁸⁷

V. ANALYSIS

The Idaho Supreme Court concluded that when determining the purposes for which Coeur d’Alene reservation had been established, “the homeland purpose theory is better suited to an Indian reservation.”⁸⁸ The court found persuasive the treatment of the issues by the Arizona and Montana Supreme Courts, which “have found *New Mexico’s* primary-secondary analysis inapplicable to Indian water rights cases.”⁸⁹

The decision was correct. Because of the fundamental distinction between a federal non-Indian reservation and an Indian reservation, and also because of the inherent purpose of an Indian reservation, the homeland standard should be applied when dealing with Indian reservations.

A. The Fundamental Distinction Between a Federal Reservation and an Indian Reservation

As explained above, the Montana Supreme Court and the Arizona Supreme Court distinguished Indian reservations and federal reservations while assessing whether or not the *New Mexico* primary-purpose analysis should be applied to Indian reservations.

Nineteen years before the *Coeur d’Alene* decision, the Idaho Supreme Court had already made a clear distinction between federal reserved water rights for Indian reservations and federal reserved water rights for non-Indian federal reservations.⁹⁰ Indeed, in *Potlatch* (the Schroeder opinion), the Court noted that Indian reservations are created through a “bargained for exchange” between two sovereign entities, while non-Indian reservations are not.⁹¹

Little about the background and principles of *Winters* is applicable in this case. *Winters* dealt with the creation of a reservation by treaty, a bargained for exchange between two entities. Without the use of water, the purpose of the agreement between the United States and the tribes would be defeated. The land retained by the tribes would not be fit for habitation. In contract terms there would be no consideration for the agreement if the tribes gave up land and did not receive the benefit of water to make the land they retained habitable. To the

86. *Id.* at 344, 165 Idaho at 539.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Potlatch Corp. v. United States*, 12 P.3d 1260, 1264, 134 Idaho 916 (2000).

91. *Id.* at 920 (2000).

contrary, the Wilderness Act is not an exchange; it is an act of Congress that sets aside land, immunizing it from further development. There is no principle of construction requiring the Court to interpret the Wilderness Act to create an implied water right. The opposite inference should apply. Congress could define the scope of any water right as it chose. Congress did not define a water right as a specific purpose of the Wilderness Act. “The Supreme Court has held that in cases such as this, where water is not necessary to fulfill the specific purposes of a reservation, there arises a contrary inference that the ‘United States would acquire water in the same manner as any other public or private appropriator.’” In *State of Arizona v. State of California*, 373 U.S. 546, 596-602, 10 L. Ed. 2d 542, 83 S. Ct. 1468 (1963), the Supreme Court again dealt with the question of water rights for Indian Reservations. The relevant portion of the decision was in the context of litigation concerning the interpretation and effect of comprehensive Congressional action determining multiple state rights to the waters of the Colorado River. However, the Indian Reservations had been created many years before from arid land that required water to sustain human life. The need for water was apparent at the time the Reservations were created, and the inclusion of water rights was confirmed by Congressional appropriations to finance and maintain irrigating projects. Following the logic of *Winters*, the Supreme Court determined that the creation of the Reservations carried with it the need for water to sustain human life on those Reservations. The purpose for the creation of Reservations was clear—to provide habitable land for the Indian tribes. The necessity for water was obvious, as was the case in *Winters*.⁹²

In the *Coeur d’Alene* case, the Idaho Supreme Court reiterated the distinctions between non-Indian federal reservations and Indian reservations and went further in its analysis, holding that these distinctions were “advis[ing] against application of *New Mexico’s* primary-secondary purposes test.”⁹³

B. The Inherent Purpose of an Indian Reservation

Federal Indian reservations exist to provide home for a group of people. The fact that the reservation is intended as a homeland is therefore inconsistent with a limited purpose. According to Professor Hedden-Nicely, speaking about the *Coeur*

92. *Id.* (internal citations omitted).

93. Dylan R. Hedden-Nicely, *The Historical Evolution of the Methodology for Quantifying Federal Reserved Instream Water Rights for American Indian Tribes*, 50 ENVTL. L. 205, 253 (2020).

d'Alene case, it was very important for the tribe that it continues to protect the rights that their ancestors reserved.⁹⁴ The tribe truly believes that the ancestors were trying to set aside *a permanent homeland* for their people *forever*.⁹⁵

Although the court found each of these distinctions important, it ultimately concluded that “more to the point, the primary-secondary distinction runs counter to the concept that the purpose of many Indian reservations was to establish a ‘home and abiding place’ for the tribes.” Accordingly, it concluded that the “purposes behind the creation of an Indian reservation should be more broadly construed and not limited solely to what may be considered a primary purpose.” Instead, the court found that “Indian reservations were created to be a homeland for the tribe and such a homeland would necessarily encompass uses for water related to the tribe’s ability to inhabit and live on the land.” It once again surveyed the caselaw⁹⁶, noting that *Winters* itself outlined a homeland purpose for the creation of the Fort Belknap Reservation, finding “in *Winters*, the Supreme Court lent support to the idea that the reservation at issue was established as a ‘home and abiding place’ of the Indians.”⁹⁷

If the Idaho Supreme Court and the Arizona Supreme Court arrive at the same conclusion, their reasoning is somewhat different.⁹⁸ In *Gila*, the Arizona Supreme Court held that “the essential purpose of Indian reservations is to provide Native American people with a ‘permanent home and abiding place,’ that is, a ‘livable environment.’”⁹⁹ While the Arizona Supreme Court rules that, as a matter of law, *all* Indian reservations have an inherent homeland purpose, the Idaho Supreme

94. Interview during Water Law II class with Dylan Hedden-Nicely, Professor, University of Idaho College of Law, in Moscow, Idaho (Mar 24, 2020).

95. *Id.*

96. Hedden-Nicely, *supra* note 93, at 253–54 (emphasis added); Interview during Water Law II class with Dylan Hedden-Nicely, Professor, University of Idaho College of Law, in Moscow, Idaho (Mar 24, 2020), (quoting *Arizona I*, 373 U.S. 546, 599 (1963)) (“The Supreme Court elaborated further that the implied reservation of water on Indian Reservations requires enough water “to make the reservation livable.”); State *ex rel.* Greely v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 712 P.2d at 768 (“The purposes of Indian reserved rights, on the other hand, are given broader interpretation in order to further the federal goal of Indian self-sufficiency.”); *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 35 P.3d 68, 74 (Ariz. 2001). The Arizona Supreme Court adopted the homeland purpose theory when it stated that it “agreed with the [U.S.] Supreme Court that the essential purpose of Indian reservations is to provide Native American people with a “permanent home and abiding place,’ that is, a “livable environment.”” *Id.* (first quoting *Winters*, 207 U.S. 564, 565 (1908), then quoting *Arizona I*, 373 U.S. at 599”).

97. Hedden-Nicely, *supra* note 93, at 253–54.

98. Hedden-Nicely, *supra* note 93, at 254 n.467.

99. Hedden-Nicely, *supra* note 93, at 254 n.468.

Court holds that “[f]ormative documents and historical circumstances should be used to derive the Reservation's purposes.”¹⁰⁰

VI. CONCLUSION

While some states, such as Montana, Arizona and now Idaho, are more open to a homeland purpose, other states, such as Wyoming, still reject the homeland standard.

Even among the states of Arizona and Idaho, there is still no consensus concerning the homeland purpose itself. Should it be an inherent purpose of *all* Indian reservations, or should the courts examine the formative documents and historical circumstances surrounding the creation of the reservation first to determine whether or not there is a homeland purpose?

If the Idaho Supreme Court decision is a step in the right direction, there is still a lot of unknown.

Right now, hundreds of tribes in the United States are confronted to divergent views of the state courts. Only a future ruling by the United States Supreme Court would be able to resolve this issue.

100. *In re CSRBA Case No. 49576 Sub Case No. 91-7755*, 448 P.3d 322, 347, 165 Idaho 517, 542 (2019).