

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

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

Case No. 39576

Subcase Nos. 51-12756, 51-12847, 51-12848, 51-12849,
51-12850, 55-13476, 55-13477, 55-13485,
55-13486, 55-13487, 55-13493 55-13499,
55-134500, 55-13501, 55-13507, 55-13509,
55-13510, 55-13511, 55-13653, 55-13654,
55-13668, 55-13669, 55-13692, 55-13695 &
55-13697

MEMORANDUM IN REPLY TO UNITED STATES'
RESPONSE MEMORANDUM RE: STATE OF
IDAHO'S MOTION FOR SUMMARY JUDGMENT

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I. REPLY TO THE UNITED STATES' CRITICISM OF THE STATE OF IDAHO'S STATEMENT OF FACTS

The United States criticizes the Statement of Facts by the State of Idaho, hereinafter the "State," as being one-sided. One general comment and a few specific statements in reply put their criticisms in proper perspective. The State acknowledges that a great deal more could be said about the history of the Duck Valley Indian Reservation, hereinafter the "DVIR," as the expert reports of Dr. Richard Clemmer-Smith and Stephen R. Wee demonstrate. U.S. Exhibit 1 to the Affidavit of Richard O. Clemmer-Smith and U.S. Exhibit 3 to the Affidavit of Kelley E. Harris, respectively.¹ A mere recitation of these volumes would be neither necessary nor particularly helpful to the Snake River Basin Adjudication District Court, hereinafter the "SRBA Court." Rather, the State summarized the facts that it thought were relevant. The United States obviously disagrees with the State's perspective, as the State disagrees with the United States. But, most of the basic facts are not in dispute.² The significance of individual facts for resolution of this matter is very much in dispute.

A. The Treaty of Ruby Valley and the 1877 Reservation.

The United States makes three criticisms of the State's statement of facts. The State fails to acknowledge the traditional role of hunting and fishing in the tribal lifestyle. *United States' Response Memorandum Re: State of Idaho's Motion For Summary Judgment*, hereinafter "*U. S. Response Memo*," at 3. The State omits any discussion of Shoshone agricultural endeavors prior to the creation of the DVIR. *U. S. Response Memo* at 4. The State omits any discussion of a

¹ The United States has some duplicate numbers in its numbering of exhibits. The Affidavit of Richard O. Clemmer-Smith has eight exhibits, which are attached and numbered from one through eight. The Affidavit of Kelley E. Harris has seven exhibits, which are attached and numbered from 1 through 7.

² Dr. Richard Clemmer-Smith makes a number of statements in his expert report regarding fishery resources that are fundamentally in error. Dr. Clemmer-Smith admitted in his deposition that he does not possess expertise as a fishery biologist. The State of Idaho is addressing these errors and the expertise of Dr. Clemmer-Smith in a separate motion to strike.

statement attributed by the United States to Captain Sam in 1870 about the creation of a reservation near game and fish. *Id.*

The State certainly understands that the Western Shoshone Tribe harvested edible plants, such as pine nuts and camas roots, and hunted and fished prior to the emigration of non-Indians across the Great Basin. These means of support are neither surprising nor remarkable. Moreover, this fact is of no significance to the present claim.

The State argued that the purposes of the DVIR included agriculture. A discussion of agricultural activities by the Western Shoshone Tribe in another part of the State of Nevada seemed irrelevant, given our argument that the 1877 Reservation included agriculture as a primary purpose of use.

The State included in its Statement of Facts a quote from an 1876 letter that describes a statement by Tsa-wie, a White Knife Shoshone, about wanting a reservation near game and fish. The United States criticizes the State because it did not also discuss a statement on the same subject that the United States and its expert Dr. Richard Clemmer-Smith attributed to Captain Sam that was made seven years previously. First, that older statement was considered cumulative and unnecessary to include. Second, a lot of problems exist with the United States and its expert, Dr. Richard Clemmer-Smith's interpretation of the historical record as the following recitation indicates.

The United States included the following description of these events in its Statement of Undisputed Facts. :

5. Captain Sam was a prominent Indian leader of a band of Western Shoshones that eventually moved to the Duck Valley Reservation after its creation.^{14/} According to documents authored by Levi Gheen, Captain Sam informed Gheen in 1870 that his band wanted a reservation.^{15/} Moreover, in 1875, Gheen reported that Captain Sam specifically suggested a location for the reservation 'about seventy or eighty miles northeast of this place [Elko] where

they (the Indians) say there is plenty of game and fish and a good farming country as they can judge with plenty of timber (in the mountains) water and grass.’^{16/}

^{15/} Clemmer Report at 61, *quoting* letter from Levi Gheen to Commissioner of Indian Affairs (hereinafter ‘CIA’) Smith dated November 1875.

^{16/} Clemmer Report at 61; Wee Report at II-10, *quoting* letter from Levi Gheen to CIA Smith, November 30, 1875.

United States’ Statement of Undisputed Facts at 4. The above statement makes reference to the following excerpt from Clemmer’s Report:

On May 16, 1870, Gheen spoke with ‘Shoshone Sam’ in Elko. Sam ‘says he would like a reservation and thinks that most of his Indians would go and work he also says that his boys are greatly in favor of a Reservation’ (sic) (Gheen to Douglas, 5-18-1870, M-837,1; NASB, WSA, Bx391). It was at this time that Sam first mentioned Duck Valley to Gheen, a ‘place . . . about seventy or eighty miles northeast of this place [Elko] where they (the Indians) say there is plenty of game and fish and a good farming country as near as they can judge with plenty of timber (in the mountains) water and grass’ (Gheen to Smith, 11-10-1875, M-234, 541). Since Sam was in Elko in May, 1870, but does not show up on the census that Gheen conducted two months later, Sam and his band must have migrated to the place with plenty of game and fish, that is, to Duck Valley, to take advantage of seasonal opportunities to hunt and fish.

U. S. Exhibit 1, Affidavit of Richard O. Clemmer-Smith at 74. The United States has used these statements to argue, as follows: “In particular, Captain Sam in 1870 requested Levi Gheen to visit his proposed location for the Reservation location where ‘there is plenty of game and fish and good farming country....’ The historical record does not support the conclusion that Captain Sam ever made in 1870 the statement, “[where] ‘there is plenty of game and fish and a good farming country.’”

The State added the May 18, 1870 letter and November 10, 1875 letter as its exhibits 36 and 37 respectively.³ These letters demonstrate the careless description of the written historical record and its misrepresentation by the United States and its expert. The May 18, 1870 letter

³ Exhibit 36: Levi Gheen to Maj. H. Douglas, May 18, 1870, Western Shoshone Agency, Correspondence 1869-1873, Western Shoshone Agency, RG 75, Box 391, NARA San Bruno.
Exhibit 37: Levi Gheen to CIA E. P. Smith, November 30, 1875, Nevada Superintendency, 1861-1880, Letters Received by the Office of Indian Affairs, 1824-1881, RG 75 (NARA Microfilm M234, roll 541).

describes a conversation between Captain Sam and Levi Gheen. That description expresses a desire for a reservation, but it does not report any statement about its location or the availability of game and fish. Exhibit 36.⁴ Later, Levi Gheen summarizes his past requests to find a reservation for the Western Shoshone in the letter dated November 30, 1875. The letter states:

The Indians of this place [Elko] have urged upon me from time to time since 1870 to go up with them and see a country which they have recommended as suitable for a reservation, the place about seventy or eighty miles northeast of this place where they (Indians) say **there is plenty of game and fish and a good farming country . . .**

Exhibit 37.⁵ Levi Gheen did not attribute this statement about game and fish specifically to Captain Sam in the letter dated November 30, 1875. Since the May 18, 1870 letter contains a description of Captain Sam's statement to Gheen at that time and since that statement does not contain any facts about its location or its environment, the obvious conclusion is Captain Sam did not make that statement about game and fish. Notwithstanding this obvious analysis of the historical record, the United States jumps to the conclusion that Captain Sam made in 1870 the statement, "[where] 'there is plenty of game and fish and a good farming country,'" and argues further that this statement by Captain Sam is of some significance. *U. S. Response Memo* at 4.

B. The Additions to the DVIR in 1886 and 1910.

The United States criticizes the State for failing to "mention the important role that fishing and hunting played in the traditional lifestyle of the Paddy Cap Paiutes." *U. S. Response Memo* at 5. The State certainly understands that the Paddy Cap Paiute Tribe harvested edible plants, hunted, and fished prior to the emigration of non-Indians across the Great Basin. These means of support, however, are neither surprising nor remarkable. Moreover, they are not

⁴ Exhibit 36: Levi Gheen to Maj. H. Douglas, May 18, 1870, Western Shoshone Agency, Correspondence 1869-1873, Western Shoshone Agency, RG 75, Box 391, NARA San Bruno.

⁵ Exhibit 37: Levi Gheen to CIA E. P. Smith, November 30, 1875, Nevada Superintendency, 1861-1880, Letters Received by the Office of Indian Affairs, 1824-1881, RG 75 (NARA Microfilm M234, roll 541).

significant with regard to this present claim. Indeed, the United States has failed to acknowledge that its own expert, Dr. Richard Clemmer-Smith concluded that hunting and fishing purposes do not apply to the 1886 Reservation or to the 1910 Reservation. *See Memorandum In Opposition To Motion For Summary Judgment By United States*, hereinafter “*Idaho’s Opposition Memo*,” at 1-3.

C. Fishing and the Indians that Settled on the DVIR.

The United States has recast the subject of this part of the State’s statement of facts to provide a basis for its criticism. The United States argues, as follows:

Finally, the State’s conclusions are problematic because the fact that the historic record does not contain more discussions of fishing on the Reservation after its creation is not necessarily evidence that the Indians living in Duck Valley stopped fishing. Indeed, based on the historic lifestyles and stated intentions of the Indians who moved to the Reservation, the more logical conclusion is that fishing continued as part of the overall subsistence economy.

U. S. Response Memo at 7. The State’s summary was intended to be very narrow. What does the historical record indicate about observations of fishing by Indians on the DVIR before and after its creation? The State submits that its summary is an accurate description of the historical record regarding the occurrences of documented fishing on the DVIR. The summary was not intended to catalog fishing activities by residents of the DVIR at places outside the DVIR.⁶ While some fishing by residents of the DVIR occurred after the creation of the DVIR, the nature of such fishing activities after the creation of the DVIR is a disputed issue of fact.

D. Prior Efforts to Adjudicate the Water Rights of the United States on Behalf of the Shoshone-Paiute Tribes.

The United States makes three criticisms of the State’s discussion of the draft federal water rights complaint for the Owyhee River (1) the complaint is only a draft, which is not

⁶ Ironically, Dr. Richard Clemmer-Smith’s concluded that “the Bruneau and Snake Rivers would have been the preferred fishing spots for most of the Duck Valley Shoshones.” U.S. Exhibit 1 to the Affidavit of Richard O. Clemmer-Smith, at 153. The corollary of this conclusion is that DVIR was not the preferred fishing spot for the Duck Valley Shoshones.

conclusive evidence regarding the United States' position; (2) the relevant dates for determining the purposes of the DVIR are the dates of the three Executive Orders in 1877, 1886, and 1910, and the purposes cannot be narrowed through a draft complaint; (3) the draft complaint was prepared when the law was unclear about federal reserved water right claims for fishery purposes. *U. S. Response Memo*, at 8. These are mere nit picks by the United States. The State agrees with the United States that operative dates are the dates of the three Executive Orders in 1877, 1886, and 1910. It is for that reason that the State focused in its *Memorandum In Support Of Motion For Summary Judgment*, hereinafter "*Idaho's Memo*," on the actual historical documents related to the creation of each part of the Reservation. Just as the purposes cannot be narrowed by some executive action years after the creation of the DVIR, the purposes of the DVIR cannot be enlarged by some reinterpretation of history to support broader purposes than existed originally. The point made by the State remains valid. The draft complaint provides a snapshot of the thinking of the United States regarding the federal reserved water right at the DVIR. Our point was that the present claims represent a substantial enlargement over the past thinking of the United States regarding the scope of the federal reserved water rights of the DVIR.

II. ARGUMENT

A. The State Correctly Analyzed the Primary Purposes of the 1877 Duck Valley Indian Reservation.

The United States criticizes the State's analysis of the 1877 Executive Order that initially created the Duck Valley Indian Reservation as incorrectly focusing on the Treaty of Ruby Valley. The State's analysis is simply a restatement of the following conclusion of the United States expert Dr. Richard Clemmer-Smith. "The primary purpose of establishing the Duck Valley Reservation, then, can be interpreted as fulfilling the provisions of the Treaty of Ruby Valley with the Western Bands of the Shoshone Indian Nation." U.S. Exhibit 1, Affidavit of

Richard O. Clemmer-Smith, at 166. Furthermore, the State agrees with the United States that the Treaty of Ruby Valley and other documents leading up to the entry of the Executive Order of April 16, 1877 need to be reviewed in determining the purposes of the initial reservation. The State conducted that review in its prior briefing. It specifically included as an exhibit an annual report from 1876 that explained in some detail the desires of the Western Shoshone Tribe regarding the creation of a reservation for them. *See* Exhibit 7.⁷ The State and United States part ways over the significance attached to different statements from the historical record.

The United States also argues: “Notably, the State does not reference any caselaw in support of its argument regarding the interpretation of the Ruby Valley Treaty. This is particularly significant because the State’s argument flies in the face of the Ninth Circuit’s decision in *U.S. v. Adair*, 723 F.2d 1394 (9th Cir. 1983), which considered treaty language similar to Article 6 of the Ruby Valley Treaty . . .” *U. S. Response Memo* at 10. Article 6 of the Treaty of Ruby Valley is almost unique. The State is aware of only one other treaty that contains similar language. While a few cases mention the Treaty of Ruby Valley, there is no interpretation of the critical language.⁸ The treaty involved in the *Adair* case is not comparable. The treaty involved in that case was the Treaty with the Klamath. Exhibit 38.⁹ Article I of that treaty states, in part, as follows: “[T]he exclusive right of taking fish in the streams and lakes,

⁷ Exhibit 7: Report for the year ending August 31, 1876, Levi A. Gheen to Commissioner of Indian Affairs, n.d. *Commissioner of Indian Affairs Annual Report, 1876-1877*, p. 520-522.

⁸ Article 6 of the Treaty of Ruby Valley is nearly identical with Article 6 of the Treaty of Tuilla Valley. 2 Kappler 859. The following court cases have mentioned at least one of these two treaties: (1) *Western Shoshone Nat. Council v. United States*, 357 F.Supp.2d 172 (D.D.C. 2004); (2) *Western Shoshone Nat. Council v. Molini*, 951 F.2d 200 (9th Cir. 1991); (3) *Te-Moak Bands of Western Shoshone Indians of Nevada v. United States*, 948 F.2d 1258 (Fed. 1991); (4) *Te-Moak Bands of Western Shoshone Indians of Nevada v. United States*, 18 Ct.Cl. 82 (1989); (5) *Te-Moak Bands of Western Shoshone Indians of Nevada v. United States*, 18 Ct.Cl. 74 (1989); (6) *United States v. Dann*, 873 F.2d 1189,1200 (9th Cir. 1989); (7) *United States v. Dann*, 865 F.2d 1528 (9th Cir. 1989); (8) *United States v. Dann*, 706 F.2d 919 (9th Cir. 1982); (9) *Te-Moak Band of Western Shoshone Indians, Nevada v. United States*, 593 F.2d 994 (Ct. Cl. 1979); (10) *United States v. Dann*, 572 F.2d 222 (9th Cir. 1978); (11) *Western Shoshone Legal Defense and Ed. Ass’n v. United States*, 209 Ct.Cl. 43, 531 F.2d 495 (Ct.Cl. 1976); (12) *United States v. Goshute Tribe or Identifiable Group*, 206 Ct.Cl. 401, 512 F.2d 1398 (Ct. Cl. 1975); (13) *Northwestern Bands of Shoshone Indians v. United States*, 95 Ct.Cl. 642 (1942).

⁹ Exhibit 38: Treaty with the Klamath, etc., Act of October 14, 1864, 16 Stat. 707, II Kappler 865.

included in said reservation and of gathering edible roots, seeds, and berries within its limits, is hereby secured to the Indians aforesaid . . .” Exhibit 38.¹⁰ The Treaty of Ruby Valley has no comparable provision, which reserves to the Western Shoshone fishing and hunting rights. The two treaties are not comparable. Thus, the United States’ reliance on *Adair* is misplaced for their broad homeland purpose.

B. The United States Has Not Demonstrated that Fishery and Wildlife Purposes are Primary Purposes of the DVIR.

The United States relies on the following four statements to support its fishery and wildlife claims:

1. The following statement attributed to Captain Sam in 1870 but not reported until 1875:

The Indians of this place [Elko] have urged upon me from time to time since 1870 to go with them and see a country which they have recommended as suitable for a reservation, the place is about seventy or eighty miles northeast of this place where they (the Indians) say there is plenty of game and fish and a good farming country as near as they can judge, with plenty of timber (in the Mountains), water and grass.

Exhibit 37.¹¹

2. The following statement in 1876 by Tsa-Wie (Good Knife): “He also states that himself and many others of this tribe are in favor of a tract of land being reserved for the Shoshones, that they may have some place for their future home; that if one place cannot be found large enough for them all, then locate three of four places, as the case may require. But to have these places as near together as possible, and as near to where there is game and fish as can be found.” Exhibit 7.
3. Levi Gheen’s statement in the letter dated March 28, 1877 about the inexhaustible fishery. Exhibit 9
4. The several statements of John How described in *Idaho’s Memo* at 13.

U. S. Response Memo at 12-13. As outlined above, the United States has misrepresented the historical record regarding the first statement. There is no legitimate basis to attribute the

¹⁰ Exhibit 38: Treaty with the Klamath, etc., Act of October 14, 1864, 16 Stat. 707, II Kappler 865.

¹¹ Exhibit 37: Gheen to CIA E. P. Smith, November 30, 1875, Nevada Superintendency, 1861-1880, Letters Received by the Office of Indian Affairs, 1824-1881, RG 75 (NARA Microfilm M234, roll 541).

statement to Captain Sam. *Supra* at 2-3. Regardless, these statements collectively are insufficient to support fishery and wildlife purposes as primary purposes of the DVIR. Rather, these statements merely acknowledge a conclusion applicable to most Indians. The Indians subsisted through a hunter-gatherer existence. While the specific prey hunted and plants gathered may have varied among the different Indian groups, these statements are neither surprising nor remarkable. Simply put, the United States' argument is inconsistent with *Arizona v. California*, 373 U.S. 546 (1963). As explained in some detail in *Idaho's Opposition Memo*, the U.S. Supreme Court quantified the entire water right for the several Indian reservations involved in that case solely on the basis of the amount of practicably irrigable acreage. *Idaho's Opposition Memo* at 7-10. This result occurred even though the Court clearly understood that other uses occurred on the reservation. The Court stated:

It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind—hot, scorching sands—and **that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.**

373 U.S. at 598-599 (emphasis added). Thus, even though water from the Colorado River was essential to the survival of the animals hunted by the Indians of the several reservations discussed in *Arizona v. California*, the Court did not award a drop of water for wildlife habitat claims. If those facts were insufficient to create a claim for wildlife purposes and fishery purposes, then there is nothing in this record that would do so. This case does not involve the facts from *Adair* where the treaty included a specific reservation of exclusive fishing and hunting rights on the reservation in question.

C. Fishery and Wildlife Purposes Do Not Apply to the 1886 Addition to the DVIR.

The United States argues that fishing and hunting purposes apply to 1886 addition to the DVIR for the Paddy Cap Paiutes. *U. S. Response Memo* at 14. The State examined Dr. Richard Clemmer-Smith about this subject at his deposition. *See Idaho's Opposition Memo* at 1-3. Dr. Clemmer-Smith concluded that the hunting and fishing purposes did not apply to the 1886 addition to the DVIR. His explanation of his conclusion is as follows:

Q (By Mr. Barber) Okay. Well, let's ask the question this way, sir: Is it your conclusion that hunting and fishing was a purpose for the 1886 extension of the reservation?

A If we – if we look at the documents that I reviewed, that I read, all I can do – I can't – **I can't, you know, draw intentions out of the air.**

Q Okay.

A Okay. So all I'm doing is looking at what the documents say, the documents that I read say. And they very clearly express the intention to provide a home for the Paddy Cap Paiutes.

There is no mention, in those documents that I read, of hunting and fishing.

Exhibit 32 (emphasis added).¹² If the United States' expert concluded that fishing and hunting purposes did not apply to the 1886 addition, then the district court can easily resolve this issue by agreeing with that conclusion and with the State's analysis of that issue.

D. The Primary Purposes of the DVIR Did Not Include a Broad Permanent Homeland Purpose as Claimed by the United States.

The United States begins its criticism of the State's response with the following statement:

The only substantive discussion of caselaw in the State's argument concerns *United States, in its own right and on behalf of the Lummi Indian Nation v. Washington*, 375 F.2d 1050 (W.D. Wash. June 23, 2005). Idaho Memorandum at 28-29. In fact, the State's bald assertion that 'the general homeland purpose is inconsistent with federal law' does not provide any citations to federal cases which [sic] support that assertion.

¹² Exhibit 32: Affidavit of Robert Wheeler Dated October 20, 2005. Excerpts from the Deposition of Dr. Richard Clemmer-Smith dated July 6-7, 2005, Vol. II, p. 179, Line 18 through p. 180 L. 14; p. 207, L. 19 through p. 209, L. 7; p. 239, L. 13 through p. 240, L. 4; p. 243, L. 1 through L. 21; p. 244, L. 17 through L. 21; p. 245, L. 24 through p. 246, L. 13.

U.S. Response Memo at 15. The United States had cited *Winters v. United States*, 207 U.S. 563 (1908) and *Arizona v. California*, 373 U.S. 546 (1963) in support of its argument. *United States' Memorandum In Support Of Its Motion For Partial Summary Judgment*, hereinafter "*U. S. Memo*," at 6. The State responded that both cases quantified the federal reserved water right of the Indians by determining the amount needed for irrigation and that neither case supported a broad homeland purpose with multiple quantities of water determined for multiple uses. The United States argument is inconsistent with both those cases. The United States chose to ignore these arguments. This choice to ignore the argument does not make the argument go away. Simply put, the United States is making a claim here that is inconsistent with the primary cases decided by the U. S. Supreme Court regarding federal reserved water rights for Indians. The federal reserved water rights for the five Indian Reservations described in *Arizona v. California* were measured by the amount of water necessary to irrigate all the practicably irrigable acreage. *Arizona v. California*, 373 U.S. at 600-601.

The United States also criticizes the State for not discussing the Ninth Circuit decision in *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1984). That case does not support the United States' claim here. That case needs to be put into historical context. The United States and Klamath Tribes *et al.* negotiated a Treaty in 1864. Exhibit 38.¹³ Article 1 of the Treaty reserved to the Tribes a described tract of land for a Reservation for the Tribes. Article 1 also reserved to the Tribes the exclusive right to hunt and fish within the Reservation. Articles 2 through 6 contained provisions to assist the Tribes in becoming farmers. Exhibit 38.¹⁴ Subsequently, Congress passed the Klamath Termination Act of August 13, 1954, ch. 732, 68 Stat. 718, which provided a payment to tribal members for giving up their interest in tribal property. The property

¹³ Exhibit 38: Treaty with the Klamath, etc., Act of October 14, 1864, 16 Stat. 707, II Kappler 865.

¹⁴ Exhibit 38: Treaty with the Klamath, etc., Act of October 14, 1864, 16 Stat. 707, II Kappler 865.

of those Indians that chose not to participate was placed in a private trust, which the United States later condemned. The end result was that the original Klamath Reservation ceased to exist. 723 F.2d at 1398. The Klamath Termination Act contained a savings clause that preserved the fishing and hunting rights previously reserved. 723 F.2d at 1408.

Several of these facts distinguish the *Adair* case from the present one. First, Article 1 reserved the exclusive right of taking fish and hunting to the Tribes. Second, Articles 2 through 6 provided the Tribes farming implements and other supplies to assist them in becoming farmers. In such a case, it is entirely reasonable for the Court to conclude that fishing and hunting purposes are of equal stature with the farming purposes in the later parts of the Treaty. Here, the Treaty of Ruby Valley does not contain any equivalent provision reserving the fishing and hunting rights of the Western Shoshone Tribe, and the Ninth Circuit has concluded that “there is no treaty which grants the Shoshone hunting and fishing rights.” *Western Shoshone National Council v. Molini*, 951 F.2d 200, 203 (9th Cir. 1991).

The present situation is much more similar to the Indian Reservations that were the subject of the adjudication in *Arizona v. California*, 373 U.S. 546 (1963). Congress created one of those reservations by an act of Congress, which was enlarged by Executive Order. The remaining four reservations were created by Executive Order. 373 U.S. at 595-596. None of those contained any documentation that preserved any aboriginal fishing and hunting rights. Even though the U. S. Supreme Court described water as essential to the preservation of the animals hunted by the Tribes, the Court did not imply any fishing or wildlife habitat claims for the Tribes. 373 U.S. at 599.

Finally, the United States argues that the State’s reliance on *United States v. Washington*, 375 F.Supp.2d 1050 (W.D. Wash. 2005), hereinafter “*Lummi Tribe*,” is misplaced. The United

States correctly points out the following facts: (1) the Ninth Circuit issued an original decision in *Skokomish Indian Tribe v. United States*, 401 F.3d 979 (9th Cir. March 9, 2005); (2) the Ninth Circuit issued an amended decision in *Skokomish Indian Tribe v. United States*, 410 F.3d 506 (9th Cir. June 3, 2005); (3) the U. S. District Court for the Western District of Washington issued its original decision in *United States v. Washington*, 2005 WL 1244797 (W.D. Wash. May 20, 2005), which cited the original Skokomish opinion; (4) the U. S. District Court for the Western District of Washington granted the motions for reconsideration of the United States and of the Lummi Tribe regarding aspects of its previous order which referenced *Skokomish Indian Tribe v. United States*, 401 F.3d 979 (9th Cir. March 9, 2005); (5) the U.S. District Court issued an amended opinion. *United States v. Washington*, 375 F.Supp.2d 1050 (W.D. Wash. June 23, 2005). The United States then makes the following argument: “When the Lummi Court deleted its reference to Skokomish, it should have also deleted its application of the primary/secondary test to Indian reservations. The Lummi decision, therefore, is inconsistent with the existing Ninth Circuit caselaw . . .” *U. S. Response Memo* at 16. This is a bizarre argument. The U. S. District Court obviously substantively considered the United States and Lummi Tribes motions and made the changes that the U. S. District Court concluded were necessary. The retention of the primary/secondary argument evidences a legal conclusion by that court that that distinction still applies. Just because the United States disagrees with this analysis is not a basis to disregard the U. S. District Court’s opinion. The State argued that the primary/secondary purpose test still applies to Indian reservations. *Idaho’s Opposition Memo* at 14-17. That analysis amply supports the U. S. District Court’s opinion.

- E. The United States Has Conceded that the SRBA District Court Has Jurisdiction To Adjudicate Those Elements of a Water Right That Occur Within the State of Idaho.

The United States challenged the jurisdiction of the SRBA District Court to determine any elements of a water right where the point of diversion occurred in the State of Nevada and the place of use occurred within the State of Idaho. *U. S. Memo* at 27-32. The State responded and argued that the SRBA Court did have subject matter jurisdiction. *Idaho's Opposition Memo* at 17-23. The United States provided no response in its briefing. The only reasonable conclusion is that the United States has conceded or abandoned this argument.

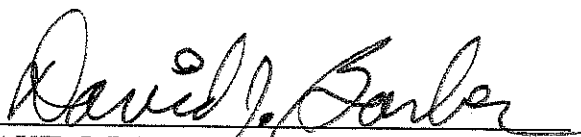
CONCLUSION

The DVIR was created to provide a residence for the Shoshone and later Paiute Tribes so that they could become herdsman and agriculturalists. The historical documents relating to the creation of the DVIR do not support the broad homeland purpose of use and related uses for fishing, wildlife habitat, recreational, religious or ceremonial purposes that the United States claimed here.

RESPECTFULLY SUBMITTED this 10th day of November 2005.

LAWRENCE G. WASDEN
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CERTIFICATE OF SERVICE

I certify that on this 10th day of November 2005, I caused to be served the original and/or copy of this MEMORANDUM IN REPLY TO UNITED STATES' RESPONSE MEMORANDUM RE: STATE OF IDAHO'S MOTION FOR SUMMARY JUDGMENT on each of the following persons by the indicated method:

1. One Original and two copies to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
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- ☐ U.S. Mail, postage prepaid
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Shoshone-Paiute Tribes
Rep. By:
Jeanette Wolfley
Special Counsel
Shoshone-Bannock Tribes
202 North Arthur
Pocatello, ID 83204

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Whiteing & Smith
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Idaho Power Company
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John K. Simpson
205 N. 10th St. STE 520
PO Box 2139
Boise, ID 83701-2139

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JR Simplot Co
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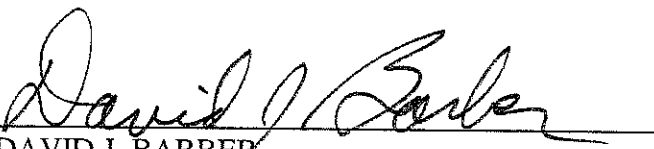
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Chief of Natural Resource Division
Office of the Attorney General
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P.O. Box 44449
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Not Applicable



DAVID J. BARBER
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