

COEUR D'ALENE LAKE RELATIONSHIPS:
AN INTERDISCIPLINARY STUDY OF HOW TWO COMMUNITIES'
RELATIONSHIPS WITH A LAKE DRIVE LARGER POLICY DECISIONS,
DISPUTES AND WHAT THOSE RELATIONSHIPS TELL US ABOUT THE
PROPOSITION OF COLLABORATION

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by

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Authorization to Submit Thesis

This thesis of Jon Logan Rezabek, submitted for the degree of Master of Science with a major in Water Resources and titled “Coeur d’Alene Lake Relationships: An Interdisciplinary Study of How Two Communities’ Relationships with a Lake Drive Larger Policy Decisions, Disputes and what those Relationships Tell Us about the Proposition of Collaboration,” has been reviewed in final form. Permission, as indicated by the signatures and dates given below, is now granted to submit final copies to the College of Graduate Studies for approval.

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Abstract

The purpose of this study is to address unresolved and ongoing disputes concerning Coeur d'Alene Lake between the Coeur d'Alene Tribal community and the non-Tribal lakeshore community. Specifically, this research poses two research questions: (1) How do the Tribal and non-Tribal communities surrounding Coeur d'Alene Lake view their relationship to the Lake itself? (2) Given the Tribal and non-Tribal communities' unique relationships to the Lake, are there opportunities for collaboration on Lake issues in the future?

An ethnographic interviewing process, transcribing and data reduction revealed themed responses to the research questions. The findings and conclusions support the idea that an examination of the history, worldviews and perspectives of a perceived opposing party in a dispute may lead to either the identification of impediments to collaboration or the facilitation of collaboration through the revelation of understanding, common ground and respect.

Acknowledgements

This thesis would not have been possible without the support of several individuals and organizations. I would like to thank Professor Rodney Frey for his guidance, dialogue and patience throughout the project. Without his expertise, the project may not have gotten off the ground. In addition to Dr. Frey, I would like to thank Mark Solomon for his guidance throughout the project as well. Without Dr. Solomon's guidance, offering of experience and suggestion to start writing far in advance, perhaps I would not have finished on time. Furthermore, I would like to acknowledge Professor Barbara Cosens for her efforts with this project. Without Professor Cosens, I may never have come to the University of Idaho to pursue this program in the first place. Professor Lorie Higgins also spent some time with me and provided some guidance. Dr. Higgins was particularly helpful in her introduction to the coding process. Furthermore, I want to thank Professor Dylan Hedden-Nicely for his mentorship throughout the thesis pursuit. Thanks to Caj Matheson for his help along the way. A "thank you" to my friend Adam "A.P." Price for his efforts in the formatting journey. Thanks to all of the interviewees who participated. Lastly, I want to thank my partner, Noa Bruhis, for her inspiration, guidance and general effort in the pursuit of this project. Without her consistent support and love, I am certain this project would be lesser, if not abandoned altogether.

As far as organizations go, I want to acknowledge the Coeur d'Alene Tribe for allowing me to interview members of their tribe and their openness to me throughout my project, specifically, the Cultural Committee and the Lake Management Division. I also want to thank the Coeur d'Alene Lakeshore Property Owner's Association and the communities of St. Maries, Harrison, Plummer and Coeur d'Alene for their participation in the interviewing process and their welcoming of my interviewing.

Dedication

This thesis is dedicated to my parents, Dale and Diana Rezabek. Your unconditional love has never wavered. I achieve only on your shoulders.

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CHAPTER 1

Introduction

1.1 Preliminary Note

This is an interdisciplinary study drawing from sociology, philosophy, history, psychology, law, anthropology and qualitative social science. These disciplines came up naturally in the approach to the complex issues at hand and were synthesized, connected or blended in an effort to achieve a well-rounded, integrated and holistic approach (Repko, 2012). The following report on the study should be approached as an interdisciplinary inquiry predominantly conducted through qualitative social science methods while simultaneously informed by concepts and methods from the aforementioned list of disciplines.

1.2 Research Context

Coeur d'Alene Lake (Lake) was formed between 12 and 15,000 years ago when an ancient body of water from the ice age named Lake Missoula breached its holding and cataclysmically flooded much of the Northwest (Lindsay, 2006). Theories on when the first humans arrived in the area range from 10 to 30,000 years ago (Harrison, 2016). Under all theories, the Schitsu'umsh or Coeur d'Alene people (Tribe) began living around the Lake at a time immemorial; before documented history itself (Hart, 2015).

Since the arrival of the Euro-Americans over 200 years ago the Tribe's ancient way of life has been changed (Hart, 2015). The interactions between the Native Americans (Tribal) and the Euro-Americans (non-Tribal) who now surround the Lake are often not agreeable and have led to numerous policy and legal disputes over the years (Hart, 2015). Nearly all of the tension between the two communities boils

down to the principles of Sovereignty and Property (Hart, 2015). In 1873 the Coeur d'Alenes and the United States negotiated an agreement where the Tribe would cede most of its aboriginal lands and live on a designated piece of land, reserved for them (a reservation) (Agreement, 1873). Since the beginning of negotiating with the United States the Tribe has been struggling to maintain their lands, rights and sovereignty in the face of the dominant newcomers, the largely European in lineage people of the United States (Hart, 2015).

Fifteen years after the Coeur d'Alene Reservation was created the General Allotment or Dawes Act was passed through the Congress of the United States and became law (Dawes Act, 1887). This new law sought to renege on the reservation agreements between Native Americans and the United States and further implement Western ways of life, such as agriculture and private property (Dawes Act, 1887). This effort at assimilation into the dominant United States way of life resulted in Tribes across the U.S. being divested of much of their original reservation land (Cotroneo & Dozier, 1974).

The tension and dispute over sovereignty and property continue into modern times. In 2001, the United States Supreme Court, in *Idaho v. United States*, recognized ownership to the southern third of the Lake in the Coeur d'Alene Tribe (Tribe). Despite the resolution of this over 100-year-old fundamental disagreement about the boundaries of the Tribe's reservation, discrete disputes between Tribal and non-Tribal contingents continue to occur. The two communities interpret ambiguities left open by the Courts in their favor, often opposing each other's interests.

Three examples of these disputes are (1) High and Low Water Line; (2) Invasive Species Management; (3) Extent of Rights to Water:

1. The Lake is controlled by the Post Falls dam which effectively drains the Lake into the Spokane River, to the west. The pool level of the Lake was significantly different before the dam existed and the Lake continues to fluctuate. Given

that *Idaho v. United States* recognized title to the “beds and the banks” of the southern third of the Lake, many question, “where do the ‘beds and banks’ of the Lake begin and end?” The management of the permits allowing dock pilings to be driven into the “bed” of the Lake were turned over from the State to the Tribe once *Idaho v. United States* was decided. Small groups and individuals refused to recognize the Tribe’s ownership, or argue that their pilings are not actually in the “beds and the banks” of the Lake, resulting in dispute and lawsuits.

2. The Idaho Fish and Game Department and the Coeur d’Alene Tribe’s Fish and Wildlife program have opposing policies when it comes to the management of invasive and predatory fish, like the Northern Pike. The Tribal community wishes to eradicate invasive species in the Lake in order to protect native species while the non-Tribal community advocates for the invasive species to exist for recreation fishing purposes.
3. The water right claims filed by the United States on behalf of the Coeur d’Alene Tribe in the Coeur d’Alene-Spokane River Basin Adjudication were met with 333 separate objections from community members within the watershed and is currently before the Idaho Supreme Court on appeal.

These disputes all place Tribal and non-Tribal practices, beliefs and ways of life against each other. It is apparent from the adversarial relationship between the two communities that differing worldviews are the driver. An examination of the two communities of people and their relationships with the Lake and themselves would render a certain amount of enlightenment as to the underpinnings of the disputes that continue to pile up and any opportunity that may be unforeseen.

1.3 Research Problem

The discord between the dominant Western cultures and the Indigenous cultures of North America has been apparent since First Contact occurred 500 years ago. The disputes between the Tribal and non-Tribal communities that surround the Lake is simply another episode in the saga of unresolved conflict between two ways of life. How does a researcher shed new light on an age-old contention? An examination into the amalgamation of worldviews, values, perspectives, traditions, cultures, histories, orientations, relationships, laws, treatment and general ways of life that give the two communities identity could inform all parties involved and foster collaboration.

1.4 Research Questions

The primary objective of this project is to examine the Tribal and non-Tribal communities that surround the Lake in order to better understand the reasons why they take the positions they take and the ground they stand on in the disputes that occur between them. Specifically, this research will attempt to answer the following questions:

1. How do the Tribal and non-Tribal communities surrounding the Lake view their relationship to the Lake itself?
2. Given the communities' unique relationships to the Lake, are there opportunities for collaboration concerning the Lake in the future?

Based on the historical interactions between the Tribal and non-Tribal communities from E. Richard Hart's manuscript, "A History of Coeur d'Alene Tribal Water Use: 1780-1915," as well as Walter Echo-Hawk's, "In the Courts of the Conqueror" and my own legal study on relevant Native American law, I hypothesized that the following concepts should be prevalent in the responses to the interview questions:

Dominion, Property, Sovereignty, Culture, Ownership, Reciprocity, Worldviews, Economic Priority, Stigma, Property Values, Prejudice, Disorganization and Funding.

1.5 Research Scope

The scope of the first research question is to catalogue and document the relationships that the Tribal and non-Tribal communities have with the Lake and each other. The second research question expands the scope, building on the catalogue of relationships from the first research question, looking for what is facilitating or impeding collaboration.

1.6 Definitions

For the purposes of this work, the term “Tribal Community,” and all derivatives, will refer to the Coeur d’Alene Tribe. The term “non-Tribal Community,” and all derivatives, will refer to members of the Coeur d’Alene Lakeshore Property Owner’s Association and non-tribal members who own property, run a business or live in close proximity to the Lake. “Close proximity” is defined as close enough to the Lake to where one sees the Lake on a daily basis and is involved or affected by its management on a frequent basis. “Native Americans” is defined as the indigenous peoples of what is now the United States. “European-Americans” or “Euro-Americans” is defined as Americans with European origin or ancestry. “Worldview” is defined as a particular philosophy of life or conception of the world. “Value” is defined as the importance, worth, or usefulness of something. “Culture” is defined as the sum of attitudes, customs, and beliefs that distinguishes one group of people from another. Culture is transmitted, through language, material objects, ritual, institutions, and art, from one generation to the next. “Traditions” is defined as the transmission of customs or beliefs from generation to generation, or the fact of being passed on in this way.

“Epistemology” is defined as the theory of knowledge, especially with regard to its methods, validity, and scope. “Tautology” is defined as a statement that is true by necessity or by virtue of its logical form. “Coding” is defined as a qualitative inquiry, most often a word or short phrase that symbolically assigns a summative, salient, essence-capturing, and/or evocative attribute for a portion of language-based or visual data (Saldaña, 2013).

CHAPTER 2

Background

2.1 Indigenous Sovereignty

As Indian tribes around the United States continue to modernize and achieve self-determination, a growing re-establishment of Tribal governance has been met with opposition and push-back (Gilmore, 2016). Tribes are managing their industries and economies more successfully and harnessing this success into further implementation of their worldview (Frank, 2008). Furthermore, many tribes have been inclusive of the mixed groups and communities now in or surrounding Indian reservations (Aripa, 2001; Wilson, 2002). Despite this effort at inclusion and attempts to grow in harmony with neighboring worldviews, the pushback continues to be ardent (Gilmore, 2016). The Tribal and the non-Tribal communities calling northern Idaho and the land surrounding the Lake home continue to find discord when it comes to the assertion of tribal sovereignty and the recognition of treaty rights to the parts of the Lake the Tribe now owns and controls (Williams, 2016).

In order to understand the two communities within the scope of this research it is important to look into the relevant background and history. When it comes to relationships with the Lake and the possibility for collaboration between the two communities, as it does in this study, three areas become particularly important in understanding why the two communities in the scope of this research are at a point of conflict that might be bridged by a deeper understanding of their differing worldviews. The first is the ownership of the Lake, which, according to law, is shared between Tribal and non-Tribal governments. The 2001 Supreme Court of the United States decision in *Idaho v. United States* recognized the disputed ownership of the southern third of the Lake in the Tribe (*Idaho v. United States*, 2001). The northern two-thirds continues to be recognized as owned by the State of Idaho. The second is

the controversial Dawes Act or General Allotment Act, passed through the Congress of the United States in 1887 (General Allotment Act, 1887). This Act and 1906's more specific Coeur d'Alene Reservation Allotment Act left the reservation only fractionally owned by Tribal members and introduced Euro-American ownership within the reservation boundary (General Allotment Act, 1887). Lastly, an understanding of sovereignty is important because of how complex the assertion of sovereignty becomes with the circumstance of split ownership of the Lake and the legacy of the Allotment Acts.

Sovereignty can be defined in many ways. A Western definition of Tribal Sovereignty would go something like this: a tribe's right to govern themselves, define their own membership, manage tribal property, and regulate tribal business and domestic relations; it further recognizes the existence of a government-to-government relationship between such tribes and the federal government or, in other words, a recognition or respect thereof. According to the Indian Appropriation Act of March 3, 1871, no longer was any group of Indians in the United States recognized as an independent nation by the federal government (Appropriation Act, 1871). Before this Act treaties between the United States and the tribes of North America were usually set up to function in relation akin to those between larger countries like, for example, the United States and Russia or France, but in practice, there is an acute disparity. While a manageable concept to define, Tribal Sovereignty has proved a far more difficult one to implement. The reasons include sovereign-within-a-sovereign tensions, limited resources and differing worldviews to name a few.

An Indigenous definition of Tribal Sovereignty would be akin to what Westerners might call "culture". The Sahaptin word, "tamanwit" can be interpreted as Indian law, natural law, divine law or simply, a way of life (Solomon, 2011). The Coeur d'Alene or the Schitsu'umsh use the word "hnhkhwkhwlnet" (meaning "our ways of life in the world") to embody a similar concept (Frey, 2017). "Tamanwit"

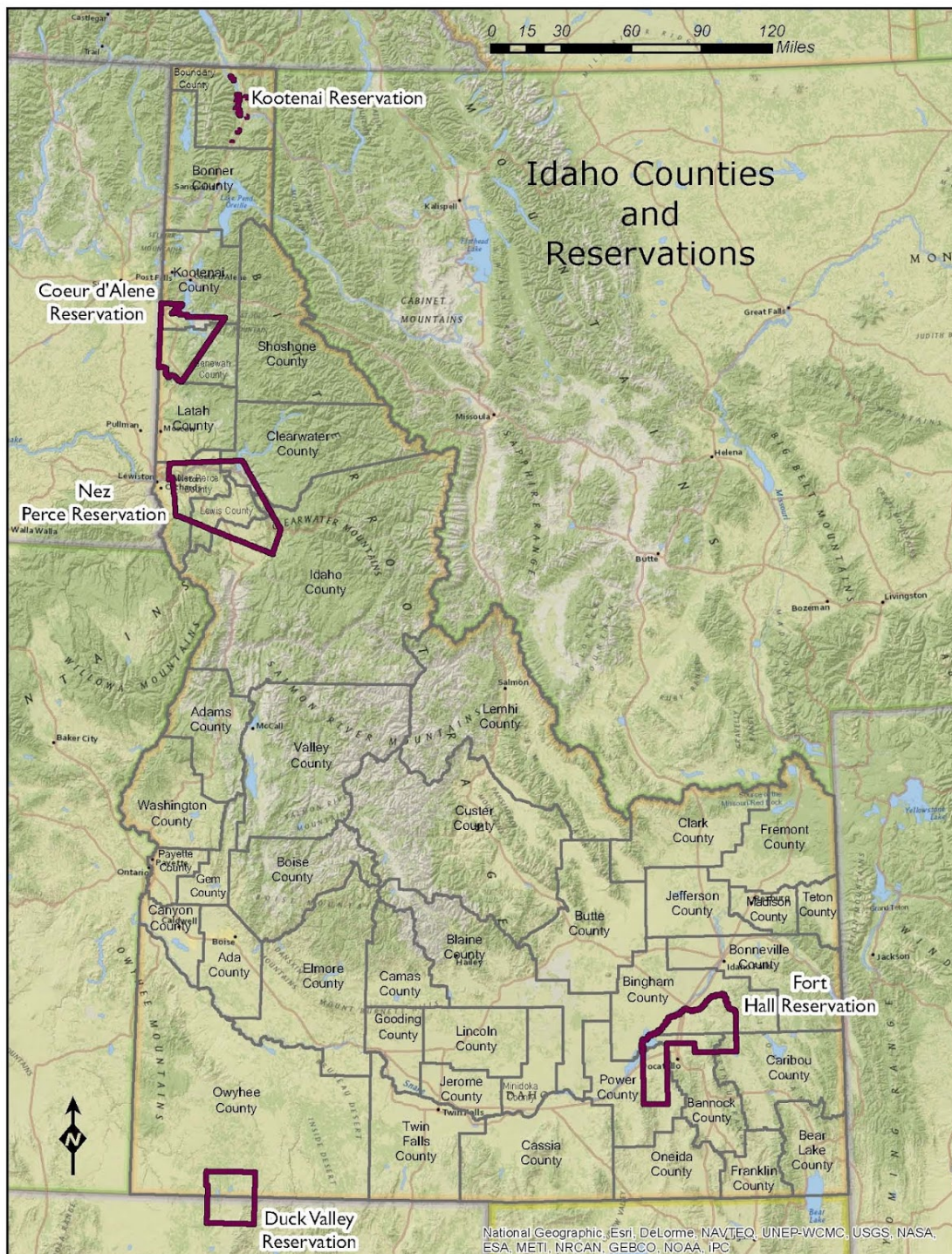


Figure 2.1: Map of Idaho showing Coeur d'Alene Reservation amongst other reservations in the State (idsmoke.blogspot.com, 2018).

and “hnhkhwkhwlnet” capture an indigenous exercise of sovereignty, the practice of traditions as sovereignty (Frey, 2017; Solomon, 2011). It is a teaching that has guided the Tribes in their relation and interactions with the world and its peoples since time immemorial (Trafzer 2005). The Coeur d’Alenes use the word “miyp,” meaning the “teachings from all things” (Frey, 2017). The indigenous world is a moral world in which all participants - first people, humans, animals, spirit people - are co-creators, equally statured and equally responsible to all others. Being equally responsible to all implies understanding to the greatest extent possible, the needs and relationships of all (Burkhart, 2004). Along these lines, the Coeur d’Alenes use the word “uchnek’we’,” literally meaning “we are all relatives/we are all one.” (Frey, 2017). Native American people are *indigenous* people, present in their places since time immemorial. In an indigenous world, all are related: earth, air, water, humans, and animals (Deloria 1999). In accordance with this, the Coeur d’Alenes use the word “chnis-teem-ilqwes,” meaning “I am your relative, I am part of all peoples—human, plant, animal, fish.” (Frey, 2017). Each has a sacred moral responsibility to honor and protect the world, its place in the world, and the pattern of relationships that make the world (Burkhart 2004). More specifically, the Coeur d’Alenes use the word “unshat’qn,” meaning “eye-to-eye” or an interrelationship that is characterized by an equality among all entities (Frey, 2017). Jeannette Armstrong, an Okanagan Native American, offers a view into a tribal sovereign exercise in *An Okanagan Worldview of Society*, “[i]n the Okanagan, our understanding of the land is that it’s not just that we’re part of the land, it’s not that we’re part of a vast system that operates on the land, but that the *land is us*” (Armstrong, 2002). For a more complete understanding of Tribal Sovereignty, it is important to view the issue through both Western and Indigenous lenses.

The history of Tribal Sovereignty, recognition and respect of tribal rights stems back to the very first encroachments on the North American continent by Europeans

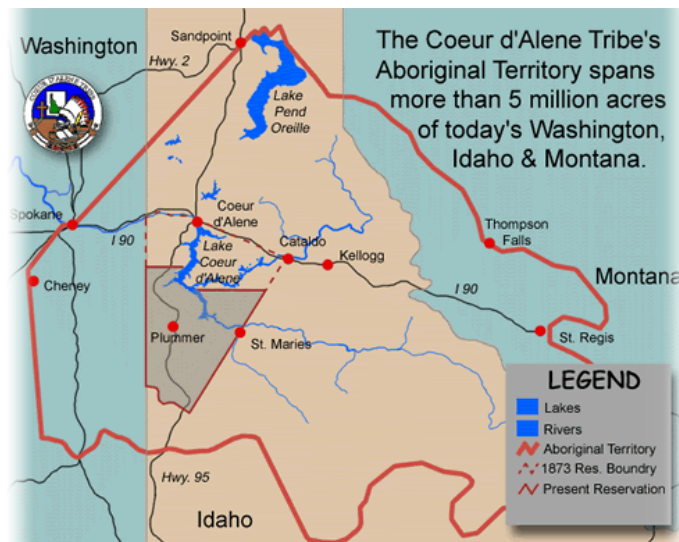


Figure 2.2: Map of Northern Idaho, Coeur d'Alene Tribe Aboriginal Territory, 1873 Coeur d'Alene Reservation Boundary and Present Reservation Boundary (Filby, 2017).

over 500 years ago, often referred to as First Contact (Echo-Hawk, 2010). Since then, the well-known story of Manifest Destiny, disease, conquest and Indian removal rendered North American tribes rather destitute by the mid-twentieth century (Echo-Hawk, 2010).

A robust literature exists, documenting the many facets of the American Indian tribal sovereignty saga. Perhaps the best place to begin is with the three sentinel American Indian law cases of the early 19th century known as the Marshall Trilogy.

In 1823, the Supreme Court ruled on the *Johnson v. M'Intosh* case that set forth a limitation on tribal property rights based on the international concept of the Doctrine of Discovery (*Johnson v. M'Intosh*, 1823). The opinion held that Indians have a right to occupancy to Indian lands, but the discovering European nation held superior title to those same lands (Eaglewoman, 2013). The United States as successor to Great Britain had thus obtained superior title to all Indian lands in mid-North America and limited the ability of Indians to sell their lands to any purchaser except the United States according to this Court decision (Eaglewoman, 2013).

The second and third cases in the Marshall Trilogy involved the resistance of the Cherokee Nation to the adverse actions of the state of Georgia. In 1831's *Cherokee*

Nation v. Georgia, an injunction was sought against the implementation of Georgia state laws asserting ownership and authority over Cherokee Nation lands and jurisdiction in contravention of tribal sovereignty and treaties with the United States (Eaglewoman, 2013). The U.S. Supreme Court opined that the Cherokee Nation was not a foreign nation with standing to bring a lawsuit under Article II, section two of the U.S. Constitution, which was a significant blow to their sovereignty (*Cherokee Nation v. Georgia*, 1831; U.S. Constitution). Rather, the Court found that the Cherokee Nation was a “domestic dependent nation,” a new political term created by the Court that did not entitle a Tribe to sue in federal court (*Cherokee Nation v. Georgia*, 1831). The Court also stated that there existed a ward/guardian relationship between the Tribal Nations and the United States, but went on to dismiss the case due to a lack of standing to appear before the Court (Eaglewoman, 2013).

The Third case involved the applicability of the laws of the state of Georgia in the Cherokee Nation lands as imposed upon Samuel Worcester, a European-American missionary under the protection of the federal government. In 1832’s *Worcester v. Georgia*, a *habeas corpus* petition was brought by Mr. Worcester when he was incarcerated by Georgia officials for failing to obtain state permissions and swear an oath to the state prior to entering Cherokee lands. The case afforded United States Supreme Court Chief Justice John Marshall the ability to provide a detailed account of the relationship between the United States and tribal governments based upon the sovereign-to-sovereign era of federal Indian policy (*Worcester v. Georgia*, 1832). The Court held in the case that federal law preempted state law in Indian affairs, upholding the treaty relationship between the United States and the Cherokee Nation and voiding the Georgia’s laws in contravention of treaty provisions (*Worcester v. Georgia*, 1832).

Thus, the Marshall Trilogy cases of the 1820s and 1830s have served as a foundation for federal Indian law in imposing limits on tribal property rights, redefining

tribal governments as “domestic dependent nations” in a “ward/guardian” relationship with the United States, and establishing federal preemption over state laws in Indian affairs (Eaglewoman, 2013).

Federal Indian policy in the late 1800s and early 1900s was defined by the implementation of the allotment and assimilation programs, continuing the tenor of the previous era’s congressional land disposal acts (Eaglewoman, 2013).¹ The Dawes or General Allotment Act of February 8, 1887, divided the communal Indian reservation up and allotted parcels as trust land to individual tribal members (Otis & Prucha, 1996). Specifically, the Act authorized the Interior Department to survey and allot tribal agricultural and grazing land in some, but not all, reservations (Eaglewoman, 2013). Only those reservations with “surplus land” following allotment were opened to homesteading by the Euro-Americans (Dawes Act, 1887). The Act was part of an assimilation policy at the time and was driven in part by a report that documented unfavorable communal conditions on Indian reservations and attributed these issues to the lack of private ownership of land (Otis & Prucha, 1996). However, as early as the 1890s, Congress began the process of breaking down the safeguard of inalienability which had been the original tenure of the Indian allotments (Otis & Prucha, 1996).

The Act has been called one of the most powerful and destructive pieces of legislation dealing with Indian affairs in United States history (Otis & Prucha, 1996). It was the culmination of many decades of agitation for a change in Indian land tenure by the Euro-American settlers and marks the Congressional abandonment of obtaining tribal consent before parceling reservation land (Cohen, 2017; Otis &

¹Signed into law by President Abraham Lincoln on May 20, 1862, the Homestead Act encouraged Western migration by providing settlers 160 acres of public land. In exchange, homesteaders paid a small filing fee and were required to complete five years of continuous residence before receiving ownership of the land. The Homestead Acts were several United States federal laws that gave an applicant ownership of land, typically called a “homestead”, at little or no cost. In all, more than 270 million acres of public land, or nearly 10% of the total area of the U.S., was given away free to 1.6 million homesteaders; most of the homesteads were west of the Mississippi River (Eaglewoman, 2013; Homestead Act, 1862).

Prucha, 1996). Humanitarian reformers, concerned with the welfare of the Indians, as well as anxious to speed them along the road to civilization, always considered the private ownership of land to be an indispensable means for Native Americans to assimilate into Euro-American society (Otis & Prucha, 1996).

The movement that led to the assimilation and the allotment era of federal Indian policy was spearheaded by entities like the Women's National Indian Association (WNIA), an association comprised of Euro-Americans, who believed the well-being of the Native Americans was only achievable by the abrogation of the existing treaties and their assimilation into white Christian society (Mathes, 1990). Riding on the back of WNIA's momentum, United States Senator Henry L. Dawes authored and helped pass the bill that authorized allotment of reservation lands to individual Native Americans in 1887 (General Allotment Act of 1887). By the early 1900s, allotment and assimilation was in full deployment (Otis & Prucha, 1996).

Through the Dawes Act and its progeny, trust land was transferred out of tribal ownership on allotted reservations (ending up in private, fee simple ownership) in two ways (Otis & Prucha, 1996). The first was that after 25 years had passed from the allotment date, a Native American allottee could be eligible to receive a patent in fee, free of encumbrance and fully alienable (Otis & Prucha, 1996; Cohen, 2017). However, many of these – once trust, now fee – lands were quickly sold because the sudden imposition of taxes made them no longer economically viable (Otis & Prucha, 1996). This was due in part to the lack of agricultural and irrigation subsidies for Native Americans that the Euro-Americans enjoyed at the time (Otis & Prucha, 1996). This policy ended with the passing of the Indian Reorganization Act of 1934 (Reorganization Act, 1934). Inalienability of allotted trust lands was almost completely dissolved by the Burke Act of 1906 (Otis & Prucha, 1996).

The Burke Act amended the Dawes Act, authorizing the Secretary of the Interior to issue a fee patent to an allottee before the expiration of the trust period, upon a

INDIAN LAND FOR SALE

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OF
YOUR OWN
*
EASY PAYMENTS



PERFECT TITLE
*
POSSESSION
WITHIN
THIRTY DAYS

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IRRIGATED IRRIGABLE GRAZING AGRICULTURAL DRY FARMING

IN 1910 THE DEPARTMENT OF THE INTERIOR SOLD UNDER SEALED BIDS ALLOTTED INDIAN LAND AS FOLLOWS:

Location.	Acres.	Average Price per Acre.	Location.	Acres.	Average Price per Acre.
Colorado	5,211.21	\$7.27	Oklahoma	34,664.00	\$19.14
Idaho	17,013.00	24.85	Oregon	1,020.00	15.43
Kansas	1,684.50	33.45	South Dakota	120,445.00	16.53
Montana	11,034.00	9.86	Washington	4,879.00	41.37
Nebraska	5,641.00	36.65	Wisconsin	1,069.00	17.00
North Dakota	22,610.70	9.93	Wyoming	865.00	20.64

FOR THE YEAR 1911 IT IS ESTIMATED THAT 350,000 ACRES WILL BE OFFERED FOR SALE

For information as to the character of the land write for booklet, "INDIAN LANDS FOR SALE," to the Superintendent U. S. Indian School at any one of the following places:

- | | | | | | |
|--------------------------------------|--|---|---|---|---|
| CALIFORNIA:
Hoopa. | MINNESOTA:
Onigum. | NORTH DAKOTA:
Fort Totten.
Fort Yates. | OKLAHOMA—Con.
Sac and Fox Agency.
Shawnee.
Wyandotte. | SOUTH DAKOTA:
Cheyenne Agency.
Crow Creek.
Greenwood.
Lower Brule.
Pine Ridge.
Rosebud.
Sisseton. | WASHINGTON:
Fort Simcoe.
Fort Spokane.
Tekoa.
Tulalip. |
| COLORADO:
Ignacio. | MONTANA:
Crow Agency. | OKLAHOMA:
Anadarko.
Cantonment.
Colony.
Darlington.
Muskogee, <small>part of</small>
Pawnee. | OREGON:
Klamath Agency.
Pendleton.
Roseburg.
Siletz. | | WISCONSIN:
Oneida. |
| IDAHO:
Lapwai. | NEBRASKA:
Macy.
Santee.
Winnebago. | | | | |
| KANSAS:
Horton.
Nadeau. | | | | | |

WALTER L. FISHER,
Secretary of the Interior.

ROBERT G. VALENTINE,
Commissioner of Indian Affairs.

Figure 2.3: Department of the Interior Allotment Land Advertisement in the early 1900s (California Indian Education.org, 2018).

determination that the allottee was “competent and capable of managing his or her affairs” (Cohen, 2017). Lands patented in fee under the Burke Act were expressly subject to alienation, encumbrance, and taxation (Cohen, 2017).

The second way was the passing of allotted land intestate or to the heirs of the original allottee (Shoemaker, 2003). Due to this system, there are parcels today with over 1000 owners (Shoemaker, 2003). Furthermore, due to marriage outside the tribe, some of those 1000 owners are not tribal members (Shoemaker, 2003). This is called the fractional ownership problem in which the same parcel is held in both trust and fee status (Shoemaker, 2003). Between 1887 and 1934, the tribal lands of 118 reservations were allotted, although many reservations, particularly in the Southwest, escaped allotment (Cohen, 2017). By 1934, approximately 27 million acres, or two-thirds of all the land allotted to tribal members, had passed by sale or involuntary transfer from the Indian fee owner into non-Indian ownership (Cohen, 2017).

Despite the repercussions of the Dawes Act, many of the main acts of the government were purportedly made in good faith (Otis & Prucha, 1996). The actors creating the allotment programs were, for the most part, made with sincerity in efforts to defend and help Native Americans (Otis & Prucha, 1996). On the other hand, the government’s Indian Agents whom were overseeing the allotment procedure were accused of conniving with land sharks in leasing transactions involving the allotments (Otis & Prucha, 1996).

Senator Dawes, after which the Act was named, argued for the benefits of allotment here,

[t]he head chief told us that there was not a family in that whole Nation that had not a home of its own. There was not a pauper in that Nation, and the Nation did not owe a dollar. It built its own capital ... and it built its schools and its hospitals. Yet the defect of the system was apparent. They have gone as far as they can go, because they own in common. It is Henry George’s system, and under that there is no enterprise to make your home any better than that of your neighbors. There is no selfishness, which is at the bottom of civilization. Till this people will consent to give

up their lands, and divide them among their citizens so that each can own the land he cultivates, they will not make much more progress. (Otis & Prucha, 1996).

However, not all shared Senator Dawes' sentiment for allotment (Otis & Prucha, 1996). The minority of the House Committee on Indian Affairs doubted whether private property would transform the Native American,

However much we may differ with the humanitarians who are riding this hobby, we are certain that they will agree with us in the proposition that it does not make a farmer out of an Indian to give him a quarter-section of land. There are hundreds of thousands of white men, rich with experiences of centuries of Anglo-Saxon civilization, who cannot be transformed into cultivators." (Otis & Prucha, 1996).

The assimilation and allotment era was further bolstered by what Native American lawyer, scholar and advocate Walter R. Echo-Hawk calls one of the ten worst Indian law decisions in history, *Lone Wolf v. Hitchcock* (Echo-Hawk, 2010; Solomon, 2011).

Lone Wolf came about when the Medicine Lodge Treaty of 1867 was violated (Act of July 25, 1868). Article VI of the Treaty allowed members of the Kiowa, Comanche and Apache tribes to select a tract from lands held in common for their exclusive possession. Article XII of the Treaty provided that no treaty for the cession of any portion of the reservation held in common would be valid unless executed by three-fourths of all the adult males occupying the same and no cession by the tribe would be construed to deprive an individual member of his rights to a selected tract without his consent (*Lone Wolf v. Hitchcock*, 1903).

Subsequently, an agreement was signed by the tribes, which included allotment, but the census needed to comply with the treaty provisions was proved to have not been met (*Lone Wolf v. Hitchcock*, 1903). The members filed their action alleging that they could only be deprived of their interest in the land by the process specified in Article XII. However, the Supreme Court held that Congress possesses a plenary power

over the real property of Native Americans, by reason of its exercise of guardianship over their interests, and such authority could be implied, even though opposed to the strict letter of a treaty with them (*Lone Wolf v. Hitchcock*, 1903). This power was a political one and was not subject to be controlled by the judiciary. Therefore, the holding professed Congress had the power to abrogate a Treaty at will (*Lone Wolf v. Hitchcock*, 1903). Consequently, the holding in *Lone Wolf* is an immense blow to tribal sovereignty, but is not recited or respected ubiquitously (Echo-Hawk, 2010).

Around the same time as the decision in *Lone Wolf*, and against the near universal opposition to the allotment process, the Coeur d'Alene Tribe lost nearly all of the land that was left to them after their 1889 Agreement with the United States to allotment (Dorchester, 1890; Hart, 2015). The Commissioner of the Bureau of Indian Affairs (BIA) at the time, Francis E. Leupp, was emboldened by the decision in *Lone Wolf* and worked behind the scenes to get things in order to survey and allot the Coeur d'Alene Reservation in the first years of the 20th century (Hart, 2015). The Tribe had voted unanimously against allotment, and looked upon the process as “nothing short of open thievery” (Hart, 2015). Nonetheless, a survey to subdivide the reservation began in 1905, which appalled the Coeur d'Alenes (Hart, 2015). Despite meeting surveyors with hostility, sending a delegation to Congress to protest the allotment surveying and other acts of civil disobedience, their protests fell on deaf ears (Hart, 2015). As a sign of the times, Commissioner Leupp went so far as to remind the Coeur d'Alene delegation, protesting allotment at the capital in Washington D.C., that Congress had plenary power over them, as guardian to their ward (Hart, 2015).

Coeur d'Alene Chief Moctelme commented on the topic,

[t]hey broke their promises and bought the northern part of our Reservation when valuable and rich gold mines were discovered there, and this against our will. The Indian did not want to sell. They were almost forced to sell, and now at the present time, today, the whites have decided to allot our Reservation. They already have started surveying it without consulting us, without even asking our consent, without any offer

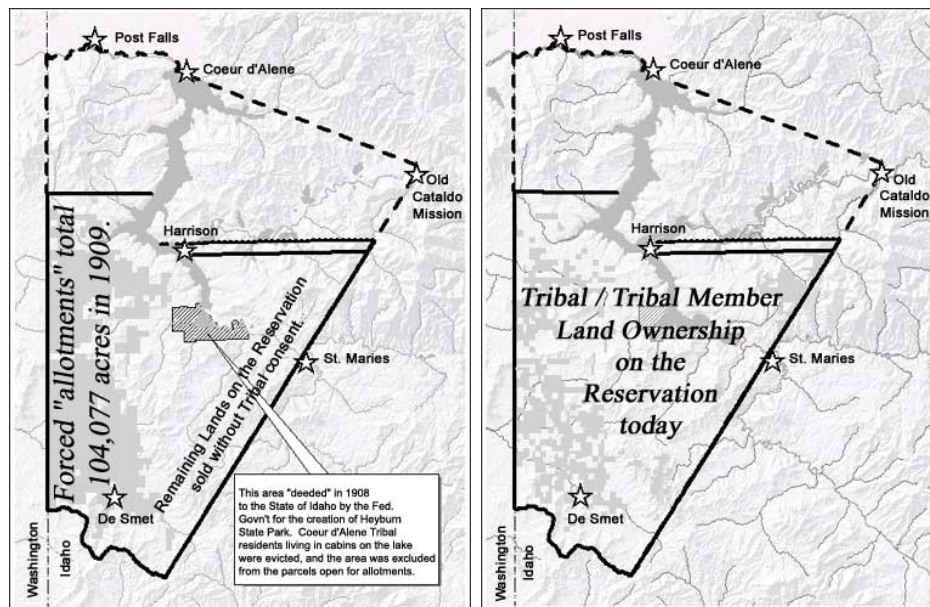


Figure 2.4: LEFT: 1910 Coeur d'Alene Reservation and Tribal Land Ownership After 1909 Allotment (Frey, 2002). RIGHT: 1999 Coeur d'Alene Reservation and Tribal Land Ownership 90 Years Later (Frey, 2002). *Tribally owned land is in a darker shade and checkered.

of compensation.” (Cox, 1979).

The Coeur d'Alene Evening Press, on November 17, 1906, correctly anticipated that the Lake would become an important resort area for the region once the reservation was opened to settlement by non-tribal members (Hart, 2015). Tribal members who lived near the Lake and river shores were forced to take allotments away from the shores (Palmer, 1987). As a result of the process, the Tribe lost all lakefront and riverfront property (Palmer, 1987).

The Coeur d'Alene Reservation Allotment Act was passed through Congress in 1906 (Hart, 2015). The process was carried out between 1907 and 1909 (Hart, 2015). Over 600 Indian allotments were issued (Hart, 2015). As a result of the allotment process, land held in trust for the Tribe or its members within the boundaries of the Reservation was reduced from 345,000 acres to 58,000 acres (Hart, 2015). Many of the Coeur d'Alenes were unable to keep the farms they had established, improved and worked for many years prior (Hart, 2015). Prior to allotment the Coeur d'Alenes were widely acclaimed as the most successful of all the tribes in the Northwest largely

due to their agricultural prowess (Palmer, 1987). After allotment the Coeur d'Alenes became fully aware of their disenfranchisement and the reality of where the allotment program had left them (Connely & Palmer, 1982).

Over 100,000 non-Indians registered for the Coeur d'Alene Reservation allotment lottery making entries on over 285,000 acres of reservation land that was to be opened to Euro-American use (Hart, 2015). On May 22, 1909, President Howard Taft issued a proclamation opening the remaining Coeur d'Alene Reservation lands (Hart, 2015). The drawing was held in August, 1909, to determine who could make entries. Thirteen-hundred and fifty lucky persons won the lottery (Hart, 2015). In early 1910, actual applications were presented for entry and then on September 1, 1910, people took possession of their entries (Cotroneo & Dozier, 1974). Within 25 years nearly 75% of the remaining Coeur d'Alene lands had been leased to non-Indians. Within fifty years nearly 50% of the allotments had passed out of tribal ownership (Cotroneo & Dozier, 1974).

Prior to the conclusion of the allotment process, the United States conveyed Reservation land around the southern end of the Lake to the State of Idaho in order to create a state park (Hart, 2015). This particular park, called Heyburn State Park, was named after a U.S. senator from Idaho, Weldon Heyburn. Before allotment, the land that is now Heyburn State Park was a prominent establishment of the Coeur d'Alenes (Hart, 2015). The allotment process removed the Tribe from the lakeshore. Throughout the remainder of the 20th century and into the 21st century the Tribe has worked to undo much of that harm and to achieve in the process, a much greater degree of self-determination (Hart, 2015).

With the Reservation greatly diminished, the Tribe persevered and eventually worked to restore its government under the Indian Reorganization Act of 1934. The Tribe gained approval of a written constitution in 1949 and elected representatives to the Tribal Council. In the 1950s, the Tribe came under termination pressure by

Congress in what was known as the Termination Era of federal Indian policy, but managed to evade such a demise (Eaglewoman, 2013).

In the last 50 years, a change in Federal policy and a push towards tribal self-determination has revitalized many tribes in the United States, including the Coeur d'Alenes (Eaglewoman, 2013). One of the seminal pieces of legislation enacted heralding in the new federal policy was the Indian Self-Determination and Education Assistance Act of 1975 (Act of January 4, 1975). The statute and others enacted since have encouraged tribal government administration of services to tribal citizens with the intention of lessening Bureau of Indian Affairs (BIA) control over tribal communities (Eaglewoman, 2013). The change in policy also seemed to introduce a host of favorable Supreme Court rulings which opened up a new avenue of the economy for tribes and proved particularly beneficial to the Coeur d'Alene Tribe.

In 1976's *Bryan v. Itasca County* case, Russell and Helen Bryan, a married Chippewa couple living in a mobile home on Indian lands in northern Minnesota, received a property tax bill from the local county, Itasca County. The Bryans had never received a property tax bill from the county before. Unwilling to pay it, they took the tax notice to local legal aid attorneys, who brought suit to challenge the tax in the state courts. The Bryans lost their case in the state district court, and they lost again on appeal by unanimous decision in the Minnesota Supreme Court. They then sought review in the United States Supreme Court. The Court granted review on November 3, 1975, and in a sweeping and unanimous decision authored by Justice William Joseph Brennan, Jr., the Court held not only that states do not have authority to tax Natives on their reservations, but that they also lack the authority to regulate Native activities on their reservations (*Bryan v. Itasca County*, 1976).

When the decision was announced, it was reported as a substantial victory for Indians by both the local and national press. *Bryan v. Itasca County* is a landmark case on the taxation of Indians and tribal sovereignty. The case has had a significant

impact on Indian gaming with its broad holding that states do not have general civil regulatory control over Indian reservations (Washburn, 2008). This ruling, in a challenge to a tax bill of under \$200, had the effect of enabling Indian tribes nationwide to earn over \$200 billion in casino and gaming revenue as of 2007 (Washburn, 2008).

As part of the progeny of this ruling, in March of 1993, the Coeur d'Alene Tribe opened a bingo hall which would blossom into a modern and lucrative casino. In 1996 the casino received a \$14 million expansion, and by 1998 it made net profits that totaled \$9.2 million. These large profits were put back into the community by the Tribe, building a modern hospital, expanding government function and agencies and hiring legal representation to vociferously defend and assert their rights (Wilson, 2002). This boost to the Tribe's economy has resulted in a turn-around in unemployment rates. The rate dropped from 70% in 1989 to single digits in 2007 due, in large part, to the advent of tribal gaming (Frank, 2008). The Tribe as a whole pulled in about \$100 million in earnings in the 2007 fiscal year (Frank, 2008).

Shortly after the profits from the casino were mounting, the Coeur d'Alene Tribe collected their resources and reasserted their right to the Lake, culminating in a pair of court cases that were decided in the Supreme Court of the United States in 1997 and 2001. These cases are known as the Lake Cases (*Idaho v. Coeur d'Alene Tribe*, 1997; *Idaho v. United States*, 2001). A prerequisite to understanding the Lake Cases is an understanding of the history of the Coeur d'Alene Reservation.

2.2 History of Coeur d'Alene Reservation

The U.S. Supreme Court examined the history of the Coeur d'Alene Indian Reservation in *Idaho v. United States*, 533 U.S. 262 (2001). This case concerned contested boundaries and actions by the parties establishing the boundaries. The Court heard from both sides of the issue and had to weigh all of the historical evidence. It thus presents a history that has been debated on all sides – and as an opinion of the



Figure 2.5: Children of the Coeur d'Alene Tribe Dig For Water Potatoes in Recent Years (Brinkman, 2017).

U.S. Supreme Court – it becomes the version of the story accepted for legal purposes. The U.S. Supreme Court is not a Tribal court, but is the highest Court in the United States. Despite this, the fact that this historical record was endorsed by a non-Tribal court and was decided in favor of a tribe, points to what must have been a clear record in the Tribe's favor. In the opinion, Justice David Souter provides a detailed summary of the circumstances leading to the Reservation's creation. That summary is partially recreated here:

The Coeur d'Alene Tribe once inhabited more than 3.5 million acres in what is now northern Idaho and northeastern Washington, including the area of Coeur d'Alene Lake and the St. Joe River. Tribal members traditionally used the Lake and its related waterways for food, fiber, transportation, recreation, and cultural activities. The Tribe depended on submerged lands for everything from water potatoes harvested from the Lake to fish weirs and traps anchored in riverbeds and banks.

Under an 1846 treaty with Great Britain, the United States acquired title to the region surrounding the Lake.... In 1867, in the face of immigration into the Tribe's aboriginal territory, President Johnson issued an Executive Order setting aside a reservation of comparatively modest size, although the Tribe was apparently unaware of this action until at least 1871, when it petitioned the Government to set aside a reservation.... The Tribe found the 1867 boundaries unsatisfactory, due in part to their failure to make adequate provision for fishing and other uses of important waterways. When the Tribe petitioned the Commissioner of Indian Affairs a second time, it insisted on a reservation that included key river valleys



Figure 2.6: Coeur d'Alene Tribal Member with a native Cutthroat Trout in 2009 (Brinkman, 2017).

because “we are not as yet quite up to living on farming” and “for a while yet we need [sic] have some hunting and fishing.”

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.” The reservation boundaries described in the agreement covered part of the St. Joe River (then called the St. Joseph), and all of the Lake except a sliver cut off by the northern boundary.

Although by its own terms the agreement was not binding without congressional approval, later in 1873 President Grant issued an Executive Order directing that the reservation specified in the agreement be “with-drawn from sale and set apart as a reservation for the Cur [sic] d’Alene Indians.” The 1873 Executive Order set the northern boundary of the reservation directly across Lake Coeur d’Alene, which, the District Court found, was contrary “to the usual practice of meandering a survey line along the mean high water mark.” An 1883 Government survey fixed the reservation’s total area at 598,499.85 acres, which the District Court found

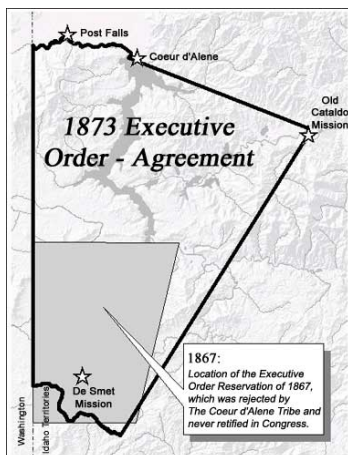


Figure 2.7: 1867 and 1873 Executive Order Reservations of the Coeur d'Alene Tribe (Frey, 2002).

necessarily “included submerged lands within the reservation boundaries.”

As of 1885, Congress had neither ratified the 1873 agreement nor compensated the Tribe. This inaction prompted the Tribe to petition the Government again, to “make with us a proper treaty of peace and friendship ... by which your petitioners may be properly and fully compensated for such portion of their lands not now reserved to them; [and] that their present reserve may be confirmed to them.” In response, Congress authorized new negotiations to obtain the Tribe’s agreement to cede land outside the borders of the 1873 reservation. 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.”

The Government, in return, promised to compensate the Tribe, and agreed that, “[i]n 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.” As before, the agreement was not binding on either party until ratified by Congress.

In January 1888, not having as yet ratified any agreement with the Tribe, the Senate expressed uncertainty about the extent of the Tribe’s reservation and adopted a resolution directing the Secretary of the Interior

to “inform the Senate as to the extent of the present area and boundaries of the Coeur d’Alene Indian Reservation in the Territory of Idaho,” and specifically, “whether such area includes any portion, and if so, about how much of the navigable waters of Lake Coeur d’Alene, and of Coeur d’Alene and St. Joseph Rivers.” The Secretary responded in February 1888 with a report of the Commissioner of Indian Affairs, stating that “the reservation appears to embrace all the navigable waters of Lake Coeur d’Alene, except a very small fragment cut off by the north boundary of the reservation,” and that “[t]he St. Joseph River also flows through the reservation.”

Congress was not prepared to ratify the 1887 agreement, however, owing to a growing desire to obtain for the public not only any interest of the Tribe in land outside the 1873 reservation, but certain portions of the reservation itself. The House Committee on Indian Affairs later recalled that the 1887 agreement was not promptly ratified for “sundry reasons, among which was a desire on the part of the United States to acquire an additional area, to wit, a certain valuable portion of the reservation specially dedicated to the exclusive use of said Indians under an Executive order of 1873, and which portions of said lands, situate[d] on the northern end of said reservation, is valuable and necessary to the citizens of the United States for sundry reasons. It contains numerous, extensive, and valuable mineral ledges. It contains large bodies of valuable timber.... It contains a magnificent sheet of water, the Coeur d’Alene Lake....”

But Congress did not simply alter the 1873 boundaries unilaterally. Instead, the Tribe was understood to be entitled beneficially to the reservation as then defined, and the 1889 Indian Appropriations Act included a provision directing the Secretary of the Interior “to negotiate with the Coeur d’Alene tribe of Indians,” and, specifically, to negotiate “for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell.” Later that year, the Tribe and Government negotiators reached a new agreement under which the Tribe would cede the northern portion of the reservation, including approximately two-thirds of Lake Coeur d’Alene, in exchange for \$500,000. The new boundary line, like the old one, ran across the lake, and General Simpson, a negotiator for the United States, reassured the Tribe that “you still have the St. Joseph River and the lower part of the lake.” And, again, the agreement was not

to be binding on either party until both it and the 1887 agreement were ratified by Congress.

On March 3, 1891, Congress “accepted, ratified, and confirmed” both the 1887 and 1889 agreements with the Tribe (*Idaho v. United States*, 2001).

2.3 The Lake Cases

The disputes surrounding the Lake have a formal history. Twice, the Tribe and then the United States brought a lawsuit arguing ownership to the beds and banks of the Lake (*Idaho v. Coeur d’Alene Tribe*, 1997; *Idaho v. United States*, 2001). An understanding of the legal arguments made by the parties involved in these lawsuits allows us to grasp the platform upon which the two communities in this study stand when they argue ownership one way or the other.

In the 1997 case, *Idaho v. Coeur d’Alene Tribe*, the Tribe filed an action against the State of Idaho, various state agencies, and numerous state officials alleging ownership of the submerged lands and bed of the Lake and various navigable tributaries and effluents lying within the original boundaries of the Reservation. The Tribe sought a declaratory judgment establishing its entitlement to the exclusive use and occupancy and the right to quiet enjoyment of the submerged lands, a declaration of the invalidity of all Idaho laws, customs, or usages purporting to regulate those lands, and a preliminary and permanent injunction prohibiting defendants from taking any action in violation of the Tribe’s rights in the lands (*Idaho v. Coeur d’Alene Tribe*, 1997).

Ultimately, the federal District Court dismissed all the components of the complaint on Eleventh Amendment immunity grounds, for failure to state a claim upon which relief could be granted, and on the merits (*In re Beds & Banks*, 1992; U.S. Constitution). The Court of Appeals affirmed that the Eleventh Amendment barred all claims against the State and its agencies, as well as the title action against the officials (*Coeur d’Alene Tribe v. Idaho*, 1994; U.S. Constitution). However, it al-

lowed the claims for declaratory and injunctive relief against the state officials to proceed insofar as they sought to preclude continuing violations of federal law. The court reasoned that those claims were based on Idaho's ongoing interference with the Tribe's alleged ownership rights, and found it conceivable that the Tribe could prove facts entitling it to relief on the claims (*Coeur d'Alene Tribe v. Idaho*, 1994). On *certiorari*, the Supreme Court answered the question, "may Indian Tribes proceed with suits against state officials in light of the sovereign immunity provided by the Eleventh Amendment?" Answering in the negative, and in a split, 5-4 decision, the Court held that the Tribe's suit against the state officials may not proceed in federal court because States enjoy Eleventh Amendment immunity in suits filed by Indian tribes (*Idaho v. Coeur d'Alene Tribe*, 1997; U.S. Constitution).

Shortly thereafter, the United States, pursuant to its trust responsibility to the Tribe, brought a substantially similar suit against Idaho in 2001. Understanding the second case over the beds and the banks of the Lake, however, requires a history lesson.

The Coeur d'Alenes aboriginal grounds were vast throughout the area now located in northern Idaho. The Tribe traditionally used the Lake and the St. Joe River for a source of food, fiber, transportation, recreation and cultural activities (*Idaho v. United States*, 2001).

In the Agreement and subsequent Executive Order (E.O.), both from 1873, the Tribe agreed to relinquish all claims to its aboriginal lands to the United States outside the bounds of a specified reservation that included part of the River and nearly all of the Lake (Agreement of 1873, Executive Order of 1873). President Ulysses S. Grant set the land designated for the Reservation aside through the aforementioned E.O. The Agreement and the E.O. would lie unratified by Congress throughout the 1870s and into the 1880s. However, an 1883 Federal Government survey recognized submerged lands as part of the Reservation (*Idaho v. United States*, 2001).

Congress also held off on compensating the Tribe for the cession of lands memorialized in the 1873 Agreement and the E.O. Because of this inaction, the Tribe petitioned the Government for the drafting of a legitimate treaty that would be better suited for ratification. Congress authorized these negotiations in 1886, which began in earnest in 1887 (*Idaho v. United States*, 2001).

In the Agreement of 1887, the Tribe ceded its rights to all land except those lands within the 1873 E.O. Reservation (Agreement of 1887). In return, the Government promised compensation for ceded lands, and a promise to hold the lands within the 1873 Reservation as Indian land forever (Agreement of 1887). Even upon this Agreement, Congress would not ratify. In 1888, the Department of the Interior Secretary responded to a federal Senate enquiry about the Reservation's boundaries, reporting that the Reservation appeared to encompass all but a small fragment of the Lake's navigable waters and that the St. Joe River flowed through the Reservation (*Idaho v. United States*, 2001). Additionally, in 1888, Congress recognized the creation of the Reservation's intent to defeat future state title when it authorized pursuit of the Tribe's consent and compensation for a railroad right-of-way that crossed the Reservation's navigable waters (*Idaho v. United States*, 2001).

Also in 1888, Congress authorized negotiations concerning the public's growing concern and interest into parts of the Reservation (*Idaho v. United States*, 2001). Subsequently, the Agreement of 1889 was created, in which the Tribe agreed to cede the Reservation's northern portion, including two-thirds of the Lake, in return for compensation (Agreement of 1889). These negotiations and agreements were being made around the same time as the Dawes Act or General Allotment Act of 1887, a few years before the Coeur d'Alene Reservation Allotment Act of 1906.

In 1890, the Senate passed a bill ratifying the 1887 and 1889 Agreements, but while the bill was pending in the federal House of Representatives, Congress passed the Idaho Statehood Act, admitting the Idaho territory into the Union as a state and

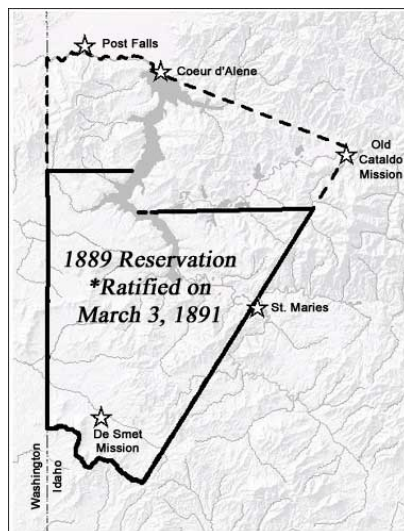


Figure 2.8: 1889 Reservation of the Coeur d'Alene Tribe. Ratified by Congress on March 3, 1891 (Frey, 2002).

granting them all of the rights inherent in the Equal Footing Doctrine, including title to the beds and banks of lakes and rivers within the a new state boundary (Act of July 3, 1890). In 1891, both houses of Congress were finally in agreement and ratified the 1887 and 1889 Agreements (Act of March 3, 1891).

From 1890 to 2001, Idaho acted as owner and regulator of the Lake, in its entirety, including the southern third, based on the presumption that the Equal Footing Doctrine gave such control to the state (*Idaho v. Coeur d'Alene Tribe*, 1997). The July 3, 1890, Idaho Statehood Act was a prior congressional action to the ratification of the 1887 and the 1889 Agreements in the Act of March 3, 1891 (Act of July 3, 1890; Act of March 3, 1891). Therefore, according to the state of Idaho, when Idaho became a state in 1890, the unratified agreements and pending act concerning the Coeur d'Alene Reservation did not imply ownership to the beds and the banks of the Lake within the Reservation because Idaho received title to all submerged lands underneath navigable water upon statehood, including the lands under the southern third of the Lake within the Reservation (*Idaho v. United States*, 2001). Under the state's argument, the subsequent congressional ratification of the Agreements of 1887 and 1889 in 1891 simply did not and could not vest title and right to the Lake and its

submerged lands to the Coeur d'Alenes as title had already vested to Idaho through statehood the previous year (Act of March 3, 1891).

In opposition to the state of Idaho's argument, the United States and the Tribe argued the ownership of the beds and the banks of the southern third of the Lake was reserved by the Tribe upon the original reservation, formed by the first agreement where the United States and the Tribe were both present and consenting parties, specifically the Agreement and subsequent Executive Order both in 1873, which reserved almost all of the Lake (Agreement of 1873, Executive Order of 1873).

After being presented with both arguments, the Supreme Court held that although title to federal land under navigable waters presumptively passed to a state upon statehood, Congress clearly intended to recognize the Executive Order reserving the submerged lands for the benefit of the Tribe prior to the State's 1890 statehood. The boundary of the Tribe's designated reservation admittedly included the submerged lands, and the final reservation was granted in exchange for the Tribe's agreement to reduce the size of its reservation. Thus, the express congressional goals of promoting settlement, avoiding hostilities, and extinguishing the Tribe's title to a portion of their land was consensually achieved by including the submerged lands in the reservation to preserve the Tribe's water rights (*Idaho v. United States*, 2001).

Upon the holding of this case in 2001, and the formal recognition and respect of Tribal title and control of the beds and banks of the southern third of the Lake, Tribal enforcement officials were met with a push-back from a contingent of the local non-Tribal population despite a statement issued on the contrary by Tribal elder Felix Aripa, directly after the Supreme Court decision in *Idaho v. United States*:

We are happy again. The justices have affirmed that our way of life, the place where we provided for ourselves, is our Lake. From now on, we will do our best to all be caretakers. From now on, we won't ever back up. We will go forward no matter what. When we become good stewards, we and our neighbors, the whole community, will be happy. We will look at each other, from the heart. Would that it be so (Aripa, 2001).

Tribal regulations and enforcement were ignored and dock permits were left unpaid, signifying a choice to reinterpret the Supreme Court, federal law, and tribal sovereignty.

2.4 Coeur d'Alene Tribe Water Rights

Throughout the conducting of this research project (2016 - 2018) the Tribe, the United States and the State of Idaho have been involved in water rights litigation. The United States as trustee of the Reservation has filed 353 water rights on behalf of the Tribe, the trustor (The United States' Claims, 2017). Many parties from the relevant watershed basins objected to the claiming of these water rights, but none more representative to this study than the State of Idaho (*Notice Of Filing Federal Reserved Water Right Claims*, 2014). The arguments made by the parties in this litigation are driven by the same perspectives, worldviews and values that are at issue in this study. Therefore, a study of the arguments made in the case are further informative to this study. A case note on the water rights litigation can be found in Appendix D.

2.5 Relationships with the Natural World

The Tribal and non-Tribal communities surrounding the Lake bring with them discrete relationships with their worlds (Hart, 2015). The Tribe, having lived on the shores of the Lake and in the surrounding area since time immemorial, traditionally used the Lake for a source of food, fiber, transportation, recreation and cultural activities (Hart, 2015). The non-tribal peoples of the Lake trace their presence through a series of settlements, mining exploits, allotment, logging exploit, treaties, land purchases and the land disposal acts of the nineteenth century (Hart, 2015). Modern uses of the Lake by non-tribal peoples include livelihood, aesthetic, transportation,

recreation, and other uses.

Studies have shown that Native American tribes often hold an ethic known as a “practical environmentalism” (Sherman et al., 2010). Practical environmentalism is a conservation practice that emerges from an opposition to concrete material and economic ties to land that contrasts traditionally held, abstract environmental values or theoretical environmental concerns (Sherman et al., 2010). This deep connection to land and place seems to transcend the western approach to property and its cornerstones: the rights to exploit landscapes owned and the right to exclude all others from landscapes owned (Dukeminier et al., 2010).

The Coeur d’Alenes’ word for themselves, “Schitsu’umsh,” means “the ones that were found here” (Frey, 2001). It situates them in their homeland around the Lake. Furthermore, the Coeur d’Alene’s oral traditions further establish and identify their first foods (e.g. roots) and the Lake as central to their existence (Frey, 2001).

The non-Tribal story or history in relation to the natural world is one of economics and capitalism and the exercising of the rights inherent in property to exploit and exclude. The influx of Euro-American settlers into the region during the gold rush, which occurred off and on in the later half of the 19th century, left a legacy of pollution in the Tribe’s aboriginal lands, specifically the Silver Valley (Hart, 2015). Mining companies discharged hundreds of millions of tons of lead and zinc contaminated sediments into the Coeur d’Alene River basin, eventually making its way into the Coeur d’Alene Lake itself (Solomon, 2011). The federal Environmental Protection Agency (EPA) eventually began addressing the most immediately dangerous toxic hotspots with its authority under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (Solomon, 2011). The “Superfund” site had been restricted by political considerations to a twenty-one square mile “box” centered on the mining district itself, excluding the Lake. There was no plan to address the longer-term restoration of the downstream depositions (Solomon, 2011).

Concerning ownership of the Lake bed, the Tribe fought all the way to the U.S. Supreme Court, winning a decision in June 2001 that granted them ownership to the southern third of the Lake (Taylor, 2002). A driving force behind the court fight was a desire to gain a stronger role in the Coeur d'Alene Lake cleanup, especially since the other parties involved refuse to admit the Lake is part of the expanded Superfund site (Taylor, 2002). "Let me make this crystal clear - as crystal clear as this water is - that this has never been a Superfund site and it never should be," said former Governor of Idaho Dirk Kempthorne (Taylor, 2002). "There is a stigma to Superfund. We all remember Love Canal," he continued, "Tourism is our fourth-biggest industry. We need to promote the area," not give people second thoughts about visiting (Taylor, 2002).

State governments have generally viewed natural resources as a basis for economic development and have managed resources to exploit their recreational, hunting and fishing, and lakeshore development values. In contrast, tribes, with a deep-seated cultural attachment to their land and lakes, have made the ecological health of the resource a management priority (Wilson, 2002).

Based on this information, it seems that the dominant conservationist land and water ethic held by the Coeur d'Alene Tribe is in juxtaposition with the dominant capitalistic land ethic of the non-Tribal communities. These approaches and relationships to the natural world are distinctly in play in the modern day disputes between the Tribal and non-Tribal communities.

2.6 Euro-American Settlement

The United States purchased much of the Mississippi River basin from the French through the Louisiana Purchase in 1803 (Livingston-Little, 1965). The Lewis and Clark Expedition came through present day Idaho and the region between 1804 and 1806 (Livingston-Little, 1965). Soon thereafter, employees from the North West

Fur Company, Hudson's Bay Company and Astor's Pacific Fur Company came to the North Idaho region to pursue fur trading as fur-bearing animals were abundant in the region (Livingston-Little, 1965). The first documented fur trader, David Thompson, was also a cartographer for the Hudson's Bay Company (Livingston-Little, 1965). He met with the Coeur d'Alenes as early as 1808 (Livingston-Little, 1965). He also established the Kullyspell House for trading with Native Americans near Lake Pend d'Oreille around 1811 (Livingston-Little, 1965). There were only a handful of trappers in the North Idaho region in the years from 1808 to 1836 (Livingston-Little, 1965). Trapping and trading continued to be a successful endeavor throughout the first third of the 19th century (Livingston-Little, 1965).

In the 1830s and 1840s, the missionaries came to the region, living amongst the Native Americans (Livingston-Little, 1965). The Spalding mission in Lapwai, Idaho, was established in 1836 and provided agriculture, milling, lumbering and printing for the first time anywhere in Idaho (Livingston-Little, 1965). The Coeur d'Alene Mission of the Sacred Heart was established on the banks of the St. Joe river, near present day St. Marie's, in 1842 (Livingston-Little, 1965). It was later moved to Cataldo on the banks of the Coeur d'Alene River (Livingston-Little, 1965). For years in the early 1800s, the United States and the British disputed territories in North Idaho, ending with the Oregon Treaty of 1846, wherein Britain ceded all rights to land south of the 49th parallel to the United States (Livingston-Little, 1965; Oregon Treaty, 1846).

In 1855, Angus MacDonald of the Hudson Bay Company sent men from Fort Colville (present day Northeast Washington state) up the Columbia River to prospect (Livingston-Little, 1965). They returned with several ounces of gold from the gravels at the mouth of the Pend d'Oreille River (Livingston-Little, 1965). Soon thereafter, gold miners began to come to the area (Hart, 2015). In the years following the Euro-Americans began to take up lands in the area to farm and prospect (Livingston-Little,

1965). Before gold miners started coming to the area in the late 1850s, the only Euro-American residents in what is now Idaho were three or four missionaries, three or four Indian Agency employees and a handful of retired fur traders (Livingston-Little, 1965). Frequent Indian troubles prevented large Euro-American influx into the area prior to 1860 (Livingston-Little, 1965).

In 1854 Congress authorized and funded the survey of a road that would connect two great navigable rivers, the Missouri and the Columbia (Hart, 2015). The Mullan road was constructed between 1859 and 1862 (Dozier, 1962). This road opened up the Inland Northwest to prospectors and other Euro-American settlers in a significant way for the first time (Hart, 2015). In just a handful of years (by 1866) over 20,000 people had traveled over the Mullan Road (Hart, 2015).

American troops entered the Coeur d'Alene territory unannounced and without permission in 1858, which led to the Steptoe and Wright Wars, in which tribes from the region and the United States army clashed in a few skirmishes (Hart, 2015). Also, the first significant gold rush in Coeur d'Alene country occurred in 1865 after a reported strike near the Cataldo Mission was published in the Walla Wall Statesman (Hart, 1865).

However, it really wasn't until the building of Fort Sherman at the western end of the Lake (present day city of Coeur d'Alene) in the late 1870s that there was any significant Euro-American establishment in the area beyond the missions (Livingston-Little, 1965). The construction of the Fort started serious trading with the Indians as a small pioneer village of Euro-Americans sprang up around the military base (Livingston-Little, 1965). In 1881 Andrew Prichard struck gold along the North Fork of the Coeur d'Alene River creating another rush (Livingston-Little, 1965). Fueling the rush was the Northern Pacific Railroad, which entered Idaho from the West in 1882 and promised free gold in North Idaho for the price of a ticket on the railroad. The railroad line from Sandpoint to Missoula was completed in 1883. Later, in 1885,

Noah Kellogg located silver and established the Bunker Hill Mine (Livingston-Little, 1965). Other silver mines were found in the area such as the Tiger and Poorman mines, leading to the establishment of a number of small towns up the Silver Valley, east of the present day city of Coeur d'Alene (Livingston-Little, 1965). Secondary railroads were built up the Silver Valley in the late 1880s as well, culminating in a complete line over into Montana in 1891 (Livingston-Little, 1965).

The town of Coeur d'Alene was founded in 1887 and the Idaho Statehood Act was passed by Congress in 1890 (Livingston-Little, 1965). Due to the Mullan Road, the Northern Pacific Railroad and mining, the population of North Idaho grew from 7,000 in 1880 to 25,000 in 1890 (Livingston-Little, 1965). By 1910, most of the towns in northern Idaho were served by at least one of the four major railroads that ran through the area (Livingston-Little, 1965).

Following a report made by a U.S. Geological Survey in 1898 about the abundant timber resources in the Pacific Northwest, several eastern lumber companies moved into North Idaho and began building their empires (Harvey, 1999). These companies purchased vast amounts of timber lands, built mills, railroads, logging camps company stores, and even town sites (Harvey, 1999). With the logging boom in full swing by 1910 thousands of people swarmed into northern Idaho in another period of substantial Euro-American growth (Harvey, 1999). Water front towns such as Coeur d'Alene, Sandpoint, Harrison, St. Maries, Post Falls, Priest River, Bonner's Ferry and Spirit Lake also became bustling timber towns in this time span (Harvey, 1999). Logging and mining continued to be driving economic factors in the Euro-American way of life in the area well into the 20th century until usurped by tourism in the later years of the century (Dahlgren & Kincaid, 2007).

CHAPTER 3

Methodology

3.1 Participant Selection

This study's subject matter concerns the communities surrounding the Lake. This, along with the decision to interview the interviewees in their homes and places of work dictated the research site. This decision was made for the comfort and convenience of the interviewee, the certainty for the researcher that the interviewee would participate and the opportunity for the researcher to observe the interviewee on their property, business or home in close proximity to the Lake. The study's focus on the Tribal and non-Tribal communities surrounding the Lake and the desire to give both contingents equal voice steered the decision to interview 10 members from each community.

The Tribal sample started with a short list of Tribal members from a Tribal employee and a professor who has worked closely with the Tribe for many years. The researcher snowball sampled from there, following methods outlined in Biernacki and Waldorf (1981). The snowball sampling method, a.k.a "chain referral," is a method of accumulating interviewees on a topic where a researcher starts with one or a few individuals for interviews on a topic and asks the interviewees themselves who they think would be knowledgeable or appropriate for the topic or set of questions that was asked to them (Davies, 2008). These referrals and the method of acquiring them is the snowball method. As suggested by Maxwell, the researcher interviewed a range of age groups and genders in order to ascertain a more accurate representation of the Tribe's opinion on the questions asked (Maxwell, 2013). For authenticity, the researcher required the Tribal interviewees to be active Coeur d'Alene Tribal members.

The non-Tribal sample started with an inquiry with the Coeur d'Alene Lakeshore Property Owner's Association and snowball sampled from there in order to reach 10

interviewees. Each non-Tribal interviewee either owned a property, a business or lived in close proximity to the Lake. Close proximity meaning close enough to where they see the Lake on a daily basis and are involved or affected by its management on a frequent basis.

Before the study was commenced the researcher complied with all requirements set forth for Human Research Protections for the University of Idaho, also known as the Internal Review Board (IRB). The IRB Number is 17-083. Furthermore, the researcher met with the Coeur d'Alene Tribe's Cultural Committee twice in early 2017, proposing research, work-shopping the research scope together and then attaining permission to conduct research with Tribal members. In May of 2018, the researcher reported back to the Cultural Committee to present the findings of the research. Even though the interviews were conducted anonymously, any cultural and intellectual materials derived from the interviews ultimately are governed by the Tribe and not the researcher.

3.2 Data Collection

The interview pool was established starting with a few initial contacts followed by the usage of a snowball sampling technique that filled out the study pool. The researcher continues this process of referrals until they are getting the same information or the same people recommended, a.k.a. saturation (Davies, 2008). Due to the limited time and resources available for a Master's thesis, researchers in that position generally must cutoff interviewing prior to saturation, which was the case in this research. However, even after conducting only 10 interviews from each group, the researcher was beginning to receive redundant information.

There were a total of 20 interviews conducted, consisting of 10 Tribal and 10 non-Tribal interviewees. The interviews were conducted by only the researcher, and the interviews themselves were taken at the interviewee's property, business or place

of residence. The youngest interviewee was 36 years old while the oldest was 72 years old. There were seven male and three female members from each of the two communities. The interviews ranged from 30 to 90 minutes in length. The researcher asked and was granted permission to record each interview.

Each interviewee signed an Informed Consent Form which made them aware of the purpose of the study, the nature of the study and the approval of the study by the University of Idaho and the Coeur d'Alene Tribe Cultural Committee (UI-IRB #17-083). Research based primarily on semi-structured interviewing has become a very popular and important form of qualitative research across the social sciences, especially in anthropology (Edgerton, 1993; Spradley, 1979), sociology (Cockburn, 1991; Laws, 1990) psychology and various applied social sciences (Davies, 2008). Semi-structured interviews are formally bracketed, and set off in time and space as something different from a normal social interaction (Davies, 2008). The interviewer goes to the interview with a loose interview schedule: it may be as structured as a set of written questions or it may be an informal list, perhaps memorized, on certain topics (Davies, 2008). However, in contrast to structured interviews, interviewers may alter the wording and order of these questions, perhaps omitting some that seem inappropriate; they may introduce new topics and supplementary questions not included on the list, and the interviewees are encouraged to expand on a response, or digress, or even go off the particular topic and introduce their own concerns (Davies, 2008). Most important, their responses are open-ended, in their own words and not restricted to the preconceived notions of the interviewer (Davies, 2008).

This semi-structured interviewing data collection method was chosen for its ability to gather information in a more natural and loosely structured manner. This gave the researcher an ability to guide the interviewee through some major topics of the study while still allowing the interviewee to speak freely on whatever topic came to mind on the subject. This open ability allowed the interviewee to unveil

new values, perspectives and relationships with the Lake and the Lake's community that would not have been elicited through a more structured method. Furthermore, the one-on-one and semi-structured interview method allows the researcher and the interviewee to talk candidly in an intimate setting which further brings out closely held and personal information that may not have come out in a more structured approach (See Appendix A.1). The interviews were conducted from July 2017 to January 2018.

3.3 Data Reduction

Each interview was recorded with a voice recorder and saved as an audio file. Each audio file was manually transcribed into a Word document using an online transcribing program found at "transcribe.wreally.com/app". Each word document was manually coded using an online Computer Assisted Qualitative Analysis Software (CAQDAS) program called "Dedoose 8.0.35".

Looking to the overarching research questions for the study, it was clear that a catalog of relationships, values, perspectives and worldviews associated with the Lake would have to be ascertained. Furthermore, any mention, insight or possibility of collaboration would also need to be noted. Given these tasks the researcher was able to code the transcripts and individual excerpts from the interviewees using a method known as "Descriptive Coding". Johnny Saldaña defined "Descriptive Coding" in his manual, "The Coding Manual for Qualitative Researchers" as a summarization in a word or short phrase – most often as a noun – that is the basic topic of a passage of qualitative data (Saldaña, 2013). It is important that these codes are identifications of the topic, not abbreviations of the content. The topic is what is talked or written about. The content is the substance of the message.

This study produced 984 excerpts coded, 244 individual codes themselves and 7 code categories. The code categories began to emerge after just a few transcripts and

were differentiated and defined as “Lake Health,” “Jurisdictional Issues,” “Sentiment for Different Groups,” “Collaboration/Non-Collaboration,” “Relationship to Lake,” and “Justification Theory.” The codebook recreated in this document as Appendix B.1 has a complete set of definitions of the code categories, including criteria for an excerpt being coded in a certain way.

As an example, the following excerpt yielded the code – Willingness to Collaborate – “I hope that over time it will go away and we’ll come to a... – there could be a lot more movement towards working together.” The code “Willingness to Collaborate” can be defined as any notion that the individual or his/her associates are willing, hope to be, or are currently available for the prospect of collaboration on an issue involving the Lake that he/she/they have traditionally been adversaries. Furthermore, the following codes fell underneath the category of “Jurisdictional Issues”: “Fisheries Issues,” “Lower Third Rights,” “Tribal Consultation,” “Dock Issue,” “Lake Level.” The “Jurisdictional Issues” code category can be defined as any code embodying or associating with a dispute over power, ownership or right to something related to the Lake or the communities that surround or have a stake in the Lake.

3.4 Data Analysis

As was described above, the overarching research questions spawned a litany of interview questions which were asked of the interviewees, rendering audio files which were turned into transcriptions. The transcriptions were scanned, where excerpts were highlight and assigned codes. Eventually, as patterns emerged, the codes were shored up into code categories. The categories and codes were applied to the research questions revealing themes. These themes spoke directly to the accuracy of the hypotheses and the research questions. The qualitative research method used in the analysis of this data is known as Grounded Theory. Grounded Theory is simply the discovery of emerging patterns in data. Grounded Theory is the generation of the-

ories from data. (Davies, 2008; Glaser & Struass, 1967). Concerning the process of choosing codes and code categories, the researcher started with the research questions in mind, the same ones that informed the creation of the interview questions. From there, the researcher was able to code and then categorize the codes in a fashion that would speak to the research questions. In as objective of a fashion as possible, the researcher read the excerpts, thought about the question asked to the interviewee and the response to the question and objectively coded the excerpt. After time, patterns emerged and categories were created to name the patterns. The patterns and categories were applied to the research questions which revealed themes showing certain values, perspectives, sentiments, opinions, relationships, worldviews and willingness to collaborate of the interviewees and the two communities that surround the Lake that they represent. The code categories are further explained through the codebook in Appendix B.1, 2 and 3.

3.5 Dispute Resolution

On a subnational level, water resources disputes between irrigators, indigenous populations, and environmentalists often see water as tied to their very way of life (Wolf, 2009). Studies have shown that these groups are increasingly threatened by the ever burgeoning water demands of cities and hydropower (Wolf, 2009). The likelihood of conflict between parties to a water resource increases whenever a large or rapid physical or political change occurs and the inability of the existing institutions to absorb and effectively manage such a change are apparent (Wolf, 2009). The recognition of ownership to the southern third of the Lake constitutes a large and rapid political change to the water resource orientation of the Lake and the push-back from the previous establishment, along with some instances of failure to comply with Tribal code on the Lake are signals of an on-going dispute. At the end of Dr. Aaron Wolf's article, "A Long Term View of Water and International Security" he

calls out to the academic world to conduct further research on the reasons for past successes and failures of water resources dispute management (Wolf, 2009). Applying Dr. Wolf's request to the Tribal and non-Tribal parties to the Lake begs the question, "what kind of further research would be helpful?" Do the parties to the dispute have a comprehensive understanding of the perspectives, worldviews and values that make up the other interest group? Are there latent, shared values that, once identified, could lead to a more agreeable future concerning the management of the Lake?

Most conflicts are rooted in genuinely divergent preferences between two or more parties (Allred, Hong & Kalt, 2002). The existence of a wide preference gap can make it difficult to resolve the conflict for multiple reasons. First, and most obviously, highly divergent preferences make it more challenging to find a mutually acceptable solution. This, in turn, can lead to a sense of frustration or the assumption that negotiations are futile. Additionally, most people are "naïve realists," meaning they believe they see the world as it "really is," and that anyone else who is reasonable should be able to see it that way too (Jones & Nisbett, 1971). Thus, when they learn that others have opposing opinions, they are likely to conclude that this is a result of the "others" being irrational or biased in favor of their own self-interest (Bar-Tal & Geva, 1986; Fisher & Ury, 1981). This, also, can serve to dissuade the parties from attempting or concluding a negotiation (Allred, Hong & Kalt, 2002).

Perceived preferences, not just actual preferences, are also an important influence on partisans willingness to work together toward mutually acceptable solutions (Allred, Hong & Kalt, 2002). Just as with actual preference differences, perceived differences can make it hard for the parties to find common ground or to feel that their counterparts are behaving in a reasonable fashion (Alred, Hong & Kalt, 2002). According to Keltner and Robinson, "[i]magine[d] extremism . . . undermines . . . negotiations. Negotiators assume their opponents' interests are hostile and antithetical to their own, commonly failing to perceive and build negotiations upon shared

beliefs, goals, and interests” (Keltner and Robinson, 1996). In a series of studies they show that parties to a conflict tend to exaggerate the extremity of the other side’s preferences (Robinson, et al., 1995; Keltner & Robinson, 1996). The possibility of mediation is sometimes “nipped in the bud” due to Confirmation Bias, which is the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand (Nickerson, 1998). Furthermore, when attempting to mediate, it should be remembered that the potential benefits of a proposed change are never as certain in the minds of the parties as what is currently established or the status quo (Lowry, 2003).

Wolf asks, “Are negotiations actually rational?” ... “Do we agree when it is in our interest to agree?” Rather, is something more transcendent occurring in the negotiating room – a process more connected to energy and transformation? Successful multiparty negotiations often require profound transformations in the way participants conceptualize the issues at hand (Wolf, 2008). Those involved can often define the precise moment when their thinking altered dramatically, essentially the “aha!” moment where emphasis shifted from individuals thinking solely in terms of their own respective agenda to a dual comprehension and understanding of others’ needs (Wolf, 2008). As previously noted, traditional conflict resolution models define their transitional moments in rational terms: people come to agreement when it is in their interest to agree (Wolf, 2008). Even overlooking the tautological nature of this argument, rationality simply often does not hold sway if the conflict involves even a modicum of real emotion (Wolf, 2008).

Macmillian explains in his book, “A Practical Guide for Mediators” that an ideal mediation has the parties to the dispute meet under a constructive atmosphere where they explain to the other party and the mediator their account of the facts, their goals and their perspectives on the matter (Macmillian, 2012). Thereafter, both parties are encouraged to listen to each other with open minds. The mediator then

helps the parties explore their underlying interests and choices concerning the matter, facilitating enlightenment and a deeper understanding of the needs of the parties and the options before them. Under these newfound circumstances, the parties are encouraged to negotiate with the assistance of the mediator and reach a settlement (Macmillian, 2012).

Macmillian's outline of the steps of a typical mediation emphasize a sharing of the underlying interests and choices concerning the matter, listening, enlightenment and a deeper understanding of the partisan needs and options before them. In pursuit of that information, the focus of this research was to elicit the values, interests, uses, perspectives, and worldviews at play in the issue from both the Tribal and non-Tribal communities of the Lake, bringing them to the forefront for analysis and examination, facilitating enlightenment and understanding concerning the issues moving forward.

3.6 Reflexivity

To address any perceived biases in the research, a statement has been prepared that reflects on who the researcher is and what he brings to the research:

I am a 31 year-old, Caucasian male from a suburban middle-class family in the Midwest of the United States. I have lived in Ohio, Colorado and Idaho. My race, class and gender align with the bulk of the non-Tribal participants in the study while my educational background and prior work has given me experience with Native American communities. This experience allows me to understand both communities up to a certain extent. I believe my ability to pull from this experience and see disputes, perspectives and worldviews from both angles has served me as a researcher striving for objectivity.

I have one collegiate level degree, and I am pursuing one graduate level degree and a law degree. The pursuit of each of these degrees has shaped the way I view the world and conduct research. My bachelor's degree in the Humanities focused in Com-

munications. This, along with my time working for newspapers and magazines gives me experience in the interviewing process, as well as the process of taking excerpts from interviews and accurately recreating them into an article. I have employed these skills, including the duty of accuracy in reporting, into the research and recreation of the sentiments of my interviewees in this study.

My love of the outdoors through recreation and a past profession as a river guide has fostered values in preservation of natural treasures and a skepticism to economic progress at the expense of natural lands and processes. These values have led to my Natural Resource, Environmental and Native American Law elective emphases in law school. I have interned with the Nez Perce Tribe's Office of Legal Counsel in the summer of 2015, clerked for the Idaho Water Adjudications in the summer of 2016, interned for a firm representing the Coeur d'Alene Tribe in a reserved water rights case in 2017 and worked as a limited license intern for a civil and criminal law firm in 2017 and 2018. This extracurricular experience has rendered me more of a Native American advocate than not. I made sure to think of each interviewee as a client as I coded their transcription so as to mitigate any ingrained bias.

My two internships in the legal field advocating on behalf of Indian Tribes have likely placed my perception of issues involving Indians on the pro-Tribal side of the spectrum. I do not own any property; therefore, my tendency is to side with public lands and access on issues where private property rights and the public's access face off.

Having a bachelor's degree and being in candidacy for a master's and a professional degree have positioned me as an educated, Euro-American, male in the interviews. While I did my best to stay conscious of and steer clear of using this position in my interviews, it is possible that the positionality affected the interviews. The perceptions that the interviewees have of the interviewer can shape responses to questions.

A Master's Degree in the Science of Water Resources: Law, Management and Policy allows me to pull on a specific knowledge of philosophy, case studies, policy, management, economics and politics of humanity's interface with water as sustenance, resource, power, habitat, transportation, tradition, spirituality and more. This knowledge places me uniquely in a position where I can compare the reasoning, procedure and potential outcomes of decisions having to do with water and a knowledge base from which to pull on in understanding why such a decision or standpoint was or is held.

Law school aims to instill skill in problem solving, critical reading, writing and editing, oral communication and listening, research, organization and management, public service and promotion of Justice, relationship-building and collaboration, background knowledge, and exposure to the law itself. It aspires to instill a knowledge of the accumulated law on a specific topic to create an understanding and ability to place a fact pattern accurately within the law and advocate for a client given that standpoint.

I am keenly aware of the advocacy that is instilled into a law student. However, law school asks its advocates to argue from both adversarial sides at the flip of a coin. Given this versatility and the awareness that issues can be seen in different light, I was careful to wash away any tendencies of my own and recreate the stories as told by the interviewees. I was also careful to do this in the choosing of what to code, the codes themselves, the choosing of themes and the excerpts recreated. My goal from the beginning was to create a study that emanated from the voices of the communities surrounding the Lake, not my own. Overlaying my own voice on the matter does not appeal to me and seems to me to be a waste of mine and everyone else's time. Therefore, I avoided this ardently.

Training in the law further allows me to identify and understand the legal basis and underpinnings of a number of the disputes that exist between the communities.

These skills also allow me to inquire into the positions and arguments made by one or the other side of an adversarial proceeding, to see if look and see if their positions are based in law or fact, assessing how well-founded their positions are.

CHAPTER 4

Findings

4.1 Introduction

This project began with two research questions. Through the data reduction process themes emerged that spoke to each of the questions. After data reduction was complete it was clear that 10 themes stood out that most spoke to the research questions, which are reported below.

4.2 RQ 1: How do the Tribal and Non-Tribal Communities Surrounding Coeur d'Alene Lake View Their Relationship to the Lake Itself?

Delineated below are 5 themes corresponding to each research question.

The Tribal and Non-Tribal Communities View Coeur d'Alene Lake and the Surrounding Area as Integral to the Identity of Their Community.

Community members surrounding the Lake referenced the Lake as their home in myriad ways. They showed this by calling the Lake integral to the identity of the community, a family tradition and more directly referencing the Lake as home. Both Tribal and non-Tribal communities see the Lake is integral to the identity of the community. Two non-tribal community members called the Lake “integral to the whole area” and that “the Lake *is* the community—the community wouldn’t be here but for the Lake.” Two tribal members explained that “the Lake is the central focus of life for the Coeur d’Alene people” and “it is integral for our people to be associated in, and to be part of, the Lake itself.”

Fortifying this perception of vital integrity to the community is the view of the Lake as a family tradition. A tribal elder recalls the stories of her great-grandfather where they would “travel back and forth from Chatcolet Lake up the St. Joe or

the Benewah and bring Cedar boughs or Cedar branches from one side to the other or even deer carcasses and meals for the family.” A non-tribal community member reflects on the Lake as a family tradition here, “we’ve been there 50 years and I was born there, literally, and I used the Lake as a kid almost every day ... now my kids have kids and they’re down there all the time....”

Focusing on the Lake as home, a tribal member stated that “the water down there provided a home; it provided food and everyday uses for water: you could wash with it, you could do your laundry with it...” A non-Tribal community member posited that the Lake is “...where I live. I choose it. I’m not here because I have to be. And, I’m going to continue to choose the Lake even after I get rid of this business.” In short, both communities view the Lake as their home based on history and experiences. The tribal members relate to an indigenous homeland while the non-tribal relate to their modern homes.

The Tribal Community Has a Unique Connection with the Lake as Their Traditional, Cultural and Spiritual Center.

The Coeur d’Alenes’ culture, lifestyle, traditions and spirituality are tied up with the Lake in a way that is intimate, stretching over a long temporal period and unique among the other communities surrounding the Lake. This relationship shapes their worldview and is at the core of many of the Tribe’s policies. One Tribal member answered this way when being questioned about his community’s relationship with the Lake,

My father-in-law said there were old campsites from back in the early 1900s, 1800s, 1700s where they would live in the summer. Each family had spots. The Aripa Family would winter on the banks of Benewah Lake and at the mouth of the Benewah Creek. And then the summertime would hit, and they would either go up the St. Joe or go up the Benewah Creek into the high mountain areas and do their thing...

Another Tribal member stated,

They used to have canoe racing up at Cataldo. We have the pilgrimage up there every year on August 15th ... and I believe it's the 87th year. One of the things that my grandparents said is that back in the day they used to have canoe races right there where they built the mission. So, we're hoping that, if not this year then next year, we can bring our canoes up there and do that.

The Coeur d'Alenes have had a relationship with the fisheries of the area for a long period of time. One Tribal member mentioned, "...this was our year round sustenance fishery. We just don't have the access and the populations of the fish are not there anymore." Another Tribal Member posited that,

The fishery was really sustainable; any time you went out, you could catch fish ... Through the years, and through our fisheries studies, the Cutthroat numbers have reduced greatly since then. Our numbers are really low now; they're drastically low which is super-emotional for me ... I used to be able to leave my home and go out and catch 5 or 6 really nice trout, Cutthroat trout, and come home and cook those for my family. I believe by the time my youngest boy is old enough to hunt, that we might not even be able to hunt there anymore. Because right now where I used to be able to fish, we can't fish. So that means that he can't fish.

The Tribe also has a tradition of hunting around the Lake, as evidenced from this excerpt,

My grandfather said that in the early 20's and 30's, the elk population wasn't that great here; there were elk here, but not in the great numbers there are now ... There is moose, white tail, mule deer, grouse and turkey as well ... You don't see the blue grouse here anymore.

Hunting and the Lake's bounty are intertwined with the Tribe's spirituality in an intimate and unique way,

A lot of it is what I would say is spiritual. Because in our way of teaching, water is The Giver of Life and when we have feasts our tradition is to honor the first foods, the water is always first and then the salmon, the deer, the roots and the berries ... The spirit in the tradition of the water for a native people – it's just important ... it kind of brings us back to our way of life that our ancestors lived.

Traditional gathering still occurs at the Lake, “...the Lake is still our heart, although we don’t depend on it for everyday living like we used to. It’s a big part of our heritage or culture. We still take our kids over there and teach them how to dig water potatoes – which grow in the Lake when the water’s low.” The Tribe gathers a multitude of roots and plants from the area as demonstrated by the previous and following quotes, “...we might head over to the Hangman Creek area to dig Camas or up on the Rathdrum Prairie.”

In modern times, the Tribe continues to rehabilitate and actively maintain their community’s relationship with the Lake,

There’s a lot of prayer time when we have these kinds of events by the Lake. We’ll have ceremonies and prayers that I think helps elevate the mind beyond just a recreational experience – and that’s the intention, we want to recognize it for what we’ve been told that it is, which is a spiritual thing more than just a recreational thing.

Another example of rehabilitation and maintenance,

Over this past summer I worked with one of our Inter-Tribal Programs in ‘Getting Canoes Back Out in the Water’ ... we built a dugout canoe out of cedar and went down and launched that canoe into the water and had a whole ceremony that blessed the entire event ... I sat and I listened to Felix Aripa talk about our people and the ways that we used to do. When we would travel, we were canoe people. We didn’t have roads that went around the Lake. He said, ‘that’s the first time that a Tribal canoe has touched these waters in over a hundred years’ – and that kind of resonated with me a little bit; that’s a part of our People that was lost.

More directly, “[w]e’ve had ceremonies from time immemorial that were based on the Lake where families would come from the rivers and streams to the Lake to participate.”

The Non-Tribal Community Uses the Lake to Boost the Economy More So Than the Tribal Community.

Both the Tribal and non-Tribal communities acknowledge and use the Lake for its ability to drive up the economy in myriad ways. The non-Tribal community

currently uses the Lake to boost the economy more so than the Tribal community, but the Tribal community is interested in capitalizing as well. This may be due to the overwhelmingly non-Tribal ownership of the lakeshore. Both communities have seen the benefits of the Lake and its surrounding area for tourism. Also, both communities have found that the Lake provides work for them and have extracted natural resources from the Lake for their livelihoods.

One non-Tribal community member said, "...the investment around the Lake, all the riverfront homes, it's huge! You're talking billions of dollars in economic activity." While a Tribal member stated in the prospective, "We're finding ourselves in a position where we're able to purchase some property on the Lake now, and we're currently using it for tribal use only, but there may be a time in the near future at least where we look at some economic development."

The Lake's tourism industry has likewise blown up to the benefit of both communities, but more so, the non-Tribal community, which owns much of the lakeshore. A non-Tribal member posits, "What would Coeur d'Alene be without the Lake? Just another small town along the highway." Another non-Tribal member posited, "...if this was just a hay field out here, would we have 50,000 people and Adam Levine playing on a Saturday night at the Coeur d'Alene resort?" The tourism has surged in recent times according to this non-Tribal member,

If you ask some of the old timers they'll say that the lakeshore areas were the slummy areas of CDA because that's where, you know, you didn't have any money, you go outside of town and you live by the Lake ... Now it's being more developed so you have nice homes on the Lake, but back then it wasn't.

A Tribal member speaks on tourism around the casino, but not the Lake,

We tie in to the tourism industry as well. We market around the world, especially for some of our cultural things. And we get people from other countries to come and take part. We have hiking trips and are working on building a traditional village out back here, and some plans in the future,

and so, yeah, the tourism industry is very important to us as well. It definitely affects our community.

The Lake itself used to be a source of livelihood for the two communities, but in different ways. A Tribal member refers to receiving a livelihood from the Lake in this way,

The Lake to me is my life, my support, because from it, in all my younger days, came my livelihood ... The water down there provided home; it provided the everyday use for water, it provided food; where we would get our food from the fish, and the men would go out and get the deer. They went out in the Lake and they'd kill the deer and bring it back and bring it home to us. There's water potatoes in there, fish in there. There are many plants that grow in that water. And that was our food. That water provided much of my people's life. And I still look at it as a very important resource ... We did everything down there; we lived right by that water. Most all of our lives - and then the government came in, and they put us on these reservations.

Another Tribal member stated,

As a young boy, I was taken to the Lake. I was brought up knowing where areas were to gather fish, where the areas were to gather our water potatoes and where the areas were that we could harvest the materials that we needed for our lodges....

A non-Tribal member stated that the Lake's "...primary purpose was to provide transportation, commerce and to facilitate the lumber industry in a day and age that has passed ... That primary purpose has changed to recreation ...” Another non-Tribal member commented on livelihoods from the Lake saying,

You know where I live they literally used to take ridiculous amounts of logs down the creek and they would pile 'em up and then bring 'em down to the mills down the Lake, and of course they did that in the St. Joe River, the CDA river, and then they have the natural resource. The mining was of course up in Silver Valley, one of the highest Silver producing areas in the world back in the day. And so it was very natural resource driven until it switched over to more of what we have now which is a tourism economy.

In short, the economy boosts the non-Tribal community more directly through lakeshore property values and tourism in and around the Lake and the City, where property is predominantly owned by non-Tribal members. Furthermore, tourism to the Lake generally benefits the non-Tribal community for this reason as well. The Tribe benefited residually from the extractive and tourism industries, but holds firm to its traditional worldview of reciprocal living with the Lake and its bounty. Lastly, the historical shift of dominant industry in the area from extraction of natural resources to tourism has shaped the livelihoods available to the non-Tribal community, predominantly.

The Lake is Used by Both Tribal and Non-Tribal Communities as a Source of Relaxation and Recreation.

Both Tribal and non-Tribal communities use the Lake as a getaway for relaxation and recreation. Tribal and non-Tribal members use the Lake for this reason similarly. Concerning relaxation and recreation, a Tribal member states, “You know, as a kid we swam in it every single day in the summertime ... I bring my child down there swimming to the same spot that we went to for years and years and years.” Another Tribal member commented, “I use it for recreation, mostly. I might go fishing from time to time ... I take the kids there, and the grand kids; we have some good family time there.” Likewise, a non-Tribal member states, “I fish. I do water sports, and I just chill on the beach around my boat - as much as I can between May and October.” Another non-Tribal member stated, “Water has just always been an attraction. So I just enjoy being there. I like being on it. I like boating. Someday I’d like to – if I ever retire that’s where I’d like to be.” In short, both Tribal and non-Tribal members use the Lake similarly to relax and recreate.

The Tribal Community Views Their Role as Stewards of the Lake Differently Than the Non-Tribal Community.

While there is ample evidence that both communities consider themselves stewards of the Lake, the concepts and manifestations differ. Non-Tribal stewardship of the Lake makes concessions for the Western worldview, such as private property rights and mining or logging practices because decisions that boost the economy often trump decisions trending toward conservation. A non-Tribal member provides a view on stewardship here,

It's hard when you lose something you fought hard for. You have private property ... and you fought for it and you're maintaining it and someone takes the ability for you to use it away. It really grates hard ... You stop logging? Well, why? Well, because it's bad. Not all logging is bad. Yeah, we've got to stop it all because you guys will just push the limits....

Concerning the Lake and its bounty, a Tribal member stated,

It's like a family member, a friend. We go down there and we treat it as a friend. We use it, and when we use it, we give back. Whatever we take from there, we put something back. If you come, and I give this to you, the pay for me – is that you use it, it's going to improve both you and me. That's the friend sharing. That's the way of sharing – is that, I give you something. It's a gift. You give me a gift by using it the way you tell me you're going to use it.

Differently, a non-Tribal member states,

My dad was pretty into making sure we took good care of our property down there, including the wetlands. In fact, there's another area that he put in fill land below the house and now that fill has grown up with trees, small deciduous trees and that is a total haven for elk and moose and deer and they're constantly down there.

Yet another view on stewardship is posited here by a Tribal member,

We are not geared into wanting this to be solely Native ground again ... we want everybody to be able to have a good life. We want everybody that comes here to have a good life with us. We want not only Tribal members, but non-Tribal members alike, to have a flourishing, good life ... we've always been known as a welcoming people, and we still are.

The Tribal version of stewardship includes a sustainability component mentioned here,

Tourist reasons are less important to me personally but I recognize that it's important for local businesses and local economy and I'm okay with that. I mean, to me, it's about sustainability more than it is, what are you using the Lake for. If you were using it to attract tourism then I'm okay with that as long as that stays sustainable....

The non-Tribal community also endorses the concept of sustainability, but defers to a number of ulterior interests, as this quote shows,

Do we have the same goals in mind? Like as far as residential use, and business use, or between the County and the Tribe? I think everybody wants to see our Lake stay healthy and continue to be a resource for us, both from an economic and personal recreation perspective ... and if you can tie it towards keeping the Lake a safe, clean type of health ... that's something people could come to an agreement on too. But when it comes to stocking the fish ... or the regulation on the waterfront property - those goals are so different. A waterfront property owner wants to maximize the use and the value of their property. And rightfully so. They purchased it, and they purchased it without this regulation. On the other hand, as a lifetime resident, I want to see people protect our Lake and what we have here. It's a valuable resource for us in so many ways ... but I don't know how you would come to a meeting of the minds on a lot of that - because I don't know what the motivation is. I don't know what the goal would be.

The non-Tribal member explains that while it would be nice to rally around sustainability, the divergent interests of private property and fisheries stymie that singular thrust.

Despite allegiances to causes other than stewardship and sustainability, the non-Tribal community speaks of the water's importance with a similar reverence to that of the Tribal members. Here, a non-Tribal member comments on water, "...if you don't have water you don't have civilization. St. Maries would not be able to survive, I mean look at the Aztecs and the Mayans." Another non-Tribal quote, "Well it is. I mean Coeur d'Alene Lake is the community. It's obvious." Here's an excerpt of Tribal

sentiment of water's importance, " ...that water is very important to me. It means a life. It is a life. I've always believed and I always teach the children: Everything on this Earth has a life. That water is alive."

4.3 RQ2: Given the Tribal and Non-Tribal Communities' Unique Relationships to the Lake, Are There Opportunities for Collaboration Concerning Lake Issues in the Future?

Delineated below are 5 themes corresponding to this research question.

Generally, the Tribal Community is in Favor of a Lake Clean-Up and the Non-Tribal Community is Not.

While both communities acknowledge the significant pollution of the Lake through sediment deposition originating in the historic mining activity upstream in the Silver Valley, opinions on whether to take action differ. One non-Tribal member responded to the idea of a clean up in this way, "...I think people would more or less look at it as a joke. What are you doing? What are you doing stirring up mud at the bottom of the Lake that nobody will ever touch? ... why are we playing with mud at the bottom of the Lake that's not a harm to anybody?" On the other hand, a Tribal member responds to the same question this way, "My heart wants to see it cleaned up tomorrow ... with the right care, things would come back. And that is something that's a staple in history. If you return it back to its natural state, things will return. That's the way it's been."

Concern for a major cleanup's affect on the property values surrounding the Lake is similarly recognized and met with a difference in opinion. Non-tribal members generally demonstrated a resistance to the idea of cleanup, with the view that there's no need to fix something that isn't broken. For example, one non-tribal member responded to the idea of a cleanup by saying,

Let it rest. Let it be. It's been fine. Our Lake's good, our vegetation's

good, our wildlife's doing good – we're fine, right? Don't go stir that up and cause issues. I just can't imagine the good that would come out of it. It would cause stigma, hurt our tourism and our property values. There could be wildlife impacts. I don't think people would recreate the same way and there would be additional costs for property and business. I think it would be scary.

Tribal members were interested in the benefits of cleanup regardless of the short-term implications, sharing sentiments such as,

Traditionally, we like to look ahead 17 or 18 years. So, with a clean up site, when it does have that designation, people say, 'It's destroying our property values,' but I would bet that the properties that were designated in the Silver Valley in the 1990s are worth way more post-clean-up – and it's a lot cleaner now.

In short, non-Tribal members generally take a position against the implementation of a major cleanup of mining sediment in the watershed and point out that such a project would damage property values, tourism and the local economy. Tribal members tend to be in favor of a major cleanup for posterity's sake and claim that dropping property values in the near term is a small price to pay for a healthy Lake in the long term.

The Change of Lifestyle Through the Western Imposition of Property Continues to be a Sensitive Issue Between the Communities.

Collaboration between Tribal and non-Tribal communities is made difficult by ideological differences such as the property and monetary systems endorsed by the non-Tribal community. Furthermore, differences of belief between the communities concerning rights and ownership to certain lands, as well as, property's general incongruent nature with a nomadic lifestyle further widen irreconcilability. Lastly, the Tribe's recent efforts at reacquiring lands on the lakeshore exemplify a priority to reclaim the Lake, despite having to do so through a disagreeable system of property.

This Tribal member expresses a disdain for the traditionally non-Tribal concepts of property and money,

When the white men came over here, they came with laws and rules, ownership and greed – This is mine! – That’s the reason that Native Americans and White People don’t get along. It’s the fact that White People want to place an ownership on something. In my belief, ‘It’s not yours; it’s here for all of us’ ... before the White Men came, we never had money, we never had problems. Because there was no such thing as ‘money.’ When we did our dealings, we traded item for item. We never had money to conflict our reasoning or our dealings.

Another Tribal Member weighed in on property here, “we still believe we own the entire Lake. So, yeah, we have some problems with the current set up. We don’t necessarily think of it in terms as ‘ownership’ in the Western way. It’s ours because it’s the heart of us.” Concerning the same issue over Tribal ownership of the entire Lake, a non-Tribal member dismissed the idea, stating, “That’s baloney.”

Another Tribal member commented on the incompatible nature of real property with a nomadic lifestyle,

If during the wintertime you don’t want to be freezing in the mountains, who’s to say that you can’t go to where it’s a little bit warmer, you know, a lower elevation? And then while you’re down there, being told, ‘Well you can be there, but you can’t go dig for your Camas.’ ‘You can’t fish while you’re down there.’ ‘You can go sit in that land, in that little area, but you can’t do anything while you’re down there.’ Well... how’re you gonna’ survive?

A radically different view on property exists within a faction of the non-Tribal community who believe the Coeur d’Alene “Reservation” is no more,

There’s maps that say, ‘former reservation.’ And there were no signs that said entering or leaving the Coeur d’Alene reservation until the late 70s when, all of the sudden, they just miraculously went up. The truth is that this reservation was diminished during the Dawes Act by 85% to 90% and is now privately owned by individuals like you and me. The Tribe will say that they have a say over the reservation. So a lot of people actually believe that if they want to do something on their property they’ve got to go ask the Tribe to do it. And they don’t, they don’t! If you say a lie long enough people will believe you.

The Dawes Act or the Allotment Act and its progeny separated the Tribe from the lakeshore, but in recent times the Tribe has been endeavoring to reclaim some

of it, as can be seen from this excerpt, “We’re finding ourselves in a position where we’re able to purchase some property on the Lake now, and we’re currently using it for tribal use only.” Another Tribal Member states, “since the Lake Case decision and acquiring back property on the Lake, I think there’s been a lot more emphasis on renewing that emotional attachment that exists for us with the Lake – slowly, but surely.”

In short, the legacy of the imposition of Western Civilization during the 19th Century upon indigenous ways of life is both an on-going source of friction between the Tribal and non-Tribal communities, as well as a keystone issue in the enabling of collaboration moving forward.

The Dual-Sovereign Interface Between the Tribal and Non-Tribal Communities Often Produces Clashes on Jurisdictional Issues.

Collaboration is stunted by the policy disparities between the two governments heading the Tribal and non-Tribal communities. The fact that the two governments have jurisdiction over different sections of the Lake has proved to be the origin of a dispute over fishery management of the Lake. Also, access to the Lake continues to be an issue for the Tribal community more so than the non-Tribal community. Ambiguity over who owns unnaturally submerged lands and the rights to build and own dock pilings on this submerged land has caused Tribal and non-Tribal individuals to sue each other. Lastly, Tribal claims to water rights have exposed the disparity between the community’s worldviews.

A Tribal member talks about the communities’ fisheries disputes here,

Whitefish and Cutthroat were originally the fisheries that were in this system. Since the introduction of predatory species like the Pike and the Bass, the Cutthroat have become almost extinct. We’ve been trying to eradicate those invasive species, but then here comes the State of Idaho saying, ‘No. We don’t want you to do that. If you catch ’em here, we want you to move ’em someplace else, not kill them.’ So, we catch them at the southern end of the Lake, tag them, and allow the State to relocate

them to another part of the Lake – only to find that they return. So, our Cutthroat are surviving, but only in the feeder streams that come into the Lake. They should come out of those feeder streams, but once they get into the Lake, they're inundated.

Tribal and non-Tribal members butt heads on the issue of access and rights to lands as well. Here, a Tribal member speaks to the importance of Tribal access to the Lake,

I had this mentality as a young boy that anybody could go down to the Lake at any point in time and go swimming, fishing, you know, do what they want to do as long as they're being respectful of their surroundings and everything else that's going on. And then, as I get older, I was told, 'You can't go over there. That belongs to somebody else.'

Another Tribal member recalls an access issue from his/her younger years here,

We used to go swimming all the time down at Spokane Point. There are non-Tribal people who live down there. I remember as a kid they would call the cops on us, saying everybody was drinking. Also, the people who were bringing the boats down there who were also not tribal members would be scared to talk to us or ask us to move our vehicles. Then they would call the cops and the cops would be like, 'they're saying you're not moving your vehicle.' And we'd be like, 'they didn't even ask!'

Docks and dock permitting on the Tribally owned, lower third of the Lake has proved to be the source of many disputes between the two communities, sometimes ending in the courtroom. Despite the ruling from the Supreme Court recognizing the Tribe as the owners of the beds and the banks of the southern third of the Lake, non-Tribal members disagree with the decision and advantageously argue its ambiguities as can be seen here,

In the Supreme Court case the question came up, 'what difference does it make who has the beds and the banks?' The attorney for the State of Idaho said, 'well, you know, fishing licenses, life jackets' which was not a good response. The response should have been, 'it's integral who owns it! We have 200 years of people thinking they own the riverfront, and you're telling them now they don't own it! That throws everything out of whack!

Another non-Tribal member questioned,

What do they really own? Because depending on which tribal treaty that we talk about in the 1800s the level of the Lake was at a different height because it was before the dam and so what would the ordinary high-water mark be at that time? You know, seven or eight feet lower than it is currently. If they only own up to an elevation of 2020 Ft. and not the current summer pool at 2028 Ft., that's quite a difference.

Another non-Tribal member demonstrates just how much of a difference that can be here, "the vertical feet can make a lot of difference, depending upon the slope of the shore. It could be 10 feet of lateral ground or a football field worth of property. It's the difference between owning the docks or paying for encroachment permits."

Since being recognized with ownership of the beds and the banks of the Lake the Tribe has also been cracking down on hazardous and overly large docks. A non-Tribal member said, "I know of some covered boathouses along the St. Joe River. The Tribe made them take all of those out which was a big problem for some people." He also said, "You see some big boathouses that are new at some of these giant properties. And you'd never be able to do that with the tribe. Of course, they're technically illegal for the state too, but somehow some people are able to build them on the State's part of the Lake."

Another non-Tribal member explained his understanding of the dock disputes,

My general opinion is that the Tribe and the town of St. Maries don't get along very well. They just don't have a very good working relationship. The Tribe did try 5 or 6 years ago, to assert their power over docks that have historically always been there. My understanding is that they went out to every dock, identified and tagged it and then sent everybody letters asking for a dock fee. After this two-year period of getting all these things registered there will be no new docks made because we want to preserve our shoreline. Most people laughed it off and said, 'I'm not going to. You don't have any authority to do this. I'm not going to give you the presumption of that authority by registering my dock.'

Rights to water in the area also fuel dispute due to conflicting origin of rights. A Tribal member shows his endorsement of the water right claims the Tribe has made

in a recent adjudication concerning water off of the reservation and in aboriginal territory,

The off-reservation water rights, that goes back to our usual and accustomed areas. Those waters have a direct impact on what happens here at home, to the Lake, to the river that feeds the Lake, to the streams where the ceremonies are held, or where fishing is done for consumption. Swimming. Recreation. By all means, the Tribe has every right to water outside of the state imposed reservation boundaries. It has a direct effect on our lifestyle.

A non-Tribal member finds the idea of Tribal water rights outside of the reservation to be unfounded, as can be seen here, “I don’t think you can come in retroactively and take off-reservation rights away ... They’re like, ‘We lived here first.’ Yeah, but you lost the war. It feels like that’s how you have to draw the line in the sand, because otherwise it’s all ambiguous.” Another non-Tribal member put it this way, “They’re claiming everything, anything that comes into it, which includes stuff from other watersheds. They’ve gone overboard. And when you go that far out there you’re going to get pushback.” (See Appendix D for more information on the water rights case referenced here).

In short, collaboration between the two communities is stifled for many reasons including dual ownership and policy making over a single natural resource, complications with physical access to the Lake, ambiguity over who owns land submerged by the introduction of the Post Falls dam and differing understandings of the extent and origins of water rights.

Members of Each Community Harbor Ill-Sentiments for Each Other and Each Other’s Governments.

Collaboration between Tribal and non-Tribal communities is stunted by a palpable tension that stems from issues including differing ideological practices, resentment of special federal treatment, and opposing governmental policies and practices. This

Tribal member refers to the unfamiliar and irreconcilable practices of the non-Tribal community,

When white people come over here, they have a tendency to wipe everything out, taking the whole thing. And then the first thing they do is claim, 'it's mine' and sell it, and get paid for that. Well, the money means nothing, because after you give it to someone, it's not yours any more, and you don't have anything for it. Where with us, we share it – and you leave here with the huckleberries and the food in your stomach – and we have shared it with you, and we have given it to you. But you did not give us any money for it. So, it's a different thing; the non-Indians have put a price on everything. And we have no price. That's why when people say, 'How much do you want for it?' We have no price; there's no price for this kind of thing.

A faction within the non-Tribal community actively advocates against Tribal sovereignty here,

My favorite saying is that when the parasite kills the horse the parasite dies to ... They don't pay property taxes, they don't pay the garbage bill while the rest of us are standing here to pick up the tab for them. They make millions of dollars and buy more land off the rolls. They contribute absolutely nothing, so at some point if they actually get their wish and we all leave and we're gone there's not going to be anybody to support them because they don't hunt, they don't fish, they don't work, they won't get stipends all the time – they will die.

Members of each community often criticize the others' governmental decisions as well. Here, a non-Tribal member believes the Tribe is misallocating certain funds,

I know Avista [corporation] gives them a couple million dollars a year. The Tribe's using it to buy new properties. They're not using it for reclamation. There are some big questions about how the Tribe's using that money. From what I've heard, it sounds like they're using it to get more land instead of what it was really intended for, to improve the habitat of the Lake. It doesn't surprise me because the Tribe, traditionally, has been about making money, whether it's casinos or anything else. Nothing wrong with making money, but if you're going to say one thing and do another, there's something wrong with that.

Likewise, a Tribal member recalls the actions of the non-Tribal government here,

In the mining liability lawsuits there were various entities that were involved and one by one, they dropped out [See *Coeur d'Alene Tribe v. Asarco Inc.*, 2003]. The State took their portion of the settlement and walked away. The Tribe stayed in there; the Tribe stuck it out with the court, and said, 'O.K. Here's the problem; here's the situation; this is what needs to be cleaned up.' We won those cases. And the courts decided that the mining companies are liable for clean up. They decided that "X" number of dollars will be set aside to address this issue of cleaning up the Basin. As soon as those decisions were made, here comes the State of Idaho; here comes the EPA; here comes the other people saying, 'We'll help you spend that money!' This has left a sore spot in my head.

In short, these sentiments reflect the larger issues separating the communities. These issues include differing ideological practices, resentment of special federal treatment, and opposing governmental policies and practices.

Members from Both Communities Have a Tendency to Interpret New Evidence as Confirmation of Their Existing Beliefs or Theories Creating a Confirmation Bias.

Another impediment to collaboration is the tendency of members of both communities to stay entrenched in *Confirmation Bias*, interpreting new facts to fortify preconceived notions. A Tribal member describes a non-Tribal member here who he is suspicious of such activity,

So there's this guy who might get up and say, 'oh, this is spotted owl science, or unbalanced science or data' – or however he wants to say it – He doesn't really know. What he's doing is he's slanting everything to one direction. In his heart of hearts, he doesn't really know because we don't know, the scientists don't really, one hundred percent, know. They all have suspicions and theories, but in the end, nobody really knows, and so for him to pull so hard in that direction means that there's something else driving him and that's the part that I really wish we could hammer out.

Similar to confirmation bias, selectively choosing facts to build an argument, perceiving facts only to fit one's agenda or the deliberate misrepresenting of facts to fit one's agenda are further communicative and psychological devices that must be overcome to facilitate collaboration. A non-Tribal member explains the general issues here,

When people don't understand the facts, it leads to different senses of what their rights are and then it creates conflict. And it's a very... it's frustrating at times, because, it's like speaking *Mandarin* to a Labrador, you talk and nobody listens. If everybody could work off of the same face facts and then make reasoned determinations as to, 'Whose right is what?' and 'Whose right is this?' – it would be a Hell of a lot more helpful ... In this instance it's, 'Well, you know, we've been doing that forever.' Yeah, well you did that forever through the permission of somebody who was being nice to you. And now, it's a different world.

This skewing, confirming, selectivity and misrepresentation of facts to fit one's agenda poses a significant hurdle in the efforts of the two communities towards collaboration.

CHAPTER 5

Discussion and Conclusions

5.1 Answering Research Questions

While elements of the hypotheses were seen in the findings of the research questions, other, stronger themes emerged from the interviews. Ten themes emerged in the thematic analysis portion of this study and have been reported in the Findings chapter of this thesis. Five of these themes respond to the first research question, regarding relationships to the Lake, and five speak to the second, regarding potential for collaboration.

5.2 RQ 1: How do the Tribal and non-Tribal communities surrounding Coeur d'Alene Lake view their relationship to the Lake itself?

A broad tapestry of relationships with the Lake were found through the interview process, including economic, religious and recreational, to name a few. Five particular relationships stood out as relevant to this study's overall purpose, given the second research question's focus on collaboration between communities surrounding the Lake.

Consolidated, those findings are that both Tribal and non-Tribal communities see the Lake and the surrounding area as integral to the identity of their home. Both communities use the Lake as a source of relaxation and recreation. The non-Tribal community uses the Lake to boost the economy more so than the Tribal community. The Tribal community has a unique connection with the Lake as their traditional, cultural and spiritual center. Lastly, the Tribal community views their role as stewards of the Lake differently than the non-Tribal community. These findings have been summarized in Table 5.1.

Table 5.1: Themes Pertaining to Tribal and Non-Tribal Communities' Relationship with Coeur d'Alene Lake.

Theme	Description
Lake Integral to Identity	Both Communities view the Lake as Integral Identity to their Community Structure
Lake Boosts Economy	Non-Tribal community benefits from the Lake in terms of economy more so than Tribal community
Lake as Relaxation, Recreation	Both Communities use the Lake to Relax and Recreate
Traditional, Cultural, Spiritual Center	The Tribal Community Interacts with the Lake in a Spiritual Manner
Stewardship Disparity	The Communities Exhibit Stewardship for the Lake Differently

These 5 themes tell us what the two communities have in common and what sets them apart. They can also be recognized as driving forces behind the facilitation or obstruction of collaboration between the communities when it comes to Lake issues.

Lake is the Identity of Both Communities

Both Tribal and non-Tribal communities see the Lake and the surrounding area as integral to the identity of their home. This theme represents common ground that both communities share. Both communities identify with the Lake and the lifestyle it provides. Both communities need the Lake to maintain their self-image. Without this relationship, both communities' identities change. Despite the fact that the lifestyles provided are diverse, the singularity of the Lake and its provision is something to rally around and perhaps build from.

Non-Tribal Community's Economic Connection to Lake

The non-Tribal community uses the Lake to boost the economy more so than the Tribal community. This theme represents the important distinction between the non-Tribal and Tribal communities. The result of the Allotment Act left the Tribal

Community geographically separated from the Lake. The non-Tribal community proceeded to benefit from the Lake under the imposed systems of property and industry. Today, the legacy of these actions continues to benefit the non-Tribal community and, in turn, drives values and decision-making. A recognition of these values and asset protection will be necessary in order to progress in mediation between the two communities.

Both Communities Use Lake For Relaxation and Recreation

The Lake is used by both Tribal and non-Tribal communities as a source of relaxation and recreation. In conjunction with the two communities sharing the Lake as their home, the recreational lifestyle opportunities provided are similarly shared, such as swimming, fishing and general access to the Lake. Through these activities, both communities have a relationship using the Lake for reinvigoration. This theme is another relatable characteristic and practice the two communities possess.

Tribal Community's Unique Connection with Lake

The Tribal community has a unique connection with the Lake as their traditional, cultural and spiritual center. This theme represents an important distinction between the Tribal and non-Tribal communities. The Tribal community's ancient connection with the Lake, the traditions practiced involving the Lake, the culture and the spiritual meaning derived from the Lake are vitally important to the Tribe. In other words, the Tribal community depends on the Lake to sustain its culture. Without this relationship with the Lake, many of the Tribal communities' traditions would be stunted. These unique and intrinsic characteristics of the Tribal community must be recognized and respected for mediation to proceed.

“Stewardship” Different Between Communities

The Tribal community views their role as stewards of the Lake differently than the non-Tribal community. This theme represents the disparity in the vision for stewardship of the Lake that exists between the Tribal and non-Tribal communities. Driven by traditional, cultural and spiritual interests of the Tribal community and the economic interest of the non-Tribal community, policies of acceptable stewardship of the Lake do not align. Both communities depend on the Lake for important parts of their lifestyles, but their ideas of stewardship or areas of focus mirror the very properties that set the communities apart. For example, the Tribal community often advocates for water potato gathering and all that supports that tradition, while the non-Tribal community will advocate for the existence of invasive species fisheries, like the Northern Pike and the economic boost the existence of that species gives to the community. Recognition of the drivers that position the two communities is crucial to an understanding of each other's community, respect for their position and negotiation moving forward.

RQ 1 Conclusion

Out of the 5 themes that emerged concerning the first research question, the Tribal community's unique connection to the Lake and the non-Tribal community's economic connection to the Lake are indicative relationships that drive a disparity in policy decision making, such as the different ideas of stewardship illuminated in the fifth theme. However, the first and second themes, the shared identity with the Lake and the shared recreational opportunities are a significant finding of common ground between the communities. This finding lends itself to the hope that collaboration on current and future issues is possible, due to these commonalities and a shared love of the Lake.

5.3 RQ 2: Given the Tribal and non-Tribal communities' unique relationships to the Lake, are there opportunities for collaboration concerning Lake issues in the future?

Each community's relationship with the Lake is indicative of what is and what isn't facilitating collaboration on certain Lake issues. Rather than show the spectrum of relationships each community has with the Lake like the first research question endeavors to do, the second research question is aimed at illuminating what characteristics, practices or realities of either community facilitate or impede collaboration on Lake issues.

The findings show that there are various opinions from both communities on the proposition of a Lake cleanup. The forced changing of lifestyle through the Western imposition of property continues to be a sensitive issue between the two communities. The dual-sovereign interface between the communities clashes often on jurisdictional issues. Members of both communities harbor ill-sentiments for each other and each others' governments. Lastly, members from both communities have a tendency to interpret new relevant facts as confirmation of their existing beliefs or theories creating a confirmation bias.

Table 5.2: Themes pertaining to the Facilitation or the Impediment to collaboration on Lake issues between the Tribal and non-Tribal Communities.

Theme	Description
Disparity on Lake Cleanup	Generally: Tribal Community in favor, non-Tribal community not in favor
Sensitivity Over Indian Removal Persists	Western imposition of property continues to be a sensitive issue
Jurisdictional Issues Persist	Communities clash on jurisdictional issues frequently
Ill-Sentiment Persists	Member of each community harbor ill-sentiment for the other community
Confirmation Bias Stifles Progress	Members from both communities interpret new relevant facts as confirmation of their existing beliefs

These 5 themes serve as key identification of both facilitating and limiting characteristics the two communities possess in the pursuit of mediation. Most of these themes can be, at least, partially explained from the findings of the first research question. Each theme will be briefly explored for its importance to a mediation between the two communities.

Disparity Over Lake Cleanup

Generally speaking, the Tribal community is in favor of a Lake clean-up and the non-Tribal community is not. This theme reflects the Tribal community's desire to protect its traditions, culture and spirituality due to the intertwined nature those practices have with the Lake. On the non-Tribal side, this theme reflects the community's desire to protect the tourist-driven economy, the property values and short-term benefit from the Lake. Generally, a clean up is unappealing to the non-Tribal community in that it would be costly, long-term, and debilitating to current residents and recreationalists. The community also fears a stigma may be cast over the Lake if a major cleanup is implemented, effectively dropping property values and hurting the economy. Generally, the Tribal community views the proposition of a clean up as appealing so that traditional gathering, fishing and Lake health will be restored. These underlying perspectives, worldview and values drive the communities' policies and are important to understand, from both sides, when considering negotiation and mediation.

Sensitivity Over Indian Removal Persists

The Tribal community's forced change of lifestyle through the Western imposition of property continues to be a sensitive issue. This theme reflects the tension between the two communities concerning entitlement to property under and adjacent to the Lake, as well as the Tribe's aboriginal territory. The Tribal community's

worldview, perspective and tradition continues to honor a lifestyle devoid of property and parsed rights, despite the fact that the Tribal community has modernized largely alongside the non-Tribal community. On the other hand, 145 years have passed since the 1873 Executive Order created the Coeur d'Alene Reservation. 109 years have passed since the 1909 allotment of the Reservation. These periods of time represent generations of non-Tribal community members relying on the rule of property. Respect of both perspectives is key to progression in a negotiation or mediation setting.

Jurisdictional Issues Persist

The dual-sovereign interface between the Tribal and non-Tribal communities often produces clashes on jurisdictional issues. This theme represents the issues that often arise due to the jurisdictional interface that exists on and around the Lake. The traditions, culture, spirituality and values of the Tribal community are expressed through the community's policy decisions, including the preservation of native fisheries. Likewise, the non-Tribal community's interests are expressed through their policy decisions exemplified through the preservation of invasive fish species such as the Northern Pike. Furthermore, dispute over access and ambiguity as to which community owns certain submerged lands further exemplifies the impediments to collaboration. Understanding the history, worldviews, perspectives, traditions and cultures of the two communities is important to understanding what is truly important to a community and what might be negotiable or non-negotiable.

Ill-Sentiments Persist

Members of each community harbor ill-sentiments for each other and each others' governments. This theme reflects the tension that exists between the two communities from issues including differing ideological practices, resentment of special federal treatment, and opposing governmental policies and practices. This ill-sentiment

comes from a disparity in worldview, perspective and culture. The history between the two communities, as well as the origin of the sentiments are inhibiting to collaboration. However, an understanding of where they come from fosters a starting point for collaboration through respect.

Confirmation Bias Stifles Progress

Members from both communities have *a tendency to interpret new evidence as confirmation of their existing beliefs or theories*, also known as a Confirmation Bias. This theme represents a recognition of the occurrence of confirmation bias in both the Tribal and non-Tribal communities. The danger of both communities interpreting new facts to fortify preconceived notions is that such a phenomenon represents a closed mind or a mind-made-up. The question that occurs when confronting confirmation bias is how to reach a person who possesses the bias. Collaboration is not available when one or both communities possess confirmation bias. An examination of the history, worldviews and perspectives of the community that the individual with confirmation bias comes from may reveal common ground or respect in the pursuit for mediation.

RQ 2 Conclusion

Out of the 5 themes that emerged concerning the second research question, all 5 present a hurdle to be made on the path to mediation. The split positions on Lake Clean Up are indicative of the Tribal community's traditional, cultural and spiritual relationship with the Lake as is the non-Tribal community's economic relationship with the Lake. These same driving relationships with the natural resource, coupled with certain events in history, have created three of the other themes or hurdles to collaboration, including Sensitivity over Indian Removal, Jurisdictional Issues and Ill-Sentiment. Lastly, cyclical, looped or entrenched thinking, known as Confirma-

tion Bias, is a hurdle best approached by an identifying of common ground and then cross-presentation in a setting which fosters genuine listening and taking to heart. While these 5 hurdles to collaboration are formidable, listening and a genuine examination of the communities' underpinnings may create the leverage needed to facilitate meaningful conversation on the path to settlement.

The identification of impasses, listening and persistent communication coupled with the commonalities and a shared love of the Lake that the two communities do have in common lends itself to the hope that collaboration on current and future issues is possible.

5.4 Collaboration Exercise

Given the insights gathered in the Findings and Conclusion section, walking through an exercise in mediation between the two communities is a worthwhile and potentially insightful exercise. Following Macmillian's template in "A Practical Guide for Mediators," as well as choosing a topic like the aforementioned fishery dispute over the management of the Northern Pike offers us an opportunity at such an exercise.

Macmillian explains that an ideal mediation has the parties to the dispute meet under a constructive atmosphere where they explain to the other party and the mediator their account of the facts, their goals and their perspectives on the matter (Macmillian, 2012). The position of the Tribal community is that they would like to eradicate the invasive species entirely. Likely driven by traditional, cultural and spiritual practices, the Tribal community would probably express the importance of natural, as opposed to invasive, ecology. One Tribal member mentioned in an interview that the native Cutthroat Trout were used for subsistence fishing and their numbers are now dwindling. The policy of the non-Tribal community on the issue is for the Pike to continue its existence in the Lake. Likely driven by the economic boost from the Pike Derbies that are annually held, the non-Tribal community would

probably advocate for the fish's existence in the Lake. Macmillian suggests that both parties should be encouraged to listen to each other with open minds (Macmillian, 2012).

After the exchange of facts, goals and perspectives on the matter between the two parties, the mediator should then help the parties explore their underlying interests and choices concerning the matter, facilitating enlightenment and a deeper understanding of the needs of the parties and the options before them (Macmillian, 2012). This is where the non-Tribal community's economic connection to the Lake and the Tribal community's traditional, cultural and spiritual practices could be brought up and examined for a deeper understanding for each party. Thereafter, and under these newfound circumstances, Macmillian suggests that the parties should be encouraged to negotiate with the assistance of the mediator and reach a settlement (Macmillian, 2012). With a deeper understanding of the other community, the communities, through respect and a please-all mentality would be more likely to find settlement than if no effort had been made to enlighten the two communities about each other.

5.5 Implications

Each stated hypothesis for the research questions turned out to be prevalent in the Findings. For RQ 1 the hypotheses were: Dominion, Property, Sovereignty, Culture, Ownership, Reciprocity and Worldviews. Prevalence of, or lack thereof, the hypotheses can be seen in the themes for RQ 1, which are Lake Integral to Communities, Lake Boosts Economy (non-Tribal), Lake as Relaxation - Recreation, Traditional - Cultural - Spiritual Center (Tribal) and Stewardship Disparity.

For RQ 2 the hypotheses were: Economic priority, Stigma, Property values, Prejudice, Disorganization and Funding. Prevalence of, or lack thereof, the hypotheses can be seen in the themes for RQ 2 as well. Those themes are Disagreement on

Lake Clean Up, Sensitivity Over Indian Removal, Jurisdictional Issues, Hard Feelings over Western Imposition of Property and Confirmation Bias Stifles Progress.

The implications of this work are that opportunities for collaboration between the Tribal and non-Tribal communities do exist through an understanding of the other community's relationships with the Lake, history, worldview, perspective and values. A more informed party to a dispute, with a mind towards addressing their needs and the needs of perceived adversaries, has a better chance at resolution than one who does not possess those dispositions (Mulroy, 2017). In fact, such good will towards perceived adversaries often unlocks the foe's position and allows for meaningful future negotiation, positive payback and fosters beneficial and ongoing amicable relations (Mulroy, 2017).

This study underlines the importance of knowing what drives the opposing party in a dispute. In this case, the traditional, cultural and spiritual largely shapes policy decisions for the Tribal community while economic interest largely shapes policy decisions for the non-Tribal community. This knowledge alone could bring mediation to the next level, allowing the parties to negotiate through pointed *quid pro quo* bargains leading to settlement.

5.6 Limitations and Future Work

This study has limited generalizability in that only 10 members from each community were interviewed. It is difficult to say that so few 30 to 90 minute interviews are truly indicative of an entire community. Nonetheless, the insights gathered from this study provide some grounding for dispute resolution efforts between the two communities in the future. Beyond the two communities in this study, the insights are generalizable in the context of disputes between parties that have significantly strained or significantly differing histories, backgrounds or practices, especially Tribal and non-Tribal relations. The study is also indicative of stakeholder-driven natural

resource disputes. Future researchers may want to implement some of the findings from this research to specific Tribal and non-Tribal disputes in a mediation or community forum. Mediators themselves may be able to glean insight from the study and extrapolate those insights into the mediation process. Knowledge of opposing or perceived to be opposing communities' histories, worldviews, perspectives and values from the start of a mediation could prove to be a key factor in reaching a settlement.

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Notice of Claim: Federal Reserved Water Right, 5th Judicial District of Idaho, Case No. 49576, Subcase No. 91-7755, January 31, 2014.

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State ex rel. Greely v Confederated Salish & Kootenai Tribes, 219 Mont 76 (1985).

State of Idaho's Motion to Reconsider Order on motions For Summary Judgment, United States and Coeur d'Alene Tribe's Joint Motion To Alter or Amend, 5th Judicial District of Idaho, Case No. 49576, Subcase No. 91-7755, May 17, 2017.

State of Idaho's Memorandum In Support of Motion For Summary Judgment, 5th Judicial District of Idaho, Case No. 49576, Subcase No. 91-7755, October 21, 2016.

United States v. Adair, 723 F.2d 1394 (9th Cir. 1983).

United States v. Idaho, 95 F. Supp. 2d 1094 (D. Idaho 1998).

United States' and Coeur d'Alene Tribe's Joint Motion For Summary Judgment, 5th Judicial District of Idaho, Case No. 49576, Subcase No. 91-7755, October 21, 2016.

United States v. District Court for Eagle County, 401 U.S. 520 (1971).

United States' Memorandum In Support of Motion For Summary Judgment, 5th Judicial District of Idaho, Case No. 49576, Subcase No. 91-7755, October 21, 2016.

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

United States v. Washington, 375 F.Supp. 2d 1050 (W.D. Wash. 2005), vacated pursuant to settlement, 2007 WL 4190400 (W.D. Wash. 2007).

United States v. Winans, 198 U.S. 371 (1905).

U.S. Const. art. II, § 2.

U.S. Const. amend. XI.

Willard, V. B. (2014). *The United States' Claims on behalf of the Coeur d'Alene Indian Tribe* (5th Judicial District of Idaho, Case No. 49576, Subcase No. 91-7755, January 31, 2014).

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

Worcester v. Georgia, 31 U.S. 515 (1832).

APPENDIX A

Methods Appendix

A.1 Interview Protocol

1. What is your name, age and in which community do you live in for my organizational purposes only?
2. Describe your relationship to the Lake.
 - (a) How do you use the Lake?
 - (b) What does the Lake give you?
 - (c) What does the Lake mean to you?
3. Why is the Lake important to your community?
 - (a) business, recreation, lifestyle
4. What are the ways that the Lake should be used?
5. What is lost by using the Lake one way versus a different way? *management
 - (a) How would you prioritize competing uses and interests of the Lake?
6. Do you think the Lake has any issues that need to be addressed? If so, what are they?
7. What are the tradeoffs amongst competing uses and interests to the Lake?
8. Is there any mutual benefit between the various interest groups in managing the Lake one way or the other, given the many uses?
 - (a) Who benefits with management the way it is now?
 - (b) Are there any solutions that benefit everyone?

9. Do you know about the mining history in the area?
 - (a) Do you think the mining history affecting the Lake needs to be cleaned up?
10. How important is it to you that the Lake is clean enough to swim in, to eat the fish from, that the Lake attracts tourists, that it looks clean?
11. Do you think implementing a major Lake clean-up plan would affect the local economy? (such as one including the Lake as part of the Silver Valley Superfund site)
 - (a) Do you think cleaning up the mining effects to the Lake would change the way people think about the Lake? Do you think it would cast a stigma over the Lake?
 - (b) Do you think property values would lessen in the wake of implementing such a plan?
12. What do or don't you like about the current management?
 - (a) Do you think the Lake is being managed fairly between all of the interest groups?
13. What do you think the Private Land Owners/Coeur d'Alene Tribe are/is entitled to when it comes to a relationship with the Lake?
14. Who should have the police power over the Lake? - docks, regulations
15. What water rights do you think the Private Land Owners/the Tribe are/is entitled to?
16. Is there anyone else I should talk to given the questions I have asked?

- (a) that has an interest in the issues; is knowledgeable; has a different viewpoint?
17. Is there anything else you would like to share on the topic and in general?
 18. Now that you've been through the interview questions, what questions would you ask regarding the management of the Lake that are important and that I didn't ask or missed?
 19. Would you be willing to participate in a meeting with the other people I am interviewing to hear and discuss the results of this research?

APPENDIX B

Findings Appendix

B.1 Code or Category Book

Code Category	Description	Typical Exemplar
Justification Theory	This category refers to interviewee's characterizing an opinion or policy of some other entity as one taken in order to better justify a position that benefits them and is disagreeable to the interviewee.	"So this is one issue - where people not understanding the facts - reach different conclusions about "Who has the right to do what?"
Relationship to Lake	This category refers to any mention of an interaction with the Lake.	<i>Interviewer:</i> "How important to you is it that the lake is clean enough to swim in, to eat the fish from, that it attracts tourists and that is looks clean?" <i>Interviewee:</i> "All of it is essential to having a clean Lake for the enjoyment, for any traditional fishing, all of it."
Collaboration / Non-Collaboration	This category refers to any mention or notion of collaboration, whether successful, unsuccessful or non-existent.	"Like I said, one guy has a plan, or EPA has their plan, State of Idaho has their plan, we had the Management Plan."
Jurisdictional Issues	This category refers to any mention or notion of an issue related to jurisdiction or property.	"You can't own the land! The line goes across there in their imagination, I guess. But the line goes across in that water, and you don't go across this point, and "ownership," whatever is this way is yours, but the water runs over into mine . . ."
Sentiment For Different Groups	This category refers to any mention, description, opinion or sentiment of any group or individual other than the interviewee themselves.	"They're only sovereign when it's to their advantage."
Lake Health	This category refers to any mention or notion of the Lake's health concerning past, present or future water quality issues or practices as well as management decisions.	"And it's due to logging and mining; and it's due to over-harvest in areas that were uncontrollable to the Tribe, such as the Main Lake (Coeur d'Alene)."
Regulations & Enforcement	This category refers to any mention or notion of regulation and enforcement concerning the Lake including examples of general policy tendencies.	"Right. I tend towards liberty, in general, so if in doubt, lean that way because things tend to level themselves out without regulation. If all of a sudden you have people that are abusing that, other things will step into place and put them in their place. Things tend to level themselves out."

B.3 Code Index and Frequency Comparison

The following chart represents every code identified for the study and the breakdown of how many excerpts were assigned to each of the two communities in focus, the Euro-Americans (non-Tribal) and the Native Americans (Tribal). The tally of excerpts simply captures the quantity of times the code was assigned and says nothing to the qualitative power of each individual excerpt. The column on the left represents the codes and the code categories themselves. The code categories are represented in red and underlined font. All of the codes underneath the code categories belong to that category. The colored columns in the center and to the right represent the “Euro-Americans” and “Native Americans” interviewed in this study aggregated together in their separate groups. In these columns a white box represents no excerpts from that code assigned to the group. A blue box represents up to 15 excerpts assigned. A green box represents between 16 and 49 excerpts assigned. And a red box represents 50 or more excerpts assigned.

Code	Euro-American	Native American
Quotes	1	16
Traditions Worth Preserving		9
Justification Theory	2	5
Distrust of Media	1	
Misperceiving The Facts	9	5
Relationship To Lake		1
Reconnecting W/Lake		6
Lake as Property		
Indigenous Ideas on Property		8
Western Ideas of Property	1	33
Tribe Buying Back Lakeshore Property	2	8
Destruction of Nature		1
Experiences w/Lake		12
Lake Crowded	1	
Visible Pollution The Turn-Off		3
Teaching Children		3
Lake as Educator		4
Prayer		1
Aboriginal Rights		4
Lake Uses		
Lake As Homeland	1	13
Hunting		4
Lake As Recreation	14	35
Lake as Getaway	1	

Code	Euro-American	Native American
Gathering		12
Lake As Resource	7	3
Lake As Sustenance		20
Lake As Tourism	15	9
Lake As Transportation	3	9
Lake As Economic Booster	9	13
Lake As Livelihood	19	7
Lake As Work	3	
Lake as Traditional, Cultural, Spiritual Center		59
Lake Sustainability		17
Lake Integral To Identity of Community	9	22
Water Important	3	12
Fishing For Sustenance	2	23
Tribe Uses Lake In Modern Times		4
Keeping Traditions Alive		37
Grateful For Lake	2	1
Tribe: Balancing Use & Environment	2	2
Lake A Family Tradition	2	29
Relationship w/Lake	6	2
Tribe As Stewards	5	52
Lake Use Has Changed	1	
Lake Beautiful	5	4
Living On Lake Coveted	3	
Tourism vs. Locals	8	

<u>Code</u>	<u>Euro-American</u>	<u>Native American</u>
All Communities Tied To Lake	3	2
Loves Lake	7	9
Lake: Extractive To Tourism	8	3
<u>Collaboration / Non-Collaboration</u>		
Tribe Policy Is Consistent	1	1
Approach to Collaboration		
Struggle To Collaborate	2	16
Failure To Collaborate	2	19
Willingness To Collaborate	6	30
Call For Collaboration	8	32
Open to the New, Draw from the Past	1	
KEA		3
Lake Needs Leadership		6
Phil Cerna		1
Lake: Respect For Others	4	5
Adverse Agendas		4
Divisive Groups		1
Not In My Back Yard Mentality		1
Lobbying		3
Turn Over Of Officials Slows Process		1
Lake Managment Plan Still Splintered	1	8
Supreme Court Bound		2

Code	Euro-American	Native American
Assimilation or Separation?	6	1
Common Ground	1	1
Social Change Takes Generations	6	6
Interested In Mediation	2	
Call For Diverse Opinions	4	2
Too Litigious	1	
Call For Temperance	1	1
Legislature Not Judicial	2	
No Communication Between Groups		7
Transcending Goals	1	
Diverging Communities Around The Lake	7	3
Education & Awareness	5	9
Jurisdictional Issues	13	8
Entitlement A Divisive Word		1
Watershed Interconnected		6
Fisheries Issues	7	45
Asserting Sovereignty	9	10
Barry Wood Decision	1	
Setting Precedent		2
Nomadic Tribe		11
Co-Existence	1	2
PIA Standard Inapplicable to CDA Rez		2
Constitutional Taking	2	
Cross-Deputization		1

Code	Euro-American	Native American
Tribal Elections		1
Honoring Treay		1
Implied Consent		1
Money	4	5
No Consultation	1	
Federalism	2	
Lower Third Rights	1	1
Reservation Creation Controversy	1	
Navigability	2	
Indian Law Schizophrenic	2	
Indian Removal		5
Separation of Powers	1	
Access Issues	2	10
Wards of the State	1	
Usual & Accustomed Areas – Off-Reservation		7
Entitlement	6	4
Fear Of Loss Of Rights In Adjudication	1	3
Concern For Stakeholder Orientation	2	
Belief That Tribe Should Own Entire Lake	3	18
Hope For Reinstatement of Title To Lake		1
Breaking Precedent	2	1
Federal Government	2	4
Tribal Consultation		4
Indefinite Borders	2	

Code	Euro-American	Native American
For Beds & Banks Ruling		13
Dock Issue	34	9
Lake Level	2	2
Water Rights	16	28
Tribal Counsel		1
Tribe vs. State	7	14
Tribe vs. State Stalemate	2	8
High/Low Water Lake Dispute	10	3
Respect SCOTUS Decision	3	1
Trust Responsibility	2	1
Lake History	3	1
SCOTUS Biased	2	
Lake's Issues Are Complicated	26	2
Against Beds & Banks Ruling	6	
SCOTUS Got It Wrong	7	
Private Interests		1
Allotment	2	11
<u>Sentiment For Different Groups</u>		
Unrelateable Stance	1	1
Anti-tribe		
Animosity For Tribe	6	6
Racism	7	9
Tribe As Hypocrite	17	1
Criticism Of State Government	2	21

Code	Euro-American	Native American
Resentment	1	3
Lake Should Be Open To All	1	10
Criticism of Federal Government	6	10
Education > Prejudice		4
Wealthy Pushing Out the Poor	2	
Harassment		2
Peaceful People		1
NAGPRA		3
Local Opposition To Tribe	5	6
Seven Generations Management		14
Tribe As Parasite	2	
Spotted Owl Science	1	1
Tribal Recognition of Rights		1
Hypocritical Property Owners	2	3
Selective Storytelling	3	1
Tribe vs. White Man	11	24
Jack Buell Story	2	1
Criticism Of Tribal \$ Allocation	12	
Criticism Of Tribal Government	21	2
Reservation As Racism	4	1
Greed	3	1
No Trouble With Indians	1	
Tribal Courts	4	
Healing	1	1

Code	Euro-American	Native American
Opinion On Tribe	37	2
Maintenance Prohibited On Tribble End of Lake	1	
Trouble With Indians Possible	1	
Perception That Tribe Will Block Access	1	6
Reservations A Bad Idea	1	
Understands Tribe's Position	3	
Tribe As Benevolent Land Owner	1	1
"Native" in Modern Times?	1	2
Tribe As Corporation	8	1
Tribe Doing Well Legally	2	5
Lake Health		2
Exigency		1
Anthropogenic Change To Lake	1	1
Invasive Species	4	1
Storm Water Runoff		1
Restoration Efforts	1	9
Clean Up ≠ Drop In Tourism	1	3
Cleaning Lake A Huge Undertaking	2	13
Risking The Lake		1
Economy vs. Recovery		3
Logging Practices	3	10
Algae Issue	5	5
Public Works	1	
Reintroduction		1

Code	Euro-American	Native American
Lake Contaminated	2	7
Natural Over Introduced		1
Pollution Practices	1	34
Clean Up = Drop In Property Values	6	9
Mining: Some Risks	2	4
Leave Lake As Is	1	4
Mismanagement of Lake	1	3
Lake Not Polluted	2	1
Lake Not Taken Care Of		1
Keep Lake Clean	3	11
Decent Job Taking Care Of Lake	1	
Call To Clean Up Lake	4	29
Septic Issues	1	2
Can't Clean Up Lake	10	2
Lake Cleans Itself	4	3
Lake Polluted	3	21
Lake Doesn't Need To Be Cleaned Up	10	1
Tribe Against Invasive Species		6
Sewage Issue	2	1
Superfund Boondoggle	5	3
Superfund Stigma		6
Quantity Not An Issue	1	
Mining Companies	3	13
Mining Devastating	1	12

<u>Code</u>	<u>Euro-American</u>	<u>Native American</u>
Mining Legacy = Sick Locals	8	9
Regulations & Enforcement	1	1
Co-Management A Wash	3	1
Against Floating Homes		2
Ambivalent Over Who Manages	2	
Local Regulation	2	
Boating Safety Issue	11	2
CSRBA Decision		1
No Political Affiliation		1
Nuisance On The Lake	3	
Poor State Enforcement	2	1
Lake Big Enough For All Uses	3	1
Preventative Measures	1	1
Regulations Burdensome	8	
Tribe Should Have Police Power Over Their Water	3	6
Beds & Banks Reoccurring Issues	10	11
Regulation A Good Thing	9	7
Competing Uses	7	
Spokane River Wake Issue	1	
Conflicting Rules	12	
Less Regulation, More Alternatives	11	2
Grass Is Greener On Other Side	2	
Libertarian Politics	35	1
Lake Unregulated	5	
Poor Tribal Enforcement	5	
Private Property Rights Issue	34	14
EPA	18	11
Enforcement & Education	11	6
Regulation: The Last Resort	6	1

APPENDIX C

Human Subjects Approval Appendix

C.1 Coeur d'Alene Tribe Cultural Committee Letter



Coeur d' Alene Tribe Natural Resources
Culture Committee
PO Box 408
402 Anne Antelope Road
Plummer ID, 83851

April 10, 2017

University of Idaho
Institutional Review Board
709 S. Deakin St.
Moscow, ID 83844

To whom it may concern:

On two occasions U of I Student Jon Rezabek (College of Law, College of Water Resources) presented to our Tribal Culture Committee. The first meeting he scheduled with the committee was February 7, 2017 and the second time was April 4, 2017. The first meeting Jon gave a presentation on the Coeur d' Alene Lake and what it means to the people/communities that live or use the lake.

This is going to be Jon's Thesis for his Master's Program. Jon presented a power point presentation. The committee and members of the Lake Management staff gave Jon suggestions on what to refine and define in his project.

On Jon's second appearance with the Culture committee, he had considered the suggestions offered and showed a revision of what his thesis will be.

The committee at this time was full quorum, and it was agreed unanimously (5 for 0 against) that Jon pursue his thesis project, as reflected in the meeting minutes. It was also understood from the committee that upon completion of his project, he return his final presentation for the committee to review.

Regards,

A handwritten signature in blue ink, appearing to read "JWM Gardipe".

JWM Gardipe
Natural Resource Department Office Manager
Secretary – Culture Committee

C.2 University of Idaho Institutional Review Board Letter

University of Idaho

Office of Research Assurances
 Institutional Review Board
 875 Perimeter Drive, MS 3010
 Moscow ID 83844-3010
 Phone: 208-885-6162
 Fax: 208-885-5752
irb@uidaho.edu

To: Rodney P. Frey

Cc: Jon Rezabek L.

From: Sharon Stoll
 Chair, University of Idaho Institutional Review Board

Date: April 27, 2017

Title: The Beds and the Banks Case 20 Years Later: An interdisciplinary View of the Management and Stakeholders Since 2001's U.S. Supreme Court Decision Concerning the Title to the southern portion of Lake Coeur d'Alene.

Project: 17-083

Review Type: Expedite

Approved: 04/27/2017

Renewal: 04/26/2018

On behalf of the Institutional Review Board at the University of Idaho, I am pleased to inform you that the protocol for the research project The Beds and the Banks Case 20 Years Later: An interdisciplinary View of the Management and Stakeholders Since 2001's U.S. Supreme Court Decision Concerning the Title to the southern portion of Lake Coeur d'Alene. is approved as offering no significant risk to human subjects. This approval is valid until 04/26/2018.

This study may be conducted according to the protocol described in the application. Research that has been approved by the IRB may be subject to further appropriate review and approval or disapproval by officials of the Institution. Every effort should be made to ensure that the project is conducted in a manner consistent with the three fundamental principles identified in the Belmont Report: respect for persons; beneficence; and justice. As Principal Investigator, you are responsible for ensuring compliance with all applicable FERPA regulations, University of Idaho policies, state and federal regulations.

Federal regulations require researchers to follow specific procedures in a timely manner. For the protection of all concerned, the IRB calls your attention to the following obligations that you have as Principal Investigator of this study.

1. For any changes to the study (except to protect the safety of

participants), an Amendment Application must be submitted to the IRB. The Amendment Application must be reviewed and approved before any changes can take place.

2. Any unanticipated/adverse events or problems occurring as a result of participation in this study must be reported immediately to the IRB.
3. Principal investigators are responsible for ensuring that informed consent is properly documented in accordance with 45 CFR 46.116.
4. A Continuing Renewal Application must be submitted and approved by the IRB prior to the expiration date else automatic termination of this study will occur. If the study expires, all research activities associated with the study must cease and a new application must be approved before any work can continue.
5. Please complete the Continuing Renewal/Closure form in VERAS when the project is completed.
6. Forms can be found at <https://veras.uidaho.edu>.

APPENDIX D

Water Rights Case Note Appendix

As this research was on-going (2016-2018) the Tribal and non-Tribal communities were involved in a dispute over water rights in a state adjudication. In order to attain a better understanding of Tribal and non-Tribal interests, a study of the water rights litigation and the briefing from the United States, the Coeur d'Alene Tribe and the State of Idaho is beneficial.

D.1 Introduction

The Coeur d'Alene Reservation (Reservation) lies in the panhandle of North Idaho with its northern boundary encompassing the southern third of the Lake.

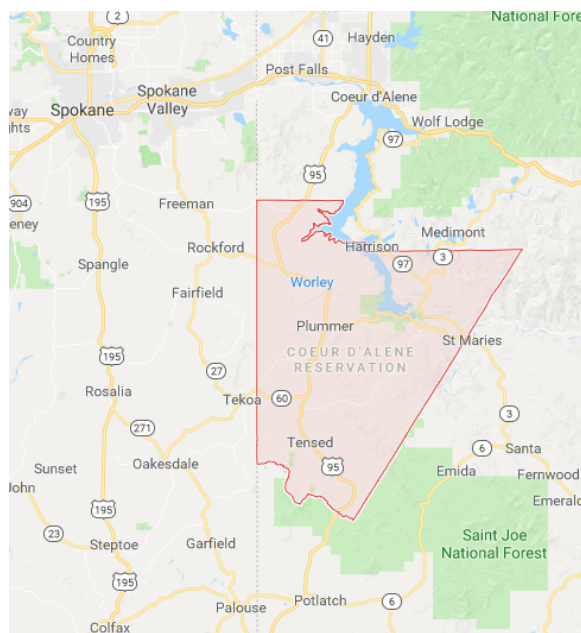


Figure D.1: Coeur d'Alene Reservation. Northern Boundary Bifurcates Coeur d'Alene Lake (Google Maps, 2018).

The Coeur d'Alene Tribe (Tribe) has relied on the Lake and its tributaries as a subsistence fishery and for gathering since time immemorial. Protecting the Lake and its tributaries is central to the cultural, spiritual and economic life of the Tribe. The

United States Supreme Court has recognized the ownership of the beds and banks of the Lake within the Reservation boundaries in the Tribe (*Idaho v. United States*, 2001). The doctrine of federal reserved water rights recognizes implied rights to water if necessary to fulfill the purpose of a reservation (*Winters v. United States*, 1908). Although governed by federal law, interpretation of a waiver of sovereign immunity of the United States as trustee for tribes by the United States Supreme Court has allowed determination of the purpose and scope of tribal water rights in state courts throughout the United States (McCarran Amendment, 1952; *Colorado River Water Conservation District v. United States*, 1976; *Dugan v. Rank*, 1963).



Figure D.2: The City of Coeur d'Alene on the shores of Coeur d'Alene Lake (Enjoy Coeur d'Alene Inc., 2018).

The State of Idaho commenced a general water rights adjudication in district court for the Idaho Panhandle in 2008 known as the Coeur d'Alene-Spokane River Basin Adjudication (CSRBA). The United States filed 353 water right claims as trustee on behalf of the Tribe with the CSRBA court (*Order Consolidating Subcases*, 2015).² The Tribe intervened to assert its own rights. The pertinent parties include the Tribe, the United States (U.S.) as trustee, and the State of Idaho (State). As the Tribe asserts their rights to water in an unfavorable state forum, self-determination

²This case is known as *In re Coeur d'Alene-Spokane River Basin Adjudication* (CSRBA), No. 49576, Subcase No. 91-7755, in the Fifth Judicial District of the State of Idaho or the CSRBA Court of the Northern Idaho Water Adjudications.

and their economic future are on the line.

The CSRBA Court ruling on summary judgment interpreted the Federal reserved water rights doctrine and found the primary purposes of the Coeur d'Alene Reservation to be agricultural, hunting and fishing and domestic uses (*Order on Motions for Summary Judgment*, 2017). The Court rejected the claim of the Tribe to a homeland purpose and to the waters of the Lake. In doing so, the court incorrectly interpreted federal Indian law by failing to apply the Indian canons of construction. The canons require that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians and that all ambiguities are to be resolved in their favor (*Montana v. Blackfeet Tribe*, 1985; *County of Oneida v. Oneida Indian Nation*, 1985). Instead, the court relied on *United States v. New Mexico*, a case applicable to non-Indian federal reservations that narrowly construes the scope of reserved rights in that context (*United States v. New Mexico*, 1978).

This case note will begin with a background section introducing the federal reserved water rights or the *Winters* doctrine. Next, the case at hand will be introduced with sections on the history of the Coeur d'Alene Reservation, a breakdown of the water right claims themselves and an overview of the procedural history. Following this section will come a summary of the arguments of the Tribe and the United States' and the State of Idaho. The CSRBA Court's Order on the Summary Judgment arguments will also be summarized. These summaries have been limited in scope to the issues of interpretation of the Federal reserved water rights doctrine and the determination of the purposes of the Coeur d'Alene reservation. Following this section will come the Analysis of the arguments and Order also limited to the aforementioned scope. Lastly, the conclusion will assess some of the legal and broader implications of the case, consider the case moving forward in the appeal process and discuss the policy implicated in the interpretations of the *Winters* doctrine.

D.2 Background

This section will provide a summary of the relevant aspects of development and application of the doctrine of federal reserved water rights in the US Supreme Court followed by its interpretation and application in federal and state courts.

Supreme Court of the United States: the *Winters* Doctrine

A Supreme Court doctrine develops over time with a series of rulings that address various aspects of the issue.

Winters v. United States, 1908 The Federal Reserved Water Rights doctrine started with a 1908 Supreme Court of the United States case, *Winters v. United States* (*Winters v. United States*, 1908). This case is remembered for its result and the reasoning relied upon, which commenced what is now known as the *Winters* Doctrine. The *Winters* opinion held that a Treaty between the United States and a tribe includes an implied reservation of water if water is necessary to fulfill the purpose(s) of the agreement. The *Winters* Doctrine has built on that initial ruling to include implied reserved water rights when an Indian reservation is created by Executive Order and when federal land is reserved for non-Indian federal purposes (*Winters v. United States*, 1908; *Arizona v. California*, 1963).

In reaching this conclusion, the *Winters* Court relied on precedent from *United States v. Winans* (1905), where a tribe's off-reservation "right of taking fish at all usual and accustomed places, in common with the citizens of the territory" implied a right of access across private land to exercise the right (*United States v. Winans*, 1905; Act of March 8, 1859). The *Winans* Court held that "the treaty was not a grant of rights to the Indians, but a grant of right from them, – a reservation of those not granted." (*United States v. Winans*, 1905).

Winters relied on this precedent, holding, "[t]he Indians had command of the lands and the waters—command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization. Did they give up all this?" (*Winters v. United States*, 1908; Treaty of Fort Laramie, 1851). In reaching this – retention of rights, rather than granted rights – holding, the Court employed the Indian canons of construction for agreements with Indian tribes which call for "...treaties, agreements, statutes, and executive orders [to] be liberally construed in favor of the Indians; and all ambiguities are to be resolved in favor of the Indians. In addition, treaties and agreements are to be construed as the Indians would have understood them, and tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous." (Cohen, 2005).

The Court also found that in order to determine the particular purposes of an Indian reservation the intent of the parties to the treaty should be ascertained through the text of the treaty establishing the reservation and the surrounding circumstances (*Winters v. United States*, 1908). In looking to the treaty creating the reservation in the *Winters* case, the Court found that the primary purpose of the reservation was for a homeland based in irrigation for agriculture, "[t]he reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people." (*Winters v. United States*, 1908).

Furthermore, the Court found that when Indian reservations are created, water is intended to satisfy the present and future needs of the people living thereon,

The lands were arid and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government. The lands ceded were, it is true, also arid; and some argument may be urged, and is urged, that with their cession there was the cession of the waters,

without which they would be valueless, and ‘civilized communities could not be established thereon.’ And this, it is further contended, the Indians knew, and yet made no reservation of the waters. We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession. (*Winters v. United States*, 1908).

While far reaching in its implications, the issue of reserved water rights would not reach the U.S. Supreme Court again until 1963.

***Arizona I*, 1963** The 1963 Supreme Court of the United States case, *Arizona v. California* is important for its holding that enough water is reserved along with an Indian reservation that includes an agricultural purpose to irrigate all of the “practicably irrigable acreage” (PIA) thereon (*Arizona I*, 1963). They reasoned that the only feasible and fair way by which reserved water for an agricultural reservation can be measured is through a determination of the irrigable acreage available on the reservation (*Arizona I*, 1963). The Court did not have multiple purposes of the reservation to rule upon, only the agricultural one. Therefore, the question of quantifying how much water each reservation receives is answered through an assessment of how many PIAs exist within the reservation boundary multiplied by how much water per acre is needed to successfully grow a crop. This ruling left open the question of the appropriate standard for determining reserved rights on Indian reservations whose purpose is agricultural, but without the need for irrigation, as well as implied water for purposes other than irrigation for agriculture. The only other cases to come before the U.S. Supreme Court on reserved water rights were two cases addressing non-Indian federal reservations (*Cappaert v. United States*, 1976; *United States v. New Mexico*, 1978).

***Cappaert v. United States*, 1976** The 1976 Supreme Court of the United States case, *Cappaert v. United States*, is important for its application of the *Winters* Doctrine to groundwater and a national monument (*Cappaert v. United States*, 1976).

A landowner challenged a lower court's ruling that took away his right to pump ground water to the detriment of Devil's Hole national monument (*Cappaert v. United States*, 1976). The Court held that the reservation of Devil's Hole as a national monument reserved federal water rights in unappropriated water to the extent needed to accomplish the purpose of the reservation (*Cappaert v. United States*, 1976). Because the *Winters* doctrine was based on the necessity of water for the purpose of the federal reservation, the government could protect its water from subsequent diversion, whether the diversion was of surface or groundwater (*Cappaert v. United States*, 1976).

New Mexico v. United States, 1978 The 1978 Supreme Court of the United States case, *United States v. New Mexico*, is important for its establishment of the primary-secondary purposes test of federal (non-Indian) reservations (*United States v. New Mexico*, 1978). The holding states that upon a federal reservation, appurtenant water is impliedly reserved to the extent needed to accomplish the purposes of the reservation and no more (*United States v. New Mexico*, 1978). In the case, the United States was using water in a National Forest for a number of purposes, including domestic-residential, road-water, stock water, recreational and fish and wildlife (*United States v. New Mexico*, 1978). The Court examined the purposes for which Congress authorized the creation of the national forests and found that the government's primary purposes were limited to the preservation of timber and the security of favorable water flows (*United States v. New Mexico*, 1978). Claims to water for recreation, aesthetics, wildlife preservation and cattle grazing purposes were not authorized, therefore falling into the secondary purposes category, where no water rights were reserved by the government (*United States v. New Mexico*, 1978). While no other cases have been decided by a majority of the U.S. Supreme Court, the *Winters* Doctrine has been applied and interpreted in numerous appellate and

district federal courts and in state courts.

9th Circuit Court of Appeals Rulings

The application of *New Mexico* to Native American reservations remains an uncertain one. The 9th Circuit has taken the approach of finding a broad primary purpose that encompasses many types of uses.

Colville Confederated Tribes v. Walton, 1981 The 1981, 9th Circuit Court of Appeals case, *Colville Confederated Tribes v. Walton* is important for its recognition of the preservation of the Tribe's access to fishing grounds as a purpose of the creation of the Colville Reservation (*Colville Confederated Tribes v. Walton, 1981*). In doing so, the court held that an implied instream reservation of water exists for the development and maintenance of replacement fishing grounds that were originally lost due to the damming of the Columbia River (*Colville Confederated Tribes v. Walton, 1981*). Therefore, the Court in *Walton* quantified water rights for the primary purposes of a homeland for the Indians to maintain an agrarian society with access to fisheries and instream flows for a replacement fishery (*Colville Confederated Tribes v. Walton, 1981*).

United States v. Adair, 1983 The 1983 9th Circuit case, *United States v. Adair* is important for its finding that the primary purposes of the reservation are agriculture, hunting, fishing and that those rights were not lost on termination of the reservation itself (*United States v. Adair, 1983*). The court found that after considering the historical importance of hunting and fishing, and the language of Article I of the 1864 Treaty, the very purposes of establishing the Klamath Reservation were to secure to the Tribe a continuation of its traditional hunting and fishing lifestyle (*United States v. Adair, 1983*; Act of July 2, 1866). They also found that a second essential purpose in setting aside the Klamath Reservation, recognized by both the

Tribe and the Government, was to encourage the Indians to take up farming (*United States v. Adair*, 1983). The court found it acceptable to have multiple primary purposes, even in light of the *Cappaert* and *New Mexico* cases (*Cappaert v. United States*, 1976; *United States v. New Mexico*, 1978; *United States v. Adair*, 1983).

Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District, 2017 This 2017 9th Circuit case, *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.* is important for its finding that the *Winters* doctrine does not distinguish between surface water and groundwater (*Agua Caliente*, 2017). The court found that the United States impliedly reserved appurtenant water sources, including groundwater, when it created the Tribe's reservation in California's arid Coachella Valley (*Agua Caliente*, 2017).

Federal District Court Rulings

United States v. Washington, 2005 The 2005 Federal District of Washington case, *United States v. Washington*, is important for its application of the *New Mexico* test (*United States v. Washington*, 2005). The Court held that 9th Circuit precedent requires the *New Mexico* test to inquire beyond the finding of the homeland purpose (*United States v. Washington*, 2005; *United States v. New Mexico*, 1978). Therefore, the inquiry into a primary purpose of a reservation cannot end with a finding of a "homeland", as such a finding is simply too broad (*United States v. Washington*, 2005). The court favors a primary purpose determination based on the intent of the federal government at the time the reservation was instituted instead (*United States v. Washington*, 2005). The primary purposes found in this case were agriculture and domestic uses (*United States v. Washington*, 2005). The remaining court opinions discussed were issued by state courts. Before this discussion, it is necessary to explain why a federal question of the rights of tribes is being determined by

state courts.

State Court Jurisdiction and the McCarran Amendment

The McCarran Amendment waives sovereign immunity of the federal government allowing the U.S. to be joined in a state water adjudication where the federal government claims water rights including reserved water rights (McCarran Amendment, 1952; *United States v. District Court for Eagle County*, 1971). This includes the government's representation of Native American reserved water rights, but does not diminish the nature of a Tribe's substantive rights defined by federal law (*Colorado River Water Conservation Dist. v United States*, 1976; *State ex rel. Greely v. Confederated Salish & Kootenai Tribes*, 1985). In *Arizona v. San Carlos Apache Tribe*, the Court clearly articulated its preference for state courts to hear and decide Indian water rights claims, even if the case is brought by an Indian tribe and the suit seeks only to determine the Indians' rights (*Arizona v. San Carlos Apache Tribe*, 1983). The waiver of sovereign immunity extends only to a general adjudication and is only a waiver of the immunity of the United States as trustee for a tribe, not the tribe itself (*Dugan v. Rank*, 1963).

State Court Rulings

State court rulings outside of the CSRBA's home state, Idaho, are not binding upon the Idaho Supreme Court. However, cases on point, but outside of binding precedent are often used as persuasive arguments.

***Gila V*, 2001** In the 2001 case, *Gila V*, the Arizona Supreme Court rejected the PIA standard as the sole means for determining water rights (*In Re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 2001) (*Gila V*). The court held that the U.S. Supreme Court in *Arizona v. California* did not

necessarily adopt PIA as the universal measure of Indian reserved water rights (*Gila V*, 2001). Instead, the *Gila V* court found that the purpose of the reservations in their case was to establish “a permanent home and abiding place...” for the tribes (*Gila V*, 2001).

Unlike the *Washington* Court, the *Gila V* court did not feel compelled to inquire further than the homeland purpose (*Gila V*, 2001). In fact, they rejected the *New Mexico* primary purpose test altogether because they “...believe the significant differences between Indian and non-Indian reservations preclude application of the test...” (*Gila V*, 2001). They continued to reason, “...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.” (*Gila V*, 2001). Therefore, instead of making a distinction between primary and secondary purposes, as in *New Mexico*, the court included what might have been deemed secondary purposes as components of the “permanent home and abiding place” or homeland singular purpose (*Gila V*, 2001). The court continued to reason that even if *New Mexico* was applied to their case, the reservations would be entitled to the full measure of their reserved rights because water use that is necessary to the establishment of a permanent homeland is a primary, not secondary, purpose (*Gila V*, 2001; *United States v. New Mexico*, 1978).

The court determined that the amount of water necessary to accomplish an Indian reservation’s purpose can be made through a fact-intensive inquiry on a reservation-by-reservation basis (*Gila V*, 2001). Factors to be considered when quantifying an Indian tribe’s federally reserved water rights include: tribal history; tribal culture; tribal land’s geography, topography, natural resources, groundwater availability; tribe’s economic base; past water use on reservation; and the tribe’s present and projected future population (*Gila V*, 2001). The *Gila V* court was the first court to find groundwater

as part of the Indian reserved water right (*Gila V*, 2001).

Gila V is important to the case at hand because it provides a persuasive example of an alternative to both the PIA standard and the *New Mexico* test (*Arizona I*, 1963; *United States v. New Mexico*, 1978). The primary purpose of the reservation found in this case was a homeland encapsulating multiple activities which support the tribes and their members (*Gila V*, 2001; *United States v. New Mexico*, 1978).

***Big Horn I*, 1988** On the other end of the spectrum concerning state court rulings, is the 1988 Wyoming Supreme Court case, *Big Horn I*, in which the court found a federal intent to reserve water when the Wind River Reservation was created in 1868 for the purpose of an agricultural homeland (*In Re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 1988) (*Big Horn I*). They rejected an earlier finding in the litigation by a Special Master whose more broad reading of the 1868 Treaty with the Shoshones and Bannocks found that “. . . the principal purpose for entering into this 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.” (*Big Horn I*, 1988). The Special Master found reserved water for the component purposes of irrigation, stock watering, fisheries, wildlife, aesthetics, mineral extraction, as well as DCMI (domestic, commercial, municipal and industrial) (*Big Horn I*, 1988). The district court rejected this broad reading, finding that “. . . on the very face of the Treaty, it is clear that its purpose was solely agricultural.” (*Big Horn I*, 1988). Citing *Winters*, the Wyoming Supreme Court affirmed the District Court’s ruling (*Big Horn I*, 1988). The court illuminated select parts of the Treaty in support of the sole agricultural purpose, while rejecting each of the Special Master’s component uses as not impliedly reserved in the Treaty for other choice reasons (*Big Horn I*, 1988). In the quantification of the water rights, the Court endorsed the PIA standard and

subsumed the DCMI and Livestock claims within and coming from the quantity set aside for PIA, further limiting the awarded water (*Big Horn I*, 1988). Comparing *Gila V* and *Big Horn I* illustrates the extremes in state court interpretation of the Winters doctrine.

Big Horn II, 1992 *Big Horn II* is important for its finding that the state, not the tribe, has authority to determine change in use of the tribal water right created in 1868 for the purpose of an agricultural homeland (*In Re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 1992) (*Big Horn II*). The State of Wyoming challenged whether the tribes could change their right to divert future project water for agricultural purposes to a right to maintain an instream flow for fishery purposes without regard to Wyoming water law and whether the tribes had the right to administer all the water rights within the reservation to the exclusion of the Wyoming state engineer (*Big Horn II*, 1992). Upon review, the court held that the tribes did not have the right to change the use of the water covered by their reserved water rights in any manner in which they deemed advisable and that such a proposition would not justify the court limiting the use of the water for agricultural purposes and then permitting the tribes to unilaterally change that use (*Big Horn II*, 1992). The court held that an actual diversion of water was not necessary to appropriate water for a beneficial use and that no person other than the State of Wyoming owned any instream flow water rights (*Big Horn II*, 1992).

The disparity of outcomes exhibited through *Gila V*, *Big Horn I* and *Big Horn II* shows that with state court jurisdiction, similarly situated tribes will be treated differently resulting in an almost unpredictable spectrum of outcomes.

D.3 The Case at Hand: *In re* Coeur d’Alene - Spokane River Basin Adjudication, Case No. 49576, Subcase No. 91-7755

The Tribe’s and U.S.’s Claims in the Adjudication

The United States’ 353 claims on behalf of the Tribe can be broken down into 5 categories (Table D.1) (*The United States’ Claims*, 2017).

Table D.1: Categories of the 353 claims filed by the United States on behalf of the Coeur d’Alene Tribe.

Type of Claim	Number of Claims
D.C.M.I. or Domestic, Commercial, Municipal & Industrial	17
Instream Flows	72
P.I.A. or Practicably Irrigable Acreage	44
Coeur d’Alene Lake Level Maintenance	1
Springs, Seeps & Wetlands	219

The first category is Domestic, Commercial, Municipal and Industrial or DCMI. Examples of these claims include wells and stock watering for Domestic claims; a casino’s water needs for Commercial claims; town or city water for Municipal claims; and a timber mill or a manufacturing plant for Industrial claims. The second category is Instream Flows. These 72 claims would mandate monthly minimum flows on certain creeks or rivers protecting native fish habitat. These claims were made by the Tribe both on and off the reservation. The third category is Practicably Irrigable Acreage or PIA. These claims discern both the reservation’s irrigable agricultural land and how much water is needed for a healthy crop to grow on that land. The fourth category is the lake elevation maintenance for Coeur d’Alene Lake. This claim asks for sufficient flows into Coeur d’Alene Lake for the purpose of maintaining a natural monthly Lake elevation. The fifth claim category includes Springs, Seeps and Wetlands. These claims ask for a sufficient amount of water to maintain wetlands, springs, and seeps on Tribal lands within the Reservation to provide for Tribally-harvested

game and waterfowl habitat, Tribal plant gathering, and other Tribal traditional cultural, spiritual, ceremonial, and religious uses.

Procedure of *In re* CSRBA, No. 49576, Subcase No. 91-7755

Prior to the CSRBA and as noted above, the United States was held to have title to the Coeur d’Alene Indian Reservation in trust, for the benefit of the Tribe (Executive Order, 1873; 1887 Agreement, United States – Coeur d’Alenes; 1889 Agreement, United States – Coeur d’Alenes; Act of March 3, 1891). In 2001, the Supreme Court of the United States quieted title to the submerged lands underlying Coeur d’Alene Lake within the Reservation in the United States, in trust for the benefit of the Tribe (*Idaho v. United States*, 2001). On January 31, 2014, the United States claimed 353 Federal reserved water rights in the Coeur d’Alene–Spokane River Basin Adjudication, which is part of the Idaho state water rights adjudications (*Notice of Claim: Federal Reserved Water Right*, 2014). Table D.2 shows the procedural steps in the case’s CSRBA filings.

Table D.2: Procedure of litigation for *In re* CSRBA, No. 49576, Subcase No. 91-7755.

Date Filed/Lodged	Document
1/31/2014	<i>Notice of Claim: Federal Reserved Water Right.</i>
3/27/2014	<i>Notice of Filing Federal Reserved Water Right Claims In The Coeur D’Alene-Spokane River Basin Adjudication.</i>
7/21/2014 - 9/29/2014	333 Separate Objections to the claim of a Federal Reserved Water Right filed with the CSRBA Court
2/17/2015	<i>Order Consolidating Subcases, Order Bifurcating Proceedings, Scheduling Order.</i>
10/21/2016 - 3/20/2017	Motions for Summary Judgment with Supporting Briefing Filed
5/3/2017	<i>Final Order Disallowing Water Rights, Final Order Disallowing Purposes of Use, Order on Motions For Summary Judgment</i>
8/8/2017 - 8/9/2017	Motions to Appeal Final Order filed.
Early 2018	Initial Briefs Due to Idaho Supreme Court
Mid-2018	Oral Argument and Full Submission to the Idaho Supreme Court for Ruling

Other water right claimants throughout the implicated river basins were informed of the Tribe's claims. Many chose to formally object (*Notice Of Filing Federal Reserved Water Right Claims*, 2014). From this point, pursuant to the Adjudication rules of procedure, the United States, the Tribe and a number of objectors were recognized as parties to the proceeding (*Amended CSRBA Administrative Order 1*, 2015; *Order Consolidating Subcases*, 2015). All of the Tribe's claims were consolidated into one case and the proceedings were bifurcated into two issues: (1) entitlement to water rights and (2) quantity of water rights entitled to (*Amended CSRBA Administrative Order 1*, 2015; *Order Consolidating Subcases*, 2015). Entitlement would be addressed first as the outcome would direct the proceeding on quantity (*Amended CSRBA Administrative Order 1*, 2015; *Order Consolidating Subcases*, 2015). Motions for Summary Judgment on the entitlement issue were filed along with supporting briefing from October 21, 2016, until March 20, 2017 (*United States' and Coeur D'Alene Tribe's Joint Motion*, 2016; *United States' Memorandum In Support*, 2016).³ CSRBA Judge, Eric Wildman, ruled on the motion with the filing of three orders on May 3, 2017; one disallowing certain claims, another disallowing certain purposes of use and an order granting and denying parts of the motions themselves (*Final Order Disallowing Water Rights*, 2017). Later, the Judge's decision was challenged by the parties and revised, but largely left the same through a series of orders amending the original set of Orders (*State of Idaho's Motion to Reconsider Order, United States and Coeur D'Alene Tribe's Joint Motion*, 2017). On August 8th and 9th, 2017, the United States and the State of Idaho appealed the CSRBA ruling to the Idaho Supreme Court (*Motion For Leave to File Interlocutory Appeal, State of Idaho's Motion for Permission to Appeal*, 2017). The court accepted the appeal (*Order Granting Motions for Permissive Appeal*, 2017). At the time this thesis was written, initial briefs to the Court had been submitted in early 2018 and oral argument is scheduled for the summer of

³A summary judgment is based upon a motion by one of the parties that contends that all necessary factual issues are settled or so one-sided they need not be tried.

2018.

D.4 Arguments and Order

The following sections describe the arguments of the United States and the Tribe, the State, and the order of the CSRBA court relevant to the purpose of the Reservation and the date of its establishment. Table D.3 summarizes these arguments.

Table D.3: Synopsis of Parties and Court’s Arguments/Ruling for *In re* CSRBA, No. 49576, Subcase No. 91-7755.

	Tribe & United States	State of Idaho	CSRBA Court
Purpose(s) of CDA Reservation	Homeland with Traditional and Modern Components	Agriculture, Fishing and Hunting, Domestic	To support the progress, comfort, improvement, education, civilization, as well as the ongoing and future agricultural endeavors of the Tribe.
Use of <i>New Mexico</i> Primary-Secondary purpose test	Inapplicable	Applicable	Applicable
Date of Creation of Reservation	1873	1891	1873

United States and Coeur d’Alene Tribe’s Argument

The Tribe and the United States claim a reserved water right to serve the permanent homeland purpose of the Coeur d’Alene Reservation (*United States’ Memorandum In Support*, 2016;). They read the *Winters* Doctrine broadly, finding the homeland purpose includes a multitude of activities, both modern (agricultural, industrial, future sustenance) and traditional (hunting, fishing, transportation, and recreation) (*United States’ Memorandum In Support*, 2016). In order to determine which uses will be included, courts must apply the legal test of looking for the purposes of the

reservation through the specific documents, unique histories and the circumstances surrounding the creation of the reservation (*United States' Memorandum In Support*, 2016). They point out that all documents examined are subject to the federal Indian canons of construction (*United States' Memorandum In Support*, 2016; *Coeur d'Alene Tribe's Memorandum In Support*, 2016).

The Tribe and the U.S. use the U.S. Supreme Court opinion in *Idaho v. United States (Idaho II)* in support of their claim (*United States' Memorandum In Support*, 2016). *Idaho II* found that the creation of the reservation occurred upon issuance of the Executive Order of 1873 (*Idaho v. United States*, 2001). The question before the Court in that case was whether the State of Idaho or the United States (in trust for the benefit of the Tribe) owned the submerged lands within the boundaries of the Coeur d'Alene Reservation (*Idaho v. United States*, 2001). The Court held that title to the submerged lands belongs to the United States, as trustee, and the Coeur d'Alene Tribe, as the beneficially interested party of the trusteeship (*Idaho v. United States*, 2001).

The Tribe and the U.S. argue that because *Idaho II* used the same legal test to determine the purposes of the Reservation, those findings can be used in the case at hand (*Coeur d'Alene Tribe's Memorandum In Support*, 2016). The *Idaho II* Court found that the documents surrounding the creation of the Reservation show that both the Tribe and the United States contemplated traditional uses such as hunting, fishing, gathering, transportation, recreation, and cultural activities while also anticipating more modern uses for the Reservation, such as agriculture, industry and other modern activities necessary to achieve economic self-sufficiency (*United States' Memorandum In Support*, 2016; *Coeur d'Alene Tribe's Memorandum In Support*, 2016).

The Court also found that the Tribe's history shows that the related water rights were continuously important to the Tribe from time immemorial, through the period establishing the Reservation and all the way up until the present (*United States'*

Memorandum In Support, 2016). The circumstances were such that the United States was plainly aware of the vital importance of water resources to the Tribe and could only achieve its goals by agreeing to a reservation that included the waterways (*United States' Memorandum In Support*, 2016).

The Tribe and the U.S. further supports their position by showing that the *Idaho II* Court started its examination of the evidence with a strong presumption in favor of state title to submerged lands under navigable waterways (*United States' Memorandum In Support*, 2016; *United States v. Idaho*, 1998). This presumption in favor of the state comes from the Equal Footing Doctrine, which holds that lands underlying navigable waters pass to a state upon its admission to the Union (*Pollard's Lessee v. Hagan*, 1845). On top of this presumption, the *Idaho II* Court applied the Indian canons of construction to the various negotiations, agreements, executive orders and Congressional actions in play during the period of creation of the Reservation by construing the documents as they would have been understood by the Tribe, who were all but cornered into negotiation and the party whose first language was not used to memorialize the agreement. (*United States' Memorandum In Support*, 2016; *Idaho v. United States*, 2001).

The Court found that even in the face of such a strong presumption in favor of the state, the historical record was so overwhelming in *Idaho II* that the Tribe and the United States overcame the presumption and were recognized to have title to the submerged lands (*United States' Memorandum In Support*, 2016). In distinguishing the case at hand, they argue that the Equal Footing Doctrine is not applicable (while the Indian canons still are), making the identical evidence all-the-more forceful (*United States' Memorandum In Support*, 2016).

The Tribe and the United States also argue that the primary-secondary test in *New Mexico* is not applicable to the case at hand (*Coeur d'Alene Tribe's Memorandum In Support*, 2016). They distinguish that the reservation in the *New Mexico* case was

a National Forest, not an Indian reservation (*Coeur d'Alene Tribe's Memorandum In Support*, 2016). Continuing, they argue that the United States Supreme Court has not applied the primary-secondary test to an Indian reservation (*Coeur d'Alene Tribe's Memorandum In Support*, 2016). The Ninth Circuit applied it broadly in *Walton*, finding a multi-component homeland primary purpose and did not find the test directly applicable specifically to Indian reservations in *Adair* (*Coeur d'Alene Tribe's Memorandum In Support*, 2016).

In conclusion, the Tribe and the United States argue that the *Idaho II* precedent and expert testimony shows a broad homeland purpose was intended by the parties that established the Reservation. This anticipated homeland purpose included both modern (agricultural, industrial, future sustenance) and traditional (hunting, fishing, transportation, and recreation) uses as components to such a purpose (*United States' Memorandum In Support*, 2016).

State of Idaho's Argument

The State begins their argument by stating that the *Winters* doctrine is a methodology for determining intent and absent any intent, there can be no reservation of water rights (*State of Idaho's Memorandum In Support*, 2016). They continue claiming a reservation of water rights cannot be implied to remedy an omission in the act creating a Reservation (*State of Idaho's Memorandum In Support*, 2016). Unlike the Tribe and the United States, the State reads the *Winters* Doctrine narrowly, claiming that it does not provide a court with *carte blanche* authority to issue water rights to any and all water necessary to Indian endeavors (*State of Idaho's Memorandum In Support*, 2016). On the contrary, they argue the *Winters* Doctrine is only a methodology for determining the implication of water through the intent of the documents creating the Reservation, as an incident of the reservation of land (*State of Idaho's Memorandum In Support*, 2016). The State looks to the nature and the

substance of the intent of the parties to determine how to confine the limits of water reserved along with the reservation of land (*State of Idaho's Memorandum In Support*, 2016).

Moving forward, the State mentions the many parallels between contract interpretation and treaty or executive order interpretation (*State of Idaho's Memorandum In Support*, 2016). They claim the negotiating history leading up to the 1873 Executive Order should be confined to the status of aid in reading and interpreting the text itself and nothing more (*State of Idaho's Memorandum In Support*, 2016). They continue by limiting the boundaries of the Indian canons of construction by citing *Choctaw Nation v. United States*, “treaties cannot be expanded or rewritten beyond their clear terms. . . .” (*State of Idaho's Memorandum In Support*, 2016; *Choctaw Nation v. United States*, 1943; *Bands of Ute Indians v. United States*, 1947).

The State reminds the court of the principles of the Separation of Powers, asking the court to not impugn anything through a viewing of the negotiation history, an application of the canons of construction nor other notions of equality or general conscience beyond the four corners of the document (*State of Idaho's Memorandum In Support*, 2016). This textualist approach to the Winters inquiry for a reservation's purpose, according to the parties involved, is the essence of the State's initial argument (*State of Idaho's Memorandum In Support*, 2016).

Next, the State argues that the intent to reserve water can only be implied where necessary to fulfill a primary purpose of a reservation where without such water the purpose would be entirely defeated (*State of Idaho's Memorandum In Support*, 2016). They illuminate how the Supreme Court of the United States has found Congress reserves only the amount of water necessary to fulfill the purpose of the reservation and no more (*State of Idaho's Memorandum In Support*, 2016; *Cappaert v. United States*, 1976). They also mention Congress' invariable deferment to state control when it comes to water rights, except for the narrow exception of Federal reserved water

rights (*State of Idaho's Memorandum In Support*, 2016).

They continue by citing *United States v. New Mexico*, where the distinction between primary and secondary purposes of a reservation is made (*State of Idaho's Memorandum In Support*, 2016; *United States v. New Mexico*, 1978). They point out that the *New Mexico* Court holds that water for secondary uses of a reservation are not federally reserved and must be acquired in the same manner as any other private appropriator within the state system (*State of Idaho's Memorandum In Support*, 2016; *United States v. New Mexico*, 1978).

Applying the *New Mexico* test, the State argues that the determination of a “homeland” as the primary purpose of a reservation is simply too broad and cannot be accepted as the end of the primary purpose of the reservation inquiry (*State of Idaho's Memorandum In Support*, 2016; *United States v. New Mexico*, 1978). The State looks to the *Walton* case, which they admit found “the general purpose [of the reservation], to provide a home for the Indians, is a broad one and must be liberally construed.” (*State of Idaho's Memorandum In Support*, 2016; *Colville Confederated Tribes v. Walton*, 1981). However, the State points out that the court did not find that the Colville Confederated Tribes had *carte blanche* when it comes to the reserved water right components of the homeland purpose, but pointed out that the court found only two narrow primary purposes entitled to a reserved water right, (1) maintenance of an agrarian society and (2) maintenance of fishing access and rights (*State of Idaho's Memorandum In Support*, 2016; *United States v. New Mexico*, 1978; *Colville Confederated Tribes v. Walton*, 1981).

The State cites the federal district court opinion in, *United States v. Washington*, finding that a “homeland” determination was insufficient and that the *New Mexico* test requires a more narrow outcome as a matter of law (*United States v. Washington*, 2005). The court found that water was federally reserved only for the very purposes that the reservation was set aside for, which, in this case was agricul-

tural and domestic uses (*United States v. Washington*, 2005).

In summary, the State reads the *Winters* doctrine narrowly, calling it a methodology for implying intent to reserve appurtenant water rights as an incident of a reservation of land (*State of Idaho's Memorandum In Support*, 2016). They argue that absent evidence of intent there can be no reservation of water rights (*State of Idaho's Memorandum In Support*, 2016). In looking to supporting documentation when discerning the intent of the parties to a treaty or executive order, the State points out that such documents cannot be expanded or rewritten beyond their clear terms (*State of Idaho's Memorandum In Support*, 2016; *Choctaw Nation v. United States*, 1943; *Bands of Ute Indians v. United States*, 1947). The State looks to the *New Mexico* test, requiring that appurtenant water reserved in order to fulfill the purpose of a reservation is limited only to the primary purposes and no more (*State of Idaho's Memorandum In Support*, 2016; *United States v. New Mexico*, 1978). Lastly, they point to *Walton* and *Washington* in showing a primary purpose finding of a “homeland” for an Indian reservation does not end the inquiry as such a finding is simply too broad (*State of Idaho's Memorandum In Support*, 2016; *United States v. New Mexico*, 1978; *United States v. Washington*, 2005; *Big Horn I*, 1988).

The State declares that the primary purposes of the Coeur d'Alene Reservation, based on the Act of March 3, 1891, are to support the progress, comfort, improvement, education, civilization, as well as the ongoing and future agricultural endeavors of the Tribe (*State of Idaho's Memorandum In Support*, 2016). They argue that the 1873 Executive Order was intended to be a temporary measure that was eventually superseded by the congressional Act of March 3, 1891 (*State of Idaho's Memorandum In Support*, 2016).

CSRBA Order

Agreeing with the Tribe, the U.S. and the State, the court begins their *Order on Motions For Summary Judgment* by examining the documentation, circumstances, and history surrounding the creation of the reservation (*Order on Motions for Summary Judgment*, 2017). Before going into detail, the court proclaims that the Coeur d'Alene Indian Reservation is entitled to reserved water rights for agriculture, fishing and hunting, and domestic purposes (*Order on Motions for Summary Judgment*, 2017).

The beginning of the Order cites six pages of *Idaho II* as a detailed summary of the circumstances leading to the creation of the Reservation (*Order on Motions for Summary Judgment*, 2017; *Idaho v. United States*, 2001). The Court endorses *Idaho II*'s finding that the Reservation was created by Executive Order in 1873 (*Order on Motions for Summary Judgment*, 2017). Following the history section, the court cites *Winters* as the commencement of the reserved rights doctrine (*Order on Motions for Summary Judgment*, 2017). The Court notes that the policy of the government in reserving the reservation in the *Winters* case was to change the habits “of a nomadic and uncivilized people” to “a pastoral and civilized people.” (*Order on Motions for Summary Judgment*, 2017; *Winters v. United States*, 1908). The court notes that *Winters* found a reserved right to irrigation along with the reservation of land (*Order on Motions for Summary Judgment*, 2017).

Like the State's argument, the court next cites *New Mexico*, endorsing its primary-secondary purpose of the reservation test as applicable to Indian reservations (*Order on Motions for Summary Judgment*, 2017; *United States v. New Mexico*, 1978). In order to find the primary purposes of the Reservation the court cites *Walton* which looks to the document and circumstances surrounding the creation of the reservation and the history of the Indians for whom it was created (*Order on Motions for Summary Judgment*, 2017; *Colville Confederated Tribes v. Walton*, 1981). Like

the Tribe and the U.S., the court acknowledges the Indian canons of construction, requiring words and agreements involving Indians to be construed in a light most favorable to them. Like the State, the court also acknowledges that such agreements cannot be re-written beyond their clear terms to remedy claimed injustice (*Order on Motions for Summary Judgment*, 2017; *Jones v. Meehan*, 1899; *Choctaw Nation v. United States*, 1943).

The court next turns to the homeland primary purpose theory put forth by the United States (*Order on Motions for Summary Judgment*, 2017). Citing the Tribe and the U.S., the court exhaustively lists all of the categories of water rights that are claimed under the homeland purpose, including domestic, commercial, municipal, industrial, instream flows for fish habitat, irrigated agriculture, maintenance of Lake levels, water storage, power generation, aesthetics, recreation, religious, cultural, ceremonial, and maintenance of wetlands, springs, and seeps for game habitat and gathering activities (*Order on Motions for Summary Judgment*, 2017). The court points out that the Objectors to these claims assert the homeland theory is overly broad; and then the court itself agrees (*Order on Motions for Summary Judgment*, 2017). The court employs the *New Mexico* test, calling the reserved water rights doctrine limited and only extended to primary, not secondary purposes of a reservation (*Order on Motions for Summary Judgment*, 2017). Like the State, the court posits that the homeland theory does not comport with the requirements of the *New Mexico* test (*Order on Motions for Summary Judgment*, 2017).

Next, the court points out that the claims entered into the adjudication by the United States include every use of water associated with the Coeur d'Alene Indian Reservation dating back to its inception over 130 years ago, all under its homeland theory (*Order on Motions for Summary Judgment*, 2017). The court calls this extensive breadth the shortcoming of the homeland theory (*Order on Motions for Summary Judgment*, 2017). The court states that the extensive claim of water rights under the

doctrine fails to accommodate the notion that the reserved water rights doctrine is intended to reserve water rights for some, but not all, uses associated with a federal reservation of land (*Order on Motions for Summary Judgment*, 2017). The fact that only federal and no state claims were made by the Tribe and the U.S. further exemplifies the notion that the claimants have for the overly expansive homeland theory (*Order on Motions for Summary Judgment*, 2017). The court again asserts its denial of such a limitless claim that has no boundaries in nature and scope (*Order on Motions for Summary Judgment*, 2017).

Lastly, the court refers to the Supreme Court of the United States' holdings on the issue in *Winters* and *Arizona I* (*Order on Motions for Summary Judgment*, 2017). The court illuminates that both cases found a limited primary purpose for agrarian or irrigation use, despite the fact that the reservations were obviously set aside for the homeland of the Indians (*Order on Motions for Summary Judgment*, 2017). The court ends the argument by rejecting the Tribe's and the U.S.'s homeland theory as a matter of law (*Order on Motions for Summary Judgment*, 2017).

Like the Tribe, the U.S. and the State, the court conclusively finds that one of the primary purposes of the Reservation was to promote an agrarian lifestyle for its inhabitants (*Order on Motions for Summary Judgment*, 2017). In support of this finding, the court points out that the 1873 Agreement between the United States and the Tribe reveals an intent by the two parties to pursue such a change in the Tribe's lifestyle (*Order on Motions for Summary Judgment*, 2017). The agreement provided the Tribe would cede its claims to much of its aboriginal territory in exchange for a reservation and other consideration (*Order on Motions for Summary Judgment*, 2017). It also shows the willingness of the Tribe to convert from a more nomadic to a more pastoral people (*Order on Motions for Summary Judgment*, 2017).

Like the Tribe and the U.S., the court supports the finding of a fishing and hunting primary purpose with evidence that the waterways were reserved as primary

purposes of the Reservation (*Order on Motions for Summary Judgment*, 2017). The court points out that the 1873 Executive Order was preceded by a period of negotiation between the Tribe and the United States (*Order on Motions for Summary Judgment*, 2017). It reasons that the Tribal villages focused on fishing and hunting near rivers and lakes (*Order on Motions for Summary Judgment*, 2017). Tribal fishing and hunting relied on the Lake and the St. Joe River (*Order on Motions for Summary Judgment*, 2017). Like the Tribe's and the U.S.'s argument, the court found that these practices continued around the time of the negotiations where the Tribe stated that they were not yet ready to live on farming alone and that they needed some hunting and fishing for awhile (*Order on Motions for Summary Judgment*, 2017). The court also pointed to evidence that if the Tribe would have been precluded from fishing, they would have fought for the retention of the right (*Order on Motions for Summary Judgment*, 2017). The United States wished to avoid conflict with the Tribe and thus intended to include such rights as primary purposes of the Reservation (*Order on Motions for Summary Judgment*, 2017).

Addressing the finding of a domestic primary purpose, the court cites to *Arizona v. California* (*Arizona II*), in that Indian reservations carry with them the appurtenant rights to make the reservations livable which includes rights for domestic use (*Order on Motions for Summary Judgment*, 2017; *Arizona II*, 1983).

D.5 Analysis

The *Winters* doctrine tells us that the Coeur d'Alene Reservation is entitled to an appurtenant, reserved water right in order to fulfill the Reservation's purposes. The question remains, what are the specific purposes of the Coeur d'Alene Reservation? Table D.4 below summarizes the analysis in the same format as Table D.3.

In determining the purposes, it is useful to look to the findings from the *Idaho II* Court that used the same legal test to determine the purposes of the same Reservation

Table D.4: Synopsis of Analysis for *In re* CSRBA, No. 49576, Subcase No. 91-7755.

	Author's Analysis
Purpose(s) of CDA Reservation	Homeland with Traditional and Modern Components
Use of <i>New Mexico</i> Primary-Secondary purpose test	Inapplicable
Date of Creation of Reservation	1873

at issue in the case at hand (*Idaho v. United States*, 2001). The *Idaho II* Court found that the documents surrounding the creation of the Reservation show that both parties to the agreements contemplated traditional uses such as hunting, fishing, gathering, transportation, recreation, and cultural activities while also anticipating more modern uses for the Reservation, such as agriculture, industry and other modern activities necessary to achieve economic self-sufficiency and determination (*United States' Memorandum In Support*, 2016). This finding supports a broad homeland purpose like the one advocated for by the Tribe and the United States.

Despite the findings of *Idaho II*, the State and the CSRBA Court employ the *New Mexico* primary-secondary test as a methodology for determining the primary purposes of a Federal reservation (*United States v. New Mexico*, 1978). However, the reservation in *New Mexico* is for a National Forest as opposed to one for a people in the case at hand (*United States v. New Mexico*, 1978). If the *New Mexico* test is applicable in finding the primary purposes of an Indian reservation, it is none-the-less important to look to the documents and circumstances surrounding the reservation's creation, the history of the Indians for whom the reservation was created, as well as their need to maintain themselves under changed circumstances when ascertaining the purposes of the Indian reservation (*Colville Confederated Tribes v. Walton*, 1981). As was noted above in *Idaho II*'s analysis, a broad homeland purpose is the binding

precedent concerning this test (*Idaho v. United States*, 2001). This suggests that with or without an application of the *New Mexico* primary-secondary test, *Idaho II*'s findings of a broad homeland purpose hold.

In *Winters*, the document that created the reservation may have been silent as to water rights, but a closer look at the circumstances reveals that an application of the Indian canons of construction are of paramount importance when interpreting such documents (*Winters v. United States*, 1908). The treaty in *Winters* and the agreement leading to the Executive Order in the case at hand were all but forced upon the Tribes by a dominant and conquering force, the United States (*Winters v. United States*, 1908). Such negotiations were held in the English language, with English documents on the table and translators of varying quality and shifting agendas relaying information from one party to another. For these reasons, the *Winters* court held that Indian treaties and agreements are not to be read like a contract between equal parties in which they are expected to have made every point clear and thus interpretation is limited to the 4 corners of the document (*Winters v. United States*, 1908). Instead the Court instituted the Indian canons of construction to make sense of such forced agreements (*Winters v. United States*, 1908). The *Winters* Court held,

The Indians had command of the lands and the waters – command of all their beneficial use, whether kept for hunting, ‘and grazing roving herds of stock,’ or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate? And, even regarding the allegation of the answer as true, that there are springs and streams on the reservation flowing about 2,900 inches of water, the inquiries are pertinent. If it were possible to believe affirmative answers, we might also believe that the Indians were awed by the power of the Government or deceived by its negotiators. Neither view is possible. (*Winters v. United States*, 1908).

The *Adair* case references the Indian canons of construction too, which state that Indian treaties should be construed as the tribes would have understood them at the time the treaty was created, among other canons (*United States v. Adair*,

1983). Applying those canons to the 1873 Executive Order, in which created the Coeur d'Alene Reservation, it is reasonable to find that the Tribe's understanding of the 1873 Agreement between the United States and the Tribe, which lead to the 1873 Executive Order, included a significant reservation of water rights along with the reservation of land (*Coeur d'Alene Tribe's Memorandum In Support*, 2016).

Application of *Winters*, *New Mexico*, *Walton*, and *Adair* to the Coeur d'Alene Reservation leads to the conclusion that the Reservation has a singular homeland purpose with component uses. This precedent provides ample evidence in support of including the claim categories as components of the homeland purpose, including DCMI, Instream Flows, PIA, Coeur d'Alene Lake Level Maintenance and Seeps, Springs and Wetlands.

For persuasive as opposed to binding reference, the approach to quantifying water in order to fulfill the purpose of an Indian reservation in the state court ruling of *Gila V* is more appropriate for the Coeur d'Alene Reservation. This is true for two reasons. One, *Gila V*'s approach allows for a broad homeland purpose encapsulating multiple activities which support the Tribe and its members (*Gila V*, 2001). This is opposed to a more narrow, exclusionary finding, such as agriculture and fishing as primary purposes. Two, the Coeur d'Alenes are inextricably linked to the inland aquatic world centered on the Lake, as opposed to an existence centered more on a pastoral lifestyle, such as the one alluded to in *Arizona I* (*Arizona I*, 1963).

The *Gila V* case rejected *Arizona I*'s PIA standard for a fact-intensive inquiry made on a reservation-by-reservation basis in order to determine how to quantify the fulfillment of the homeland purpose (*Gila V*, 2001). The court considered the following factors: tribe's history; tribal history; tribal culture; tribal land's geography, topography, natural resources, groundwater availability; tribe's economic base; past water use on reservation; and the tribe's present and projected future population (*Gila V*, 2001).

The *Gila V* factors are helpful in determining the encapsulated components of a homeland purpose. Applying the *Gila V* factors to the Coeur d'Alene Tribe and Reservation would show how the Tribe's traditions, culture and spirituality is closely connected to water and the Lake. Furthermore, it would show that the Reservation's geography includes the southern third of the Lake and many of the Lake's tributaries. The mountainous terrain and abundant watershed further widen the Tribe's components in establishing a reserved water right for a homeland purpose. The Tribe's economic base has a significant opportunity to capitalize should water be reserved for the purpose of economic stimulus. The Tribe has used water for a multitude of purposes, but has claimed additional water for the enjoyment of their present and future members. The Tribe has used the Lake in myriad ways from time immemorial until the present. As was stated earlier the Tribe is inextricably linked to the inland aquatic world centered on the Lake. Lastly, the Tribe's present population uses the lake in many ways and the preservation of their traditions ensures that their future populations will interact with and need rights to water and the Lake forever.

This fact-intensive inquiry on a reservation-by-reservation basis is more appropriate for assessing the purposes of Indian reservations, especially given the spectrum and variety that they come in.

Lastly, *Idaho II* found that the creation of the reservation occurred upon the Executive Order of 1873. There is no need to distinguish this case from *Idaho II* concerning this issue. The 1873 Executive Order was the first federal withdrawal upon which both the United States and the Tribe were privy. Furthermore, the ratification of previous agreements by Congress in 1891 simply does not erase President Ulysses S. Grant's withdrawal of land subject to previous agreements. The ratification simply denotes Congress's acknowledgment of the earlier creation of the Reservation.

D.6 Conclusion

After considering multiple arguments, many questions linger. What do these disparate positions say about the worldviews, relationships, perspectives, histories, beliefs, epistemologies and values of the parties to this lawsuit? Does this litigation represent the latest episode in the saga of Western versus Indigenous cultures? Is there any room for a meeting of the minds, a settlement? How much would be gained and lost by a final ruling for either party?

These questions remain as the litigation is appealed to the Idaho State Supreme Court. With such contention exemplified in this case note, will the Supreme Court's ruling satisfy the parties enough for finality or is this case destined to be appealed to the U.S. Supreme Court?

As the CSRBA Court reasoned in their Order, the United States Supreme Court has not applied the homeland theory advanced in this case by the United States and the Tribe in determination of the purposes of a reservation. Both *Winters* and *Arizona I* had to do with Indian reservations and neither were found to have a broad homeland purpose (*Winters*: agrarian purpose; *Arizona I*: irrigation purpose). In distinction, the *New Mexico* case dealt with a Nation Forest reservation and so, it can be argued, that the test is inappropriate for application to reservations for people (Indians).

What is the difference between a reservation for a group of trees and a group of people? What does a precedent that compares the two apples-to-apples say about the state of the law? What does it say about the Courts' view of Indians and the duty to uphold the promises to them memorialized in their treaties? If the reserved water rights doctrine is read narrowly, as is suggested by the State and held by the CSRBA court, Indians will have to acquire water rights through the State system. As tribes change over time and modernize in an increasingly globalized world, will they be stunted by the inconvenience of the state water acquisition system? Is the need

to resort to this system inconsistent with tribal sovereignty? Perhaps a consideration of the spirit of the Indian canons of construction should be considered. Looking past whether the U.S. had good intentions, it is in hindsight that we must attribute good intentions. Otherwise, who are we as a people?

This case provides the appellate courts an opportunity to endorse a homeland purpose, first in the Idaho Supreme Court and possibly in the Supreme Court of the United States. The final ruling has powerful implications on Indian Reservations across the country.