

In the Supreme Court of the United States

STATE OF IDAHO, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the United States holds title, in trust for the Coeur d'Alene Tribe, to lands underlying portions of Coeur d'Alene Lake and the St. Joe River that are within the Coeur d'Alene Indian Reservation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-30) is reported at 210 F.3d 1067. The opinion of the district court (Pet. App. 31-86) is reported at 95 F. Supp. 2d 1094.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 2000. The petition for a writ of certiorari was filed on July 25, 2000, and was granted on December 11, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States brought this action to quiet title to submerged lands for the beneficial use of the Coeur d'Alene Indian Tribe. The disputed lands are located in northern Idaho within the exterior boundaries of the Coeur d'Alene Indian Reservation and consist of approximately the southern third of Coeur d'Alene Lake and a portion of the St. Joe

River. The district court held that the United States owns those lands in trust for the benefit of the Tribe, Pet. App. 31-86, and the court of appeals affirmed, *id.* at 1-30.

1. Under the Property Clause of the United States Constitution, Congress has plenary power to “make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” U.S. Const. Art. IV, § 3, Cl. 2. In territories belonging to the United States, Congress’s power under the Property Clause extends to submerged lands beneath navigable waters, which have long been viewed as having special sovereign attributes. See *United States v. Alaska*, 521 U.S. 1, 33-34 (1997); *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987). “As a general principle, the Federal Government holds such lands in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an ‘equal footing’ with the established States.” *Montana v. United States*, 450 U.S. 544, 551 (1981). The United States may, however, deprive a future State of title to submerged lands by reserving them for an appropriate public purpose or by granting them to private parties. See *Alaska*, 521 U.S. at 33-34. Nevertheless, “disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.” *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926).

2. The Coeur d’Alene Tribe once inhabited more than 3.5 million acres in northern Idaho and northeastern Washington, including the lands adjacent to Coeur d’Alene Lake and its associated waterways, the St. Joe, Coeur d’Alene, and Spokane Rivers. Pet App. 32, 43. The Tribe depended on those waterways for food, trade, travel, and cultural practices. The Tribe ate trout and whitefish year-round, collected mussels and clams, traded dried fish, relied on the lake and associated rivers to facilitate hunting, gathered

plants growing in the wetlands and marshes of those bodies of water, and used the watercourses as primary highways for travel, trade and communication. *Id.* at 44; 1 Richard Hart, *A History of the Coeur d'Alene Tribe's Claim to Lake Coeur d'Alene* (Hart Rep.) 5-43 (July 15, 1996).¹ The lake and rivers were also tied to the Tribe's "recreational pursuits, religious ceremonies and burial practices." Pet. App. 45. In the mid-1800s, the Tribe "had begun to cultivate small garden plots, rarely exceeding an acre or two," but it remained dependent on the waterways for fish, waterfowl, and plants. *Id.* at 46. That dependency continued well into the twentieth century. 1 Hart Rep. 42.

The United States acquired fee title to the Coeur d'Alene Lake region through the Treaty with Great Britain in 1846. Treaty in Regard to Limits Westward of the Rocky Mountains, July 17, 1846, 9 Stat. 869. In 1848, Congress enacted legislation "to establish the Territorial Government of Oregon," which encompassed the aboriginal lands of the Coeur d'Alene Tribe. Act of Aug. 14, 1848, ch. 177, § 1, 9 Stat. 323; see J.A. 263. That law declared that "nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians." § 1, 9 Stat. 323. The Tribe's aboriginal lands thereafter became part of the Territory of Washington. Act of Mar. 2, 1853, ch. 90, § 1, 10 Stat. 172; J.A. 263-264.

In 1853, Congress authorized the President to enter into treaties with the Indian Tribes west of Missouri and Iowa for the cession of portions of their lands. Act of Mar. 3, 1853, ch. 104, § 2, 10 Stat. 238. By 1855, treaties had been concluded with most of the Tribes in the region except the Coeur d'Alene Tribe. J.A. 332-334. In that same year, the

¹ The Hart Report was produced as expert testimony in the district court and is excerpted at J.A. 410-534.

lead negotiator was on his way to negotiate with the Coeur d'Alene Tribe, but was called away by the outbreak of a general Indian war in the Territories of Oregon and Washington, which lasted for approximately two years. J.A. 336. That war arose in part out of the Tribe's dissatisfaction at not having its lands protected by treaty. In 1858, when a federal force led by Colonel Steptoe entered the area for reconnaissance, the Tribe misperceived the military's intentions, believing that it was there to forcibly take the Tribe's lands. The Tribe's successful attack on Colonel Steptoe's force caused the government to send a larger force under the command of General Wright, which subdued the Coeur d'Alene and Spokane Tribes and culminated in the signing of a peace treaty in 1858. J.A. 266. That agreement permitted non-Indians to travel through the Tribe's aboriginal lands but did not provide for the cession of any of those lands. J.A. 23-24, 266.

In 1863, when Congress established part of the Washington Territory as the Territory of Idaho, it again declared that the Act was not to be construed to impair any Indian rights of property so long as they remained unextinguished by treaty. Act of Mar. 3, 1863, ch. 117, § 1, 12 Stat. 809; see J.A. 264. On June 14, 1867, President Andrew Johnson issued an Executive Order establishing a reservation for the Tribe lying southwest of Coeur d'Alene Lake and including only a sliver of the lake. Pet. App. 32, 50; J.A. 46. The Tribe apparently was unaware of the establishment of that reservation, and upon learning of its existence in 1871, the Tribe expressed dissatisfaction with its boundaries and refused to accept it. Pet. App. 50; J.A. 45, 418. In 1871 and 1872, the Tribe sent two petitions to Congress and to the Commissioner of Indian Affairs describing certain areas it wished to see included in a reservation for the Tribe. J.A. 418-419. In the second petition the Tribe clarified that it requested, in addition to 20 square miles identified in the first petition,

“two valleys, the S. Josephs [today called the St. Joe], from the junction of S. and N. forks, and the Coeur d’Alene from the Mission inclusively.” Pet App. 51; see J.A. 27, 419. Those two rivers flow into Coeur d’Alene Lake from the southeast and east, respectively. The Tribe noted that the valleys “have been from old the habitual residence of most of us,” and that although the Tribe was gaining experience at farming, “[w]e think it hard to leave at once old habits to embrace new ones: for a while yet we need have some hunting and fishing.” *Ibid.* The need to include the waterways within the reservation was noted in 1871 by a government agent who found that the Tribe “subsist[s] principally by hunting and fishing.” Pet. App. 52. In 1873, a government official warned that “there will in my opinion be trouble” with the Tribe if the waterways were excluded from the reservation. *Ibid.*; J.A. 30, 425.

In 1873, the Commissioner of Indian Affairs directed a commission to visit non-treaty Tribes in Idaho, including the Coeur d’Alene, to induce them “to abandon their roaming habits and consent to confine themselves within the limits of such reservation or reservations as may be designated for their occupancy.” Pet. App. 54. That year, the commission reached an agreement in which the Tribe received a reservation of approximately 598,000 acres in exchange for relinquishing all claims to its aboriginal lands outside the reservation, which totaled approximately 3 million acres. The agreement required the approval of Congress to become binding. *Id.* at 57-58; J.A. 32, 431. The reservation significantly expanded the area set aside by the 1867 executive order, which was primarily agricultural. Although the additional area did not include significant agricultural acreage, it did, in accordance with the Tribe’s petition, add the St. Joe and Coeur d’Alene Rivers, as well as all but a small portion of Coeur d’Alene Lake. Pet. App. 33, 55; J.A. 30, 306, 432. The agreement also guaranteed “that the water

running into said reservation [from the Coeur d'Alene and Spokane Rivers] shall not be turned from their natural channel where they enter said reservation." Pet. App. 55; J.A. 34. The Tribe's insistence on including navigable waters was subsequently confirmed by Governor Bennett of the Idaho Territory, one of the negotiators on the commission, who declared that the expansion of the reservation was required in part because the Tribe "*demanded* an extension of their reservation so as to include the * * * fishing and mill privileges on the Spokane River," J.A. 38, which flows out of the northwest corner of the lake into what is now Washington State, where it joins the Columbia River.

On November 8, 1873, President Grant acted on the recommendation of the Commissioner of Indian Affairs and the Acting Secretary of the Interior (see J.A. 45-47) by issuing an Executive Order directing that the tract of country described in the 1873 Agreement be "set apart as a reservation for the Coeur d'Alene Indians." J.A. 47. An 1883 survey of its boundaries confirmed that the Reservation encompassed a total area of 598,499.85 acres, "a calculation that included submerged lands under the Lake and rivers within the boundaries of the reservation." Pet. App. 57-58; see also J.A. 12-13, 21. In addition, the surveyor was instructed to run the northern boundary across the lake, excluding a sliver at its northern end, rather than meandering the shoreline. Pet. App. 57. Surveying a boundary across a navigable waterway "was contrary to the usual practice of meandering a survey line along the mean high water mark." *Ibid.*; see also J.A. 14, 20.

Congress did not formally ratify the 1873 agreement. Instead, Congress considered an alternative proposal to establish a single reservation for several different Tribes in the northeastern corner of Washington and in northern Idaho. J.A. 436-439. Meanwhile, the influx of non-Indians in and through the Reservation accelerated, with the advent of

the region's gold rush. J.A. 441-460. In 1885, the Tribe expressed its dissatisfaction with the lack of protection for its lands by petitioning the federal government for confirmation of its Reservation, J.A. 351, which the Tribe described as including "the Coeur d'Alene Lake and Coeur d'Alene River," J.A. 348; see J.A. 447. The Tribe also sought payment for the lands not reserved to them. Pet. App. 68; J.A. 444-450. In 1886, Congress responded by authorizing the Secretary of the Interior to negotiate with the Tribe "for the cession of their lands outside the limits of the present Coeur d'Alene reservation." Act of May 15, 1886, ch. 333, 24 Stat. 44.

In 1887, an agreement was reached with the Coeur d'Alene Indians to cede their aboriginal lands "except the portion of land within the boundaries of their present reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation." Pet App. 35, 68; J.A. 92; see also J.A. 62-115, 468-473. In exchange, the federal government promised that the Coeur d'Alene Reservation "shall be held forever as Indian land and as homes for the Coeur d'Alene Indians" and that "no part" of it "shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation." J.A. 93; Act of Mar. 3, 1891, ch. 543, § 19, 26 Stat. 1028. The 1887 Agreement specified that it was not binding on either party until ratified by Congress. J.A. 96, 382.

During the same period, non-Indian encroachment on tribal lands and the associated waterways increased. The federal government, however, treated the lake as reserved for the Tribe. Steamboats that used the lake were subjected to laws prohibiting the introduction of liquor into Indian country. Pet. App. 69; J.A. 52-61, 453-458. Non-Indians who made recreational use of the lake and rivers within the reservation boundaries were ejected as trespassers. Pet. App. 70; J.A. 477. Those enforcement actions caused

increasing pressure to make a portion of the lake and adjacent rivers available to non-Indian use. Pet. App. 70; J.A. 475-490.

On January 25, 1888, in an apparent effort to clarify the status of the lake and rivers, the Senate passed a resolution calling for a report by the Secretary of the Interior. Pet. App. 71; J.A. 116-117. The resolution recited that it was alleged that the Reservation included “Lake Coeur d’Alene, all the navigable waters of Coeur d’Alene River, and about 20 miles of the navigable part of St. Joseph River, and part of St. Mary’s, a navigable tributary of the Saint Joseph,” except for about 3 1/2 miles of shoreline at the north end of the lake. Pet. App. 71; J.A. 116-117, 493-495. The resolution expressed concern that the Reservation embraced “the most important highways of commerce,” that all boats entering these waters “are subject to the laws governing the Indian country,” and that persons landing on the shore were trespassers. J.A. 116, 494. The resolution accordingly directed the Secretary to “inform the Senate as to the extent of the present area and boundaries of the Coeur d’Alene Indian Reservation,” including 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,” and whether it would be advisable to throw open lands valuable for mineral entry and to release “any of the navigable waters aforesaid” from the limits of the Reservation. J.A. 117, 495.

On February 7, 1888, the Secretary transmitted to the Senate a report of the Commissioner of Indian Affairs, who explained 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 which runs ‘in a direct line’ from the Coeur d’Alene Mission to the head of Spokane River.” J.A. 123, 497-498. The Commissioner concluded that the Reservation could be

materially diminished without detriment to the Indians and “that changes could be made in the boundaries for the release of some or all of the navigable waters” from the Reservation. Pet. App. 73; J.A. 129, 499. The Commissioner described the Tribe as “firm friends of the whites” who “not only shielded and protected the whites in [the Nez Percé outbreak of 1878] to the fullest extent of their power, but guarded their property at the peril of their own lives, when a large portion of the white population had fled the country for safety.” J.A. 127-128. Although the Commissioner noted accounts of the Tribe’s fear of losing its Reservation, he believed that the Tribe would be open to “just and reasonable terms.” J.A. 129. He anticipated that, “when the [1887] agreement shall have been ratified,” it would not be difficult to negotiate with the Tribe “for the cession of such portions of their reservation as they do not need, including all or a portion of the navigable waters, upon fair and very reasonable terms.” Pet. App. 73; J.A. 132. The Commissioner attached to the report a map of the 1873 Reservation that showed the lake and rivers in relation to the Reservation’s boundaries and described the Reservation as including 598,499.85 acres. Pet. App. 73; J.A. 134-136.

Less than four months after it received the Commissioner’s report, Congress enacted a statute provisionally granting the Idaho and Washington Railroad Company a right of way “through the lands in Idaho Territory set apart for the use of the Coeur d’Alene Indians by executive order, commonly known as the Coeur d’Alene Indian Reservation.” Act of May 30, 1888, ch. 336, § 1, 25 Stat. 160; J.A. 137. In doing so, Congress treated the Reservation, including the submerged lands within it, as belonging to the Tribe by conditioning the grant on the railroad’s obtaining the Tribe’s consent to the right of way and making payment to the Tribe. J.A. 138-139. The Act described the right of way as extending “on the Coeur d’Alene Lake,” J.A. 138, thus

requiring the acquisition from the Tribe of submerged lands under Coeur d'Alene Lake, as well as of dry lands.

During that same year, Congress took up a bill to ratify the 1887 Agreement, which passed the Senate. J.A. 141-143. Further action, however, was delayed due to Congress's desire to obtain cessions of land within the Tribe's Reservation. On March 2, 1889, Congress passed the annual Indian Appropriations Act, which included a provision directing the Secretary of the Interior

to negotiate with the Coeur d'Alene tribe of Indians 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.

Act of Mar. 2, 1889, ch. 412, 25 Stat. 1002; J.A. 144. As subsequently described in an 1890 House committee report urging ratification of the ensuing Agreement with the Tribe, the intent behind the 1889 legislation was for the United States to acquire "lands, situate[d] on the northern end of said reservation," that were valuable for minerals and timber and that contained "a magnificent sheet of water, the Coeur d'Alene Lake, and its chief tributary, to wit, the Coeur d'Alene River, over the waters of which steamers now ply daily." J.A. 269; see Pet. App. 74.

On September 9, 1889, the Commissioners appointed to conduct the negotiations reached agreement with the Tribe to cede a portion of its Reservation. At first, the Tribe had "absolutely refused" to consider new negotiations until the 1887 Agreement was ratified, although the Tribe later agreed to make ratification of the 1887 Agreement merely a condition of the new agreement. J.A. 320-321. The federal negotiators initially told Chief Seltice that, under their proposed cession, "the Lake belongs to you as well as to the whites – to all, every one who wants to travel on it." Pet. App. 75; J.A. 183. When the Tribe objected to that proposal, General Simpson responded by proposing a boundary line

that ran east along the Idaho/Washington territorial boundary to the west shore of the lake, ran south along the shore of the lake to a point about two-thirds from its northern end, and then cut directly east across the lake. Pet. App. 75; J.A. 183; see also maps at J.A. 536 *et seq.* Like the 1873 survey line that cut across the northern portion of the lake, the drawing of the 1889 line across the lower portion (rather than meandering around it) demonstrated the government's inclusion of the lower portion of the lake within the diminished Reservation. Pet. App. 75. General Simpson told the tribal members that if the government bought the tract he proposed that the Tribe cede, "you still have the St. Joseph River and the lower part of the lake and all the meadow and agricultural land along the St. Joseph River." J.A. 183. As relevant here, the final agreement, signed in September 1889, reflected that proposal. Pet. App. 75-76; J.A. 193. As the Commissioner of Indian Affairs reported to Congress, the lands ceded were "valuable chiefly for minerals and timber, and embrac[ed] by far the greater portion of the navigable waters of the reservation." J.A. 157. The portion of the Reservation not ceded by the 1889 Agreement remained subject to the 1887 Agreement's specification that no *part* of the Reservation could be disposed of without the Tribe's consent. See p. 7, *supra*.

The 1889 Agreement was submitted to Congress later that same year, accompanied by a detailed description and transcript of the negotiations with the Tribe. J.A. 162-261. In 1890, the House and the Senate moved quickly to ratify both the 1889 and 1887 Agreements, ratification of the latter being a pre-condition to approval of the 1889 Agreement. In March 1890, the House Committee on Indian Affairs reported a bill (H.R. 7703, 51st Cong., 1st Sess.) to approve both agreements. See 21 Cong. Rec. 2775 (1890); H.R. Rep. No. 1109, 51st Cong., 1st Sess. (J.A. 262). On June 7, 1890, the Senate passed a parallel bill (S. 2828, 51st Cong., 1st

Sess.). 21 Cong. Rec. 5769-5770. On June 10, the Senate bill was referred to the House, which already had its own bill calendared for full House action. The House committee chair, however, indicated some uncertainty as to whether the House and Senate bills were identical, and the Senate bill was referred to the House committee. J.A. 368-369. The House committee reported out the Senate bill on August 19, 1890. H.R. Rep. No. 2988, 51st Cong., 1st Sess. (J.A. 373). On March 3, 1891, the bill approving the 1887 and 1889 Agreements was enacted into law. Act of Mar. 3, 1891, ch. 543, §§ 19-22, 26 Stat. 1027-1032 (J.A. 376-388).

3. At the same time that federal officials were negotiating with the Coeur d'Alene Tribe over the boundaries of its Reservation, persons in the Territory of Idaho began pressing for statehood. Without waiting for enactment by Congress of an enabling act, the Territory proceeded to convene a constitutional convention on Independence Day, July 4, 1889. S. Rep. No. 316, 51st Cong., 1st Sess. 1 (1890). The constitution adopted by the convention contained a disclaimer clause identical to one that Congress had included in recent years in other statehood enabling acts. That clause "forever disclaim[ed] all right and title to the unappropriated public lands" and lands "owned or held by any Indians or Indian tribes" in Idaho, and recognized that "until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." J.A. 371-372. In November 1889, Idaho voters approved the constitution. S. Rep. No. 316, *supra*, at 1.

In early 1890, Congress took up the Idaho statehood legislation. On April 3, 1890, the House passed its bill, but the legislation lay idle in the Senate until June 30 when, apparently anticipating the Fourth of July holiday, the Senate took up the bill and passed it the following day. See

21 Cong. Rec. 3005-3006; *id.* at 6834. On July 3, 1890, the President signed the Idaho Statehood Act into law. Act of July 3, 1890, ch. 656, 26 Stat. 215; J.A. 370. That Act admitted Idaho into the Union “on an equal footing with the original States” and “accepted, ratified, and confirmed” the Idaho Constitution, which contained the disclaimer language quoted above. § 1, 26 Stat. 215; J.A. 370-371.

After statehood and Congress’s ratification in 1891 of the 1887 and 1889 Agreements, Congress continued to negotiate with the Tribe for the release and sale of lands, including submerged lands, within its Reservation. In 1894, Congress ratified the Harrison cession, which encompassed a one-mile strip of land that included a corner of the lake. Act of Aug. 15, 1894, ch. 290, 28 Stat. 322; Pet. App. 26; J.A. 389-403; 2 Hart Rep. 246-267. In 1908, Congress withdrew a portion of the Reservation encompassing three smaller lakes and, in 1911, formally conveyed those lands by patent to the State, which designated them as Heyburn State Park. Act of Apr. 30, 1908, ch. 153, 35 Stat. 78-79; Pet. App. 27; J.A. 276-282. Under the Act of June 21, 1906, ch. 3504, 34 Stat. 325, 335, approximately 80% of the Reservation passed out of Indian ownership, and today the Tribe or tribal members own less than 70,000 acres of the Reservation. 2 Hart Rep. 272-276, 284.

4. In 1994, the United States, acting in its own capacity and as trustee for the Tribe, initiated this action for the benefit of the Tribe and its members against the State of Idaho to quiet title to the submerged lands within the exterior boundaries of the Tribe’s Reservation. Pet. App. 31-32.² The Tribe intervened, asserting its interests based

² The United States previously asserted its ownership of the lake bed within the Tribe’s Reservation as an intervenor in proceedings initiated in 1972 before the Federal Power Commission (now the Federal Energy Regulatory Commission). See *Washington Water Power Co.*, 25 F.E.R.C. ¶ 61,228 (1983). The United States asserted that, because the Tribe

on alternative legal theories. *Id.* at 32. The State of Idaho counterclaimed, requesting that title to the submerged lands be quieted in its favor. *Ibid.*

After engaging in extensive fact-finding, the district court concluded that the United States retained the submerged lands for the benefit of the Tribe. The court entered an order quieting title to the bed and banks of the Coeur d'Alene Lake and the St. Joe River lying within the current boundaries of the Coeur d'Alene Reservation.³

5. The court of appeals affirmed. Pet App. 30. The court applied the two-pronged test set forth by this Court in *United States v. Alaska*, *supra*, for determining whether a State's presumptive equal footing title to submerged lands within its borders has been defeated: "whether the United States intended to include submerged lands within the [reservation] and to defeat [Idaho's] title to those lands." Pet. App. 12 (quoting *Alaska*, 521 U.S. at 36). Because the State conceded, for purposes of the appeal, that the 1873 Executive Order was intended to reserve title to submerged lands, the court focused on the second prong. *Id.* at 13. Citing *Alaska*, the court recognized that the second prong

owned the lower third of the lake, the Commission was required under the Federal Power Act to fix annual charges payable to the Tribe for the use of that portion of the lake as a reservoir. The Commission ruled in favor of the United States and the Tribe, but the order was later vacated for lack of jurisdiction. See *Washington Water Power Co.*, 43 F.E.R.C. ¶ 61,254 (1988).

³ Having found in favor of the United States, the district court did not address the Tribe's alternative legal theories. Pet. App. 84 n.27. The court denied Idaho's counterclaim. *Id.* at 86. The court also rejected the State's motion for stay and injunction pending appeal. See *United States v. Idaho*, CV 94-328-N-EJL (D. Idaho Oct. 19, 1998). The court rejected the State's assertion that management of the southern portion of the lake by the United States or the Tribe would adversely affect the State's or the public's interest. Rather, the court concluded that "the record reflects that currently the Tribe intends to honor all permits, licenses or uses issued or authorized by the State or its political subdivisions." Slip. op. 4.

required an affirmative showing of congressional intent, which must be “definitely declared or otherwise made very plain.” *Id.* at 12 (citation omitted). The court of appeals looked to three factors emphasized in *Alaska*: (1) whether the Reservation’s boundaries were drawn so as necessarily to include the submerged lands; (2) whether the purpose of the Reservation would have been defeated had the submerged lands not been included; and (3) whether legislative action by Congress affirmatively demonstrated its intent to defeat state title. *Id.* at 15.

The court noted that the boundaries of the Reservation in both the 1873 Executive Order and the 1889 Agreement were drawn *across* the lake (in different locations), an unusual practice most naturally understood as designed to include any submerged lands within the Reservation boundaries. Pet. App. 16-17. The court also found that the inclusion of the submerged lands was crucial to the Tribe’s acceptance of the 1873 Reservation and that the boundaries were redrawn in 1889 specifically to “establish[] the Tribe’s right to the Lake and rivers,” a fact recognized in the maps submitted to Congress. *Id.* at 16. Thus, the court concluded that “the executive reservation and subsequent renegotiation could only have been meant and understood to convey title to submerged lands within the reservation’s borders.” *Id.* at 17.

Finally, the court concluded that congressional actions in the late 1880s regarding the Reservation demonstrate “acknowledgment, recognition, and acceptance of the boundaries of the 1873 Reservation, which Congress knew the Executive had construed to include submerged lands,” thereby establishing congressional intent to defeat the State’s title at statehood. Pet. App. 19-20. The court explained that “[t]he express reference to the reservation as *the Tribe’s reservation*, explicit recognition that the choice to sell was the Tribe’s, and reference to *tribal release* of

portions of *its reservation* all manifest an awareness and acceptance by Congress of the boundaries of the 1873 reservation – boundaries that included submerged lands.” *Id.* at 22. The court determined that Congress’s affirmative act of directing open-ended negotiations to purchase whatever non-agricultural land the Tribe was willing to cede, including portions of the lake and associated rivers, “presupposes that beneficial ownership of all land within the 1873 reservation, including submerged lands, had already passed to the Tribe.” *Id.* at 23. Congress thus “otherwise made very plain” its intention regarding the submerged lands. *Ibid.* (quoting *Holt State Bank*, 270 U.S. at 55).

SUMMARY OF ARGUMENT

Congress plainly indicated its intent to defeat state title to the submerged lands within the boundaries of the Coeur d’Alene Indian Reservation. At the time of Idaho’s statehood, Congress was in the last stages of ratifying agreements with the Coeur d’Alene Tribe for cession of a substantial portion of its aboriginal lands. In 1887, negotiators had reached agreement with the Tribe in which the Tribe agreed to cede its lands outside the Reservation set apart for it in the 1873 Executive Order in exchange for the United States’ promise to retain the Reservation for the Tribe as its permanent home and not to dispose of any lands within the Reservation without the Tribe’s consent. After the 1887 Agreement was concluded, however, Congress mandated additional negotiations with the Tribe for cessions of land within the Reservation, if the Tribe consented, and to pay for those cessions. Congress thus honored the 1887 Agreement by treating the Reservation as owned by the Tribe.

When Congress authorized those negotiations, it was on notice that the Reservation included the submerged lands within its boundaries. To obtain a voluntary agreement with the Tribe for further cessions, Congress had to retain the

submerged lands in the Reservation, as the Tribe had specifically bargained for those lands to be included within the Reservation.

Congress understood and intended that retaining lands for the Tribe, including submerged lands, would deprive the State of title to the lands. At the time Congress passed the 1889 Act, Congress typically required States to include a clause in their constitutions disclaiming title to all lands owned or held by an Indian or Indian Tribes. Idaho included such a disclaimer clause in its state constitution, which Congress approved at statehood. When Congress retained the 1873 Reservation in federal trust status for the Tribe during negotiations, it necessarily also recognized and intended that none of the lands within the Reservation would transfer to the State until released by Congress after negotiations were concluded. Additional actions by Congress to negotiate with the Tribe for the release and sale of parcels of the Reservation that contained submerged lands further confirm its intent.

This case bears important similarities to the case of the Arctic Wildlife Range in *United States v. Alaska, supra*. With respect to the Range, Congress indicated its intent to retain beyond statehood whatever lands were set apart or withdrawn by the Executive for wildlife purposes in federal ownership. Even though neither the Executive nor Congress had determined, at the time of statehood, whether the United States would indeed retain permanent ownership over the Range, Congress intended to preserve the United States' ability to make that decision. Because Congress was on notice that the lands set aside by the Executive included submerged lands, Congress plainly intended to defeat state title to submerged lands. Here, similarly, Congress manifested its intent to retain federal ownership beyond statehood of whatever lands were within the 1873 Executive Order Reservation. Although negotiations with the Tribe

were completed and the Senate had passed a bill ratifying the Agreement at the time of statehood, Congress did not complete the ratification process until shortly after statehood. Congress intended to preserve the United States' ability to ratify those Agreements after statehood by retaining ownership of lands that the Tribe had twice successfully bargained for and that the Agreements pending before it retained.

ARGUMENT

CONGRESS RESERVED THE SUBMERGED LANDS WITHIN THE COEUR D'ALENE RESERVATION FOR THE TRIBE AT THE TIME OF STATEHOOD

A. *Alaska v. United States* Establishes The Legal Framework For Ascertaining Congress's Intent To Reserve The Submerged Lands For The Tribe

1. Congress has the power to grant lands beneath navigable waters in any territory of the United States “whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States hold the territory.” *Shively v. Bowlby*, 152 U.S. 1, 48 (1894); see also *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970). Congress may also reserve such lands in federal ownership, rather than convey them, to carry out appropriate public purposes. See *Alaska*, 521 U.S. at 33-34.

Nevertheless, “[a] court deciding a question of title to the bed of navigable water must . . . begin with a strong presumption’ against defeat of a State’s title.” *Alaska*, 521 U.S. at 34 (quoting *Montana*, 450 U.S. at 552). “[D]isposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as

intended unless the intention was definitely declared or otherwise made very plain.” *Holt State Bank*, 270 U.S. at 55.

2. Where Congress intends to convey land under navigable waters to a third party prior to statehood, “of necessity it must also intend to defeat the future State’s claim to the land.” *Utah Div. of State Lands*, 482 U.S. at 202. Hence, the analysis necessarily focuses on whether Congress clearly intended the transfer to include the United States’ interests in submerged lands. Thus, when a conveyance to an Indian Tribe is concerned, the Court has looked to the “construction and effect” of the pertinent agreement between the United States and the Tribe. See *Montana*, 450 U.S. at 551; *Choctaw*, 397 U.S. at 628.

In *Choctaw*, several factors combined to indicate that Congress intended to convey the bed of the Arkansas River to the Cherokee and Choctaw Indians in the treaty, even though there was no explicit reference to the riverbed: the drawing of the boundaries in relation to the navigable waters; the interest in fee title transferred to the Tribes; and the promise in the treaty that the lands conveyed to the Tribes would never become part of a State, which all but eliminated the possibility that Congress could have intended to retain the lands for transfer to a future State. 397 U.S. at 628-635. By contrast, in *Montana* the Court discerned no plain indication of congressional intent to include submerged lands in a treaty in which the Crow Indians retained absolute use and occupancy of the lands in question, rather than fee title, and where the Indians did not exhibit a dependency on fishing or use of the navigable waterways. 450 U.S. at 553-554.

3. Where the United States, prior to statehood, has reserved for federal purposes a tract of land that includes submerged lands, the question whether the reservation defeats the future State’s claim turns on whether (1) the United States clearly intended to include land under naviga-

ble waters within the federal reservation, and (2) Congress affirmatively intended to defeat the future State's title to such land at the time of statehood. See *Alaska*, 521 U.S. at 36; *Utah Div. of State Lands*, 482 U.S. at 202. As *Alaska* demonstrates, the Executive Branch's intent may satisfy the first part of this test, *i.e.*, may establish the intent of the United States to include land under navigable waters within the reservation in the first place. See 521 U.S. at 40, 55.⁴ There is no dispute on that question in this case: Idaho concedes (Br. 17) that the reserved lands in question—the 1873 Executive Order Reservation—included submerged lands.

This case, therefore, focuses on the second part of the *Alaska* analysis: whether Congress affirmatively intended to withhold from Idaho the title to the submerged lands reserved for the Tribe. In answering that question in *Alaska*, this Court looked to whether Congress intended to retain ownership of the overall tract of land that was set aside or reserved by Executive action, and then to whether Congress was aware that the tract contained submerged lands and intended to retain those lands beyond statehood.

In *Alaska*, Congress's assertion in the Alaska Statehood Act of the “power of exclusive legislation” over the National Petroleum Reserve was sufficient to retain ownership at statehood of the Reserve as a whole, because the exercise of such power necessarily presumes title to the property and because ownership was necessary to protect the

⁴ The analysis for determining whether submerged lands are included in a federal reservation is analogous to the analysis for determining whether submerged lands are included in lands conveyed to a Tribe by treaty or agreement prior to statehood. See *Alaska*, 521 U.S. at 37 (looking to *Montana* analysis for guidance in determining whether Executive reservation included submerged lands). Intent may be discerned from factors such as how the boundaries are drawn, see *id.* at 38, and whether retaining the submerged lands is necessary to the purposes of the reservation, see *id.* at 39.

government's ability to extract petroleum from the Reserve and prevent its draining by the State through drilling on submerged lands. 521 U.S. at 42. The Court similarly discerned an intent to retain ownership of the Arctic Wildlife Range from Congress's declaration in the Alaska Statehood Act that lands "set apart" or withdrawn for wildlife purposes would not transfer to the State. *Id.* at 57-61. Prior to statehood, the Department of the Interior's Bureau of Sport Fisheries and Wildlife had submitted an application to the Secretary of the Interior for withdrawal of 8.9 million acres of land to establish the Arctic Wildlife Range, which had the effect under applicable regulations of segregating the lands until the Secretary could determine whether to withdraw them for wildlife purposes. *Id.* at 46-47. This Court determined that the application therefore "set apart" the lands in the Range within the meaning of the relevant provision of the Statehood Act and that Congress had retained ownership of them. *Id.* at 59-60.

The Court then concluded that Congress had retained the submerged lands within the Reserve and Range at the time of statehood. The Court found that Congress had expressed its awareness that the National Petroleum Reserve contained submerged lands by enacting other legislation prior to statehood that retained oil and gas deposits in the Reserve for the United States when it granted lands to the Territory of Alaska. 521 U.S. at 42. Moreover, Congress's purpose in enacting the legislation—to secure the oil and gas supplies—would have been defeated if the submerged lands were transferred to the State. *Id.* at 43. The Court similarly found that Congress intended to retain the submerged lands in the Arctic Wildlife Range because the Department of the Interior had informed Congress prior to statehood that the administrative application for the Range was pending and provided maps showing the area as a federal enclave embracing submerged lands. *Id.* at 56. The Court concluded

that Congress thus was on notice that the Secretary of the Interior had construed his authority to withdraw or reserve lands such as those within the Range to apply to submerged lands. *Ibid.*

Applying the analytical framework of *Alaska* to this case, we demonstrate below that Congress manifested its intent to defeat state title to submerged lands at statehood. Congress retained ownership of the entire Reservation for the Tribe's benefit during the period of negotiations with the Tribe over cession agreements and during the period of its consideration of the Agreements resulting from those negotiations. During both periods, Congress knew that the Reservation boundaries—as set forth in the existing 1873 Reservation and in the proposals to redraw the Reservation—included submerged lands. Moreover, the Idaho Constitution, which Congress ratified when it admitted Idaho to the Union, specifically disclaimed any right on the part of the State to lands held by Indians and recited that, until title was extinguished by the United States, such lands could be disposed of by the United States. Finally, Congress's purposes in recognizing and retaining ownership of the Reservation for the benefit of the Tribe would have been defeated if Congress had allowed the Reservation's submerged lands to pass to the State.

B. Congress Intended To Retain The 1873 Executive Order Reservation In Federal Ownership Beyond Statehood

1. *Congress intended to retain the 1873 Executive Order Reservation during negotiations with the Tribe*

Over an extended period of time prior to Idaho's admission to the Union, Congress had consistently manifested its intent to obtain lands from Indian Tribes (including the Coeur d'Alene Tribe) in the Pacific Northwest by negotiating voluntary cessions of those lands. The territorial acts of

1848 and 1863 expressly declared that Congress would extinguish aboriginal rights solely by treaty. See pp. 3-4, *supra*. In 1853, Congress directed the Secretary of the Interior to negotiate treaties with the Tribes. Act of Mar. 3, 1853, ch. 104, § 2, 10 Stat. 238. Indeed, by 1855, treaty negotiations had been concluded with most of the Tribes in the Oregon Territory, and neither the Secretary nor Congress evidenced any intent to treat the Coeur d'Alene Tribe differently. Treaty negotiations were about to commence with the Tribe in 1855, and were prevented only by the outbreak of a general Indian war to the west.⁵

The Steptoe War and the Civil War put a temporary halt to negotiations with the Tribe. See p. 4, *supra*. Negotiations resumed in 1873, however, after the Tribe rejected the 1867 reservation established for it by Executive Order and petitioned for a reservation that included navigable waters to enable it to continue hunting and fishing. That petition resulted in the 1873 Agreement with the Tribe, which was submitted to Congress. See pp. 4-5, *supra*. In the meantime, to preserve the lands designated for the Tribe in the 1873 Agreement, the President set apart those lands as a reservation in the 1873 Executive Order. J.A. 47-48.

There is no question here about the validity of the 1873 Executive Order or the scope of the Reservation it established. As the courts below properly held (Pet. App. 10, 13, 42-66) and Idaho does not dispute (Br. 17), the Reservation established by the 1873 Executive Order included the submerged lands that the Tribe had bargained for in the

⁵ Although in 1871 Congress ended the practice of making treaties with Indian Tribes in favor of reaching agreements that were subject to congressional approval, see Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566 (codified at 25 U.S.C. 71), neither the negotiators nor Congress appeared to place any import on this difference in terminology. The House committee report regarding ratification of the 1887 and 1889 agreements is entitled "Ratification of Coeur d'Alene Indian Treaties in Idaho," and the agreements are referred to as treaties throughout. J.A. 262.

1873 Agreement. The district court based its determination to that effect on detailed factual findings that Idaho also does not dispute in its appeal. See Pet. App. 59-66.

Congress did not act on the 1873 Agreement with the Tribe. It instead pursued the idea of a single large reservation to provide a home to several Tribes in the region. See J.A. 436-439. As encroachments on the Tribe's lands and the 1873 Reservation increased, however, the Tribe became increasingly dissatisfied with Congress's failure to resolve the status of its lands. In 1886, in response to the Tribe's petition to Congress for ratification of an agreement, Congress directed the Secretary to negotiate with the Coeur d'Alene Indians "for the *cession* of their lands *outside* the limits of the *present* Coeur d'Alene reservation." Act of May 15, 1886, ch. 333, 24 Stat. 44 (emphasis added). Congress's reference to the "present" reservation confirmed that the lands (which included submerged lands) were set aside for the Tribe; the provision for negotiation with the Tribe for cession of lands "outside" that present reservation evinced an intent that the Tribe would retain the reservation itself. Congress's use of the word "cession" in referring to land outside the reservation also is significant. As this Court has noted, "'cession' refers to a voluntary surrender of territory or jurisdiction, rather than a withdrawal of such jurisdiction by the authority of a superior sovereign." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 597 (1977). Thus, even with respect to the lands outside the Reservation, to which the Tribe retained only aboriginal title, Congress determined that cession by the Tribe, rather than unilateral extinguishment by the United States, was called for. The 1887 Agreement was the product of those negotiations.

The negotiators commissioned to negotiate with the Tribe felt compelled by "[t]he anxiety of the Indians about their reservation and their fears that it might in some way be taken away from them" (J.A. 87) to include language in the

1887 Agreement providing that “their reservation *shall be held forever* as Indian land [and] as homes for the Coeur d’Alenes and such other Indians as may be removed thereto, and that *no part* of the reservation shall ever be sold or occupied, open to white settlement, or *otherwise disposed of without the consent of the Indians.*” *Ibid.* (emphasis added). The negotiators explained:

It may be said that this was unnecessary, inasmuch as no such thing would happen; but the loss of their former possessions and other causes had so excited their fears that it was concluded, in order to allay suspicion, and in as strong a manner as possible, [to] bind the Government to that good faith which the Indian prizes so highly and which he thinks has been violated so frequently.

*Ibid.*⁶

The Senate passed a bill ratifying the 1887 Agreement, J.A. 141-143, but further action was delayed because the Senate sought confirmation from the Secretary about whether the Reservation included potentially valuable minerals and timber, as well as navigable waters used for steamboat travel in the region. See J.A. 118-120. In his response on behalf of the Secretary, the Commissioner of Indian Affairs confirmed that the Reservation contained most of the navigable waters useful for commerce. J.A. 123-124. But he opined that “the reservation might be materially diminished without detriment to the Indians, and that changes could be made in the boundaries for the release of some or all of the navigable waters therefrom, * * * but

⁶ One of the negotiators reported in more detail: “When assurances were given them that they would be protected by the Government in their homes and reservation their gratitude knew no bounds, and it is the sincere belief of the Commissioners that Chief Saltice and every able-bodied man of his tribe could be relied on in any emergency in the defense of the flag and the country with as much certainty as any community in the Union. This is strong language, but it is true.” J.A. 83.

this should be done, if at all, with the full and free consent of the Indians, and they should, of course, receive proper compensation for any land so taken.” J.A. 129. The Commissioner cautioned, however, that the 1887 Agreement, in which the Tribe was to be compensated for aboriginal lands it ceded *outside* its Reservation, should first be ratified:

I think that when the present agreement shall have been ratified it will be an easy matter to negotiate with them for the cession of such portions of their reservation as they do not need, including all or a portion of the navigable waters, upon fair and very reasonable terms.

J.A. 132, 500. That response to the Senate resolution led Congress to direct the Secretary to embark on additional negotiations with the Tribe, this time to secure the release of lands *within* the Reservation that had been set aside for the Tribe.⁷

Specifically, Congress directed the Secretary to “negotiate with the Coeur d’Alene tribe of Indians for the purchase and *release by said tribe* of such portions of *its reservation* * * * as such tribe shall consent to sell.” Act of Mar. 2, 1889, ch. 412, § 4, 25 Stat. 1002 (J.A. 144) (emphasis added). The 1889 Act expressed Congress’s intent to honor the 1887 Agreement (which had been negotiated with the Tribe pursuant to the 1886 Act and which provided that no part of the Reservation would be disposed of by the United States

⁷ As this Court’s decisions would subsequently establish, Congress would have had no legal need to seek the Tribe’s agreement or to pay for cession of aboriginal lands outside the Reservation because it had the power unilaterally to extinguish the Tribe’s aboriginal title without compensation. See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 288-289 (1955). Congress also could have reduced or repealed the 1873 Reservation without the consent of or payment to the Tribe. *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942); see also *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

without the Tribe's consent) and to maintain federal control over the entire Reservation until Congress completed negotiations with the Tribe.⁸

2. Federal ownership of submerged lands within the Reservation was necessary to achieve Congress's purposes

In *Alaska*, this Court explained that one factor indicating that Congress intended to retain ownership of submerged lands within the National Petroleum Reserve was that ownership was necessary to achieve Congress's goal in setting aside the Reserve, because it prevented petroleum resources from being drained by drilling in submerged lands. 521 U.S. at 42-43. Similarly, retaining federal ownership of the entire 1873 Reservation (as recognized by statute in 1886 and 1889) was necessary to enable tribal members to continue their fishing and other uses of the lake and associated rivers and to preserve Congress's ability to bargain in good faith with the Tribe concerning possible cession of a portion of its Reservation. As noted on p. 7, *supra*, the 1887 Agreement that was before Congress for ratification provided that "no part" of the Reservation would be disposed of without the Tribe's consent. Consistent with that understanding, the 1889 Act directed the Secretary to renegotiate for the release of such lands within the

⁸ Congress had earlier manifested a similar intent when it authorized the grant of a railroad right of way to the Washington and Idaho Railroad across the Reservation, including on a portion of the lake itself. Congress required the consent of and payment to the Tribe as a condition of the grant. J.A. 137-140. The court of appeals determined that such actions indicated congressional recognition of the Tribe as the permanent beneficial owner of the Reservation. See Pet. App. 15, 21 & n.13; see pp. 34-35, *infra*. Congress, however, need not have actually recognized the Tribe's ownership of the Reservation in order to defeat state title to the Reservation's submerged lands. It is sufficient that Congress intended to retain the Reservation in federal ownership for the Tribe until its negotiations with the Tribe were concluded. See pp. 28-29, *infra*.

Reservation as the Tribe was willing to sell. Later that year, the Secretary secured such an Agreement, which retained for the Tribe the remainder of the Reservation, including the lower part of the Lake and the St. Joe River.

Against that background, it would have been at least a breach of good faith, if not outright fraud, for the United States to have transferred submerged lands within the Reservation to the State while at the same time purporting to negotiate with the Tribe for their release and then purporting to ratify an agreement to that effect in 1891. Accordingly, this Court should not presume that Congress flouted the principle that “[g]reat nations, like great men, should keep their word.” *Heckler v. Mathews*, 465 U.S. 728, 748 (1984) (quoting *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting)).

3. Congress recognized that retaining ownership of the Reservation would defeat State title to the lands

Congress understood and intended that retention of the Reservation in federal ownership would defeat state title to the lands within it. At the time it passed the 1889 Act, Congress required territories seeking statehood to include in their proposed state constitutions a clause disclaiming state title to lands “owned or held by any Indian or Indian tribes” and recognizing that “said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.” See, *e.g.*, Enabling Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 677 (North Dakota, South Dakota, Montana, and Washington).⁹ This Court has noted that a disclaimer

⁹ Congress included such clauses “in the case of virtually every State admitted after 1882.” *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 561-562 & n.12 (1983) (citing numerous Enabling Acts). Like Idaho, Wyoming was admitted to statehood in 1890 without a prior enabling act, but nevertheless included a disclaimer clause in its state constitution. See Idaho Const. Art. 21, § 19; Wyoming Const. Art. 21, § 26.

clause constitutes recognition of Congress’s power under the Property Clause to retain lands in federal ownership. See *Van Brocklin v. Tennessee*, 117 U.S. 151, 167 (1886); see also *Metlakatla Indian Cmty. v. Egan*, 369 U.S. 45, 57-58 (1962) (disclaimer preserves broad class of Indian rights). By requiring new States to disclaim Indian lands, Congress clearly demonstrated its awareness and intent that title to lands it treated as held by the Indians would not pass to the States at the time of their admission to the Union.¹⁰ Congress specifically demonstrated its intent to retain lands for the Indians in Idaho by ratifying the Idaho constitution at statehood, which provided that “the people of the state of Idaho do agree and declare that we forever disclaim all right and title * * * to all lands * * * owned or held by any Indians or Indian tribes.” J.A. 371. Congress thus understood and intended that all lands within the Tribe’s established Reservation would remain in federal ownership for the Tribe’s benefit at the time of statehood notwithstanding (or, indeed, because of) Congress’s failure to take final action prior to statehood on the 1889 Agreement, which provided for the Tribe to cede some of its Reservation lands (including submerged lands) while retaining others.¹¹

¹⁰ Congress’s intent to retain “absolute jurisdiction and control” over Indian lands further demonstrates that Congress understood that when it retained lands for the Indians, it was defeating the state’s proprietary interest in their ownership. *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 68 (1962); cf. *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164, 176 & n.15 (1973) (noting that *Kake*’s holding concerning “‘absolute’ federal jurisdiction * * * came in the context of a decision concerning *non-reservation* Indians”).

¹¹ The court below opined that Congress’s actions conveyed “beneficial ownership” to the Tribe prior to statehood. See, e.g., Pet. App. 15, 21. We agree that those actions evidenced an intent to reserve for the Tribe’s benefit those lands (including submerged lands) within the Reservation as framed by the applicable agreements. Nonetheless, we have not used the phrase “beneficial ownership” to describe the Tribe’s pre-ratification

**C. Congress Specifically Intended To Retain Federal
Ownership Of The Submerged Lands Within The 1873
Reservation**

Idaho concedes that the Reservation as established by Executive Order in 1873 and recognized by Acts of Congress in 1886 and 1889 included submerged lands. Pet. Br. 17-18. Because Congress intended the 1889 Act both to retain all of the lands within the Reservation for the benefit of the Tribe and to direct negotiations with the Tribe for the cession of some of those lands, Congress necessarily also asserted continuing federal ownership over the submerged lands within the Reservation. See *Alaska*, 521 U.S. at 42. Four factors in particular demonstrate Congress's intent to retain submerged lands as part of the Reservation: (1) Congress was on notice that the Reservation included submerged lands; (2) Congress's negotiation strategy with the Tribe necessarily required the United States to retain ownership over the submerged lands; (3) Congress treated the Tribe as owner of the submerged lands in the Reservation in other legislation prior to the 1888 Act; and (4) congressional actions after Idaho's admission to the Union confirm Congress's intent to retain the submerged lands in federal ownership after statehood.

**1. Congress was on notice that the 1873 Executive
Order Reservation included the navigable waters
within its boundaries**

It is settled law that, when Congress is on notice that an Executive reservation reserved at statehood includes submerged lands, Congress intends to defeat state title to those lands. See *Alaska*, 521 U.S. at 56. In *Alaska*, Congress was on notice that the Arctic Wildlife Range included the submerged lands because the Secretary had publicly announced the filing of the application to withdraw

interest in the Reservation lands, because it may tend to denote a compensable property interest.

the Range, maps submitted to Congress showed boundaries of the Range that included submerged lands, and an Executive Order made clear that the Secretary construed his authority to reach submerged lands. *Ibid.*

The notice to Congress is even more evident here. When it manifested an intent to retain ownership of the Coeur d'Alene Reservation for the Tribe, Congress was unquestionably on notice that the Reservation included the submerged lands within its boundaries. The Senate's January 23, 1888, resolution recognized the controversy surrounding inclusion of navigable waters within the Reservation boundaries, specifically naming the lake and each river individually and noting the government's position that "all boats now entering such waters are subject to the laws governing the Indian country and all persons going on such lake or waters within the reservation lines are trespassers." J.A. 116. The Senate specifically directed the Secretary of the Interior to inform the Senate whether the Reservation "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." J.A. 117. The Secretary answered affirmatively, forwarding a report of the Commissioner of Indian Affairs confirming that the reservation embraced "all the navigable waters of Lake Coeur d'Alene" except the northern fragment described in the Senate resolution, as well as the Coeur d'Alene and St. Joseph Rivers. J.A. 123. In addition, the Secretary's report attached the survey map of the Reservation, which indicated, by the drawing of the northern boundary line drawn across the lake, that the lake was almost entirely within the Reservation. J.A. 135. That report also identified the Reservation's area as 598,499 acres, which necessarily included the lands under navigable waters. J.A. 136. Accordingly, when Congress subsequently retained the lands reserved by the President in federal ownership beyond Idaho's admission to the Union, Congress

manifested its intent to defeat state title to the submerged lands within the Reservation.

2. *Congress's purpose in retaining the Reservation required retention of the submerged lands*

In *Alaska*, the fact that Congress was on notice that the Reservation included submerged lands when it retained the Reservation in federal ownership beyond statehood was sufficient to indicate Congress's clear intent to defeat state title to those lands. 521 U.S. at 56-57. Although *Alaska* does not require analysis of whether retention of the submerged lands is necessary to accomplish the purposes of the reservation, see *ibid.*, in fact Congress's retention of the submerged lands within the Tribe's Reservation here *was* necessary to achieve Congress's purpose, which was to obtain the Tribe's voluntary agreement to cede substantial portions of the Tribe's lands, both inside and outside the Reservation, while reserving the remainder for the benefit of the Tribe. The Secretary's report on the 1887 negotiations informed Congress that the Tribe was dissatisfied with Congress's previous failure to confirm the 1873 Agreement or to provide permanent protection for the Reservation set aside for it. J.A. 82-84, 87. The 1887 Agreement thus included a provision specifically committing the United States to ensure that "the Coeur d'Alene Reservation shall be held forever as Indian land" and that "no part of said reservation"—which necessarily included the submerged lands—would be disposed of without the consent of the Indians living there. J.A. 379.

When Congress subsequently sought further cessions from the Tribe, it knew that the Tribe was insisting upon adherence to the 1887 Agreement before agreeing to cessions of land within its Reservation. Congress was on notice that the 1887 Agreement retained the 1873 Reservation in its entirety for the Tribe and that the Reservation included the submerged lands within it. J.A. 93, 119, 123-124. Con-

gress, therefore, could negotiate with the Tribe on a good faith basis under the 1887 Agreement only if it continued to reserve the submerged lands within the Reservation.

Congress also was on notice that, in prior negotiations, the Tribe had insisted on retaining the navigable waters within the Reservation because of its reliance on fishing and hunting. J.A. 27. Congress thus knew in providing for the negotiations in the 1889 Act that the Tribe would almost surely insist on retaining some of the navigable waters within the Reservation as a condition to voluntarily ceding a portion of its reservation lands.

The immediate circumstances of the 1889 Agreement further confirm that Congress needed to retain the submerged lands in the Reservation beyond statehood. The President's report to Congress on the 1889 Agreement contained detailed descriptions of the negotiations with the Tribe. J.A. 176-197. The transcripts show that the Tribe rejected a proposal by the United States in which negotiators declared that "the lake belongs to you as well as to the whites." J.A. 183. Instead, the final proposal accepted by the Tribe was explained by the United States' negotiators as ensuring that the Tribe would have "the St. Joseph River and the lower part of the lake and all the meadow and agricultural land along the St. Joseph River." *Ibid.* In addition, the survey of the cession provided for by the 1889 Agreement, like the survey of the 1873 Reservation, drew the boundary line across the lake rather than meandering its shoreline, thereby confirming that the navigable waters south of that line were retained as part of the Reservation for the Tribe. J.A. 202. See *Alaska*, 521 U.S. at 56 (relying on "submitted maps [to Congress] showing the area as a federal enclave embracing submerged lands"). Consequently, when it considered the Idaho statehood legislation that ratified the disclaimer clause in the Idaho constitution, Congress knew that the 1889 Agreement (which it was also in the process of

ratifying) reserved to the Tribe some of the submerged lands within the 1873 Reservation and ceded others in return for compensation. Congress could in good faith ratify such an agreement only if the United States retained the submerged lands.

3. *Congress demonstrated its intent to treat the Tribe as owner of the submerged lands in other legislation*

In *Alaska*, Congress's awareness that the National Petroleum Reserve encompassed submerged lands was reinforced by legislation, enacted just prior to statehood, granting certain offshore lands to the Territory of Alaska but exempting oil and gas deposits located in the submerged lands along the coast of the Reserve. 521 U.S. at 42. Here, Congress's awareness that the Reservation included submerged lands, and its intent to treat the Tribe as the beneficial owner of the submerged lands, is similarly reinforced by the 1888 legislation granting the Washington and Idaho railroad a right of way. Congress passed that law after the Secretary, pursuant to the 1886 Act, had concluded the 1887 Agreement in which the United States promised to retain the Reservation for the Tribe, and after Congress was informed by the Commissioner of Indian Affairs that the Reservation included the navigable waters within its boundaries. The boundary descriptions of the right of way, set forth in the legislation, expressly described the right of way as extending "on the Coeur d'Alene Lake," thereby explicitly acknowledging that the Reservation included the submerged lands. Act of May 30, 1888, ch. 336, § 1, 25 Stat. 160. The 1888 Act further required the consent of and compensation to the Tribe for the right of way as described in the legislation. *Ibid.*; see J.A. 137-143. Accordingly, Congress viewed the bed of the Coeur d'Alene Lake as part of the Reservation for which compensation was to be paid to the Tribe.

4. Congress's intent to retain the submerged lands within the Reservation beyond statehood is confirmed by post-statehood acts

Several Acts of Congress after statehood confirm that Congress had retained the submerged lands within the Reservation and that those lands continued to be held in trust for the Tribe after Idaho became a State.¹²

a. *Ratification of the 1887 and 1889 Agreements.* Congress's ratification in 1891 of the 1887 and 1889 Agreements with the Tribe confirms that Congress retained the submerged lands within the Reservation in federal ownership beyond statehood. When Congress initiated negotiations with the Tribe for a cession of lands within the 1873 Reservation, Congress knew that the Reservation included navigable waters. Congress also knew that, as contemplated by the 1886 Act, the Tribe had signed the 1887 Agreement to cede its aboriginal lands in exchange for the retention of that existing Reservation, which included lands underlying navigable waters. And Congress further knew that the 1887 Agreement promised that "no part" of the Reservation would be disposed of without the Tribe's consent. J.A. 238. In the 1889 Act, Congress directed the negotiators to seek the release only of those reservation lands that the Tribe would consent to sell. Congress thereafter knew, well prior to Idaho statehood, that the Tribe had signed the 1889 Agreement, in which it had agreed to cede a portion of the Reservation lands and, in exchange, was guaranteed the retention of the remainder. And Congress was specifically notified that the 1889 Agreement retained the lower part of Coeur d'Alene Lake and the St. Joe River for the Tribe. See p. 11, *supra*; J.A. 183.

¹² Jurisdictional history that occurs after the operative event may be relevant to determining Congress's intent. See *Rosebud Sioux Tribe*, 430 U.S. at 603-604; *Alaska Pac. Fisheries Co. v. United States*, 248 U.S. 78, 89-90 (1918).

The record shows that while Congress wanted to obtain the maximum amount of lands possible for white settlers, it intended to deal with the Indians in the Idaho Territory fairly and in good faith. First, the House committee report on the ratification legislation detailed the lengthy history of attempts to negotiate an agreement with the Tribe. It summarized the territorial acts passed between 1848 and 1863 that promised to extinguish tribal property rights solely by treaty. J.A. 263-265. It described the failure to conclude a treaty with the Coeur d'Alene Tribe. J.A. 266, 335-343. It recognized that after the treaty of peace following the Steptoe War, the Tribe was "left under the impression that the Government of the United States would thereafter act justly and fairly toward them, so far at least as their lands were concerned." J.A. 266-267.¹³

As with the negotiations preceding the 1887 Agreement, the Tribe expressed its dissatisfaction in negotiations preceding the 1889 Agreement with the United States' failures to make a treaty addressing the aboriginal lands outside its Reservation and to assure permanent protection of the Reservation itself. See pp. 10-11, *supra*. Congress was aware of the Tribe's dissatisfaction, which had resulted in the Tribe driving a hard bargain regarding cession of its reservation:

[T]he commissioners were made aware of the stern fact that they were contending with obstacles that threatened to overthrow all business plans they had formed,

¹³ The House committee report also included a letter from former Captain John Mullan, describing the long-standing failure to compensate the Tribe for their aboriginal lands and to confirm the Reservation to them, and urging that "it would be a grave injustice for our Government now to permit this condition of things long to continue." J.A. 341. It also reprinted two letters from non-Indian settlers in the region who had been protected by the Tribe during an outbreak of hostilities by the Nez Percé, which supported the Tribe's petition to have the Reservation confirmed to it. J.A. 352-355.

and presented formidable barriers to the consummation of a treaty. The Indians, while kind and courteous, were reluctant upon business propositions, from the fact that other business transactions with them had been neglected, and the failure of Congress to ratify the last treaty, together with the dilatory manner of the railroad company in making payment for right of way, were weapons they used against overtures of the commissioners for the purchase of any more land. They displayed surprising business sagacity, coupled with an exalted idea of the fulfillment of promises.

Much time was consumed in appeasing the grievances they fostered, and in establishing confidence with them. They finally consented to dispose of a portion of the land that is included in this treaty, they insisting upon making the lines. The exorbitant price asked and the small amount of land offered precluded any bargain, and thus matters stood for two councils following. After they had been shown the benefits to accrue from the sale of these lands, and assurance by the Commission of the ratification of the former treaty, a clause being inserted bearing upon the fulfillment of the provisions of the former treaty, the sale was consummated, and the agreement signed accompanying this report.

J.A. 175.

Executive reports to Congress on negotiations with the Tribe made Congress fully aware that the negotiators had repeatedly pledged the good faith of the United States to reach the 1887 and 1889 Agreements in the face of the Tribe's mistrust of the United States. See, *e.g.*, J.A. 177-180. The negotiators declared that they had been "commissioned to treat with you upon high and holy grounds; to give you all the rights ever accorded to any people by the wisest government on earth." J.A. 107. They assured the Tribe that

“[t]he Government will protect you and your lands. It will do so if it takes its whole power.” J.A. 111. Congress knew that the Tribe acceded to the 1887 and 1889 Agreements in reliance on those promises. Congress could not properly have ratified those Agreements after statehood if it had already transferred to Idaho upon statehood the submerged lands promised to the Tribe. If Congress had intended to deprive the Tribe of ownership of the residual portion of the lake bed—and thus to deny the Tribe the benefit of the bargain the parties had made—Congress would have *refused* to honor those Agreements or would have modified them to exclude the lake and river beds. The State’s theory of statutory construction in this case is premised on a notion of congressional duplicity that is simply unthinkable.

b. *The Frederick Post patent.* The law passed by Congress in March 1891 to ratify the 1887 and 1889 Agreements contained a provision directing the Secretary to convey a private patent to certain property in the northern portion of the Reservation ceded by the Tribe. J.A. 387-388. The property, located at Post Falls on the Spokane River, had been sold by the Tribe in 1871 to a man named Frederick Post for hydropower purposes. J.A. 388. The 1891 Act identified the property, in a narrative description by Chief Seltice, as containing “all three of the *river channels* and islands, with enough land on the north and south shores for water-power and improvements.” *Ibid.* (emphasis added); see also J.A. 404-407 (patent), 408 (map showing river channels as part of patented lands).¹⁴ Congress could not, of course, have approved a grant of submerged lands in the river channels to Post if the lands had already conveyed to Idaho at statehood. See *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845) (negating a post-statehood congressional grant of

¹⁴ Chief Seltice’s father had sold these lands to Post for \$500, thereby demonstrating that the Tribe knew the value and importance of the riverbeds. 2 Hart Rep. 234.

submerged lands). Consequently, Congress's approval of this patent confirms that Congress understood that it had retained the submerged lands within the Reservation in federal ownership when Idaho was admitted to the Union.

It is significant as well that the provision for confirming the Tribe's conveyance of the submerged lands to Post was included in the bills to ratify the 1887 and 1889 Agreements that had been passed by the Senate and reported by the House committee *prior* to statehood, and the House reports on those bills described the Post lands as among those to be ceded by the Tribe. See J.A. 271-272, 374. This provision thus reflects an understanding by Congress both prior *and* subsequent to statehood that the submerged lands within the 1873 Reservation were the Tribe's to cede or retain.

c. *The Harrison cession.* Shortly after the cession agreements were ratified, it became clear that the point of land just south of the mouth of the Coeur d'Alene River would make an excellent location for a town, to be named "Harrison." The Reservation boundary, however, ran in a line from the west shoreline of the lake directly across the lake to the mouth of the Coeur d'Alene River, and the point of land suitable for the townsite was within that boundary. Negotiations for a cession ensued, producing a new boundary proceeding from the point on the east shoreline at the mouth of the River one mile due south across Coeur d'Alene Lake to a point in the lake, and then turning a 90 degree angle east over a mile of lake bed. 2 Hart Rep. 246-266; J.A. 403. In 1894, after being apprised by a map that the cession included a portion of the lake bed, Congress approved the cession for a payment to the Tribe of \$15,000. J.A. 389-403. "The Harrison townspeople believed they needed a portion of the lake in order to create docks, so it is not surprising that negotiations led toward a cession of a small portion of lakebed directly adjacent to the Harrison shoreline." 2 Hart Rep. 261. That post-statehood acknowledgment of tribal

ownership of the lake bed further confirms that Congress retained ownership of the submerged lands within the Reservation after statehood.

d. *Heyburn State Park*. In 1908, Congress withdrew from allotment, for use as a park, part of the Reservation embracing three smaller lakes adjacent to the southern end of Lake Coeur d'Alene. 2 Hart Rep. 276-282 (noting that the survey of the withdrawal included acreage of submerged lands). In 1911, the United States subsequently transferred those lands to Idaho, which designated them as the Heyburn State Park. As the court of appeals explained, “[t]here would have been no need for the United States to withdraw the lands comprising the Park from the reservation and no need for the United States to convey these lands by patent to the State if the State already owned them.” Pet. App. 27.

D. Idaho’s Contentions That Congress Did Not Intend To Defeat State Title To The Submerged Lands Within The 1873 Reservation Are Without Merit

1. *The 1889 Act confirmed rather than repudiated the Reservation*

Idaho asserts that the 1889 Act repudiated rather than confirmed the 1873 Reservation. Pet. Br. 37. Idaho has it backwards. While Congress sought to open a portion of the Reservation lands to non-Indian use, Congress did so not by repudiating the Reservation and unilaterally taking the land from the Tribe, but instead by first accepting and formally recognizing the status of the Reservation, and then seeking the Tribe’s assent to *cede* lands from its Reservation in return for compensation.

Idaho suggests that the purpose of the 1889 Agreement was to protect the Tribe’s farmlands. Pet. Br. 46. Congress arguably had the power to unilaterally redraw the Reservation’s boundaries to retain only the agricultural lands, which were marked on a map supplied with the Secretary’s

response to the Senate's 1888 resolution. See J.A. 135.¹⁵ Congress could also have held out in the negotiating process for an agreement by the Tribe that left it with only agricultural lands. Instead, the United States negotiated the 1887 Agreement with the Tribe, which guaranteed to the Tribe a much larger Reservation as a permanent home that included the southern portion of the lake and that could not be taken from them without their consent. In the 1889 Act, Congress acted in accordance with that agreement. See pp. 10-11, *supra*. Importantly, moreover, retention of the lake and rivers in the Reservation was central to the Tribe's existence. Tribal members depended on fishing and water-based plants for their subsistence. 1 Hart Rep. 20-28 (describing tribal fishing traps affixed to submerged lands); *id.* at 35-36 (foods collected from plants along the shoreline and marshes of the lake and rivers). Indeed, fishing was so crucial that the Tribe erected "an extensive and complex system, involving weirs, basket traps, various types of nets, lines, spears, and hooks," to harvest fish "through all seasons of the year." *Id.* at 28. The lake and rivers were also central to the Tribe's spiritual life. *Id.* at 36-37.

Thus, the fact that Congress sought ultimately to reduce the size of the Reservation does not negate its intent to retain the Reservation as it then existed, with the agreed-upon boundaries, until a mutually satisfactory agreement could be reached with the Tribe. In *Alaska*, this Court held that Congress clearly indicated its intent to defeat state title

¹⁵ In addition, in 1887 Congress had passed the General Allotment Act, ch. 119, 24 Stat. 388 (25 U.S.C. 331 *et seq.*), which authorized the President to allot portions of tribal reservation lands to individual Indians without consent of the Tribe. See *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 254 (1992). Indeed, the Indian Commissioner had suggested that the tribal members receive allotments. 2 Hart Rep. 195-196. The tribal members, however, voted unanimously to reject taking the lands in severalty, and the United States did not compel them to do so. *Id.* at 216.

to submerged lands identified in an application for withdrawal submitted by the federal Bureau of Sport Fisheries to the Secretary of the Interior. Those lands were segregated only temporarily, to protect them until the Secretary acted on the application. 521 U.S. at 57. Nevertheless, the Court deemed Congress to have clearly expressed an intent to preserve the United States' prerogative to make that future determination after Alaska became a State. Similarly, in this case, Congress manifested an intent to exercise its prerogative to determine the final scope of the Reservation through negotiations with the Tribe, which necessarily required the retention of the entire Reservation in federal trust status for the Tribe unless and until Congress determined otherwise.

2. *The 1889 Act retained all interests embodied in the 1873 Reservation, including the submerged lands*

Idaho asserts that, to the extent the 1889 Act affirmed any rights of the Tribe, it was only a right of use and occupancy, which, Idaho contends, is incapable of defeating the State's title. Pet. Br. 42-44. There is no basis for such a rule. Just as reservations of land in *Alaska* for petroleum or wildlife purposes defeated the State's title, a reservation of land for Indian purposes may defeat state title.

Moreover, in the 1889 Act Congress recognized the 1873 Executive Order Reservation in its entirety, including the submerged lands that are within its boundaries, and manifested its intent to retain that Reservation pending negotiation of an agreement for cessions of portions of the Reservation by the Tribe and ratification of such an agreement by Congress. See p. 10, *supra*. That legislation expressly directs the Secretary to attempt to obtain the Tribe's consent to release portions of "its reservation," 25 Stat. 1002, which reflects a congressional intent to treat the Tribe as holding a reservation of the lands (including sub-

merged lands) that were so designated. Such language is consistent with the purpose of the legislation, which was to continue Congress's long-standing objective of obtaining cessions of the Tribe's lands through voluntary negotiation. The Statehood Act itself then ratified the clause in the Idaho Constitution that disclaimed any interest in any lands in the State that were held by Indians. See p. 12, *supra*.

Idaho erroneously contends (Br. 44) that, because Congress did not permanently convey Reservation lands to the Tribe until after statehood (with the formal ratification in 1891 of the 1887 and 1889 Agreements), the only rights in the Tribe that Congress could have recognized in the 1889 Act were the Tribe's pre-existing rights of occupancy within the Reservation. The 1889 Act, however, demonstrated Congress's intent to retain the Reservation in its entirety, for the benefit of the Tribe, at least until Congress ratified an agreement with the Tribe or otherwise resolved the status of the Reservation. The fact that Congress did not ratify the 1887 and 1889 Agreements until after it admitted Idaho into the Union does not undermine Congress's express intent in the 1889 Act to respect the Tribe's interest in the Reservation, and to retain the submerged lands and all other lands in the Reservation for subsequent disposition. Congress therefore defeated state title.

Idaho misreads *Holt*, *Choctaw*, and *Montana* as imposing a general rule that a Tribe that does not have fee title cannot hold the submerged lands. Pet. Br. 43-44. First, those cases cannot be read to limit Congress's plenary authority under the Property Clause to grant rights in federal land to third parties or to reserve interests in federal land for their benefit. Congress may, as here, recognize a third-party interest in submerged lands held by the United States, in a manner that defeats the State's title, even if that recognition falls short of completely alienating fee title. Indeed, by maintaining governmental control over the submerged lands,

rather than ceding control to private parties, that approach *respects* the special sovereign interest in lands underlying navigable waters. A fortiori, Congress may recognize an interest in an Indian Tribe in submerged lands reserved by the United States, which not only protects the Tribe's interests but also serves important federal interests in fulfilling the United States' ongoing trust responsibilities.

Second, *Holt*, *Choctaw*, and *Montana* simply recognize that, in the absence of express language or other firm indications of the intent of the parties, the type of ownership interest conveyed to or retained for the Tribe by treaty or agreement may aid in determining whether the submerged lands were included within the boundaries of the lands conveyed to or set aside for the Tribe, but it is not dispositive. Here, it is undisputed that the lands in question, the 1873 Reservation, included the submerged lands within its boundaries.

3. *Congress need not specifically address the effects on state sovereignty to defeat state title to submerged lands*

Idaho contends (Br. 35) that Congress cannot be held to have clearly intended to defeat state title to submerged lands in the Reservation unless it specifically “contemplated the effects of its action on the assumption of state sovereignty over submerged lands.” Pet. Br. 33. That contention fails in three respects.

First, while this Court may identify various factors that help elucidate congressional intent for particular types of cases, it is inappropriate to “seize[] upon several factors and present[] them as apparent absolutes.” *Rosebud Sioux Tribe*, 430 U.S. at 588 n.4. The combination of factors required to show intent may vary from case to case, and no single factor is necessarily dispositive. *Id.* at 598 n.20.

Idaho purports to derive its proposed express renunciation standard from *Choctaw* and *Montana*. In those cases, in

the absence of an express indication that the parties had understood the grant to include the submerged lands, the Court looked to other language in the treaty to determine whether the parties intended to include the submerged lands. The promise in the *Choctaw* treaties that the lands granted would never be included within a State supported the conclusion that the submerged lands were included in the grant to the Tribe. See 397 U.S. at 625. Such language, however, is not required to determine congressional intent in this case, because the 1873 Reservation included the submerged lands within it, as Idaho now concedes and as both Congress and the Tribe in that era well knew.

Nor does *Alaska* support the State's position. See Pet. Br. 32-33. In *Alaska*, Congress retained its power of "exclusive legislation" under the Enclave Clause over the National Petroleum Reserve, and excepted from the transfer to Alaska lands that were "withdrawn or otherwise set apart" as refuges or reservations for the protection of wildlife. See 521 U.S. at 42, 47. Beyond indicating congressional intent to retain ownership of the lands in question for the United States, however, those provisions present no indication that Congress expressly "contemplated the effects * * * [on] state sovereignty." Pet. Br. 33.¹⁶ Similarly, here Congress necessarily retained ownership of the 1873 Reservation because that enabled the United States to conduct the negotiations on the bases set forth in the 1889 Act. Congress, therefore, necessarily contemplated that the lands would not transfer to the State.

¹⁶ Idaho cites (Br. 31) an Alaska Statehood Act provision that retained administration and management of fish and wildlife resources of Alaska until the Secretary of the Interior certified that the State had adequately provided for the administration, management, and conservation of them. As the *Alaska* Court made clear, however, that language is independent of the provisions regarding transfer of wildlife lands. See 521 U.S. at 60-61. It thus has no relevance here.

Even if this Court were to adopt Idaho's proposed test, however, it is satisfied here. In approving the Idaho Statehood Act, Congress *did* contemplate the effect of its actions on the State. Congress's ratification in the Statehood Act of the Idaho Constitution, which disclaimed "all right and title" to all lands "owned or held by any Indians or Indian Tribes," demonstrated Congress's understanding that the lands it retained for Indian Tribes would not be transferred to Idaho. That ratification amply demonstrates that Congress expressly contemplated the effects on Idaho of its retention of the Reservation's submerged lands.

4. *Congress did not intend to reject the Secretary's determination that the 1873 Reservation included navigable waters*

Idaho maintains that Congress's failure to include the lake in the description of the lands to be acquired in the 1889 Act was a purposeful omission indicating that Congress did not intend to recognize and affirm tribal title to the lake bed. Pet. Br. 40.¹⁷ The State's contention cannot be squared with at least four explicit congressional actions: (1) the Senate's request to the Secretary in the 1888 resolution to specify whether navigable waters were part of the Reservation and to opine whether the Tribe would agree to release navigable waters within the Reservation; (2) Congress's 1888 grant of the railroad right of way, which was surveyed as extending

¹⁷ Idaho's suggestion (Br. 41 n.15) that Congress understood that it could not defeat state title to submerged lands in light of *Pollard v. Hagan*, *supra*, is misplaced. In *Pollard*, the Court held that Congress could not convey lands (including submerged lands) after it had previously transferred them to the State. 44 U.S. (3 How.) at 230. The congressional statute purporting to make the conveyance at issue there well post-dated Alabama statehood and did not involve lands the United States retained upon Alabama's admission. As this Court held in *Choctaw*, by contrast, in treaties ratified from the 1820s to the 1840s, Congress defeated the State's subsequent title to submerged lands by having conveyed it to Indian Tribes. See 397 U.S. at 628-636.

onto the lake bed; (3) the House and Senate Committee reports accompanying the legislation to ratify the 1887 and 1889 Agreements, which included an explanation from the Secretary of the Interior of how the commission appointed to negotiate with the Tribe had successfully obtained the release of certain navigable waters (J.A. 269); and (4) Congress's ratification of the 1887 and 1889 Agreements with the Tribe, which Congress knew included the submerged lands for which the Tribe had successfully bargained. See pp. 7-12, *supra*.

The most natural reading of the 1889 Act is that it directed the Secretary to seek to obtain from the Tribe the lands and associated navigable waters in the portion of the Reservation that the Secretary had identified in his report to Congress as being valuable primarily for minerals and timber. That interpretation is confirmed by the 1890 House committee report accompanying the 1891 ratification legislation, which explains that Congress had delayed ratification of the 1887 Agreement to acquire "a certain valuable portion of the reservation * * * situate[d] on the northern end of said reservation." J.A. 269. The report described that area as containing "valuable mineral ledges," "valuable timber," and "a magnificent sheet of water, the Coeur d'Alene Lake, and its chief tributary, to wit, the Coeur d'Alene River." *Ibid*. Thus, Congress specifically understood that the Tribe had agreed to release and the United States to purchase a portion of the lands underlying the navigable waters in the portion of the Reservation that the Tribe was ceding. Moreover, the 1890 House report did not include the St. Joe River in its description of waters ceded by the Tribe,¹⁸ although the Secretary's 1888 report to Congress had identified that river as being within the Reservation. J.A.

¹⁸ Although the Secretary's report to Congress indicated there was no information as to the navigability of the St. Joe River, it was described as being "quite as large as the Coeur d'Alene River." J.A. 124.

123. That omission in the 1890 House report is further evidence that Congress understood that the Tribe retained the St. Joe and other navigable waters in the portion of the Reservation it retained.

The State's argument boils down to two untenable propositions. First, after Congress requested and received information confirming that the Reservation contained navigable waters that the Tribe might be willing to release, it nonetheless determined—without debate or any evidence of deliberation—that the Secretary was in error and that the navigable waters were not part of the Reservation. Second, after supposedly determining that the Secretary was in error, Congress failed to so inform the Secretary before he embarked on negotiations with the Tribe in which he could be expected, as he did, to try to convince the Tribe to release certain portions of land underlying navigable waters and to pay the Tribe for those lands it agreed to release. Neither proposition is plausible, and the State's argument therefore must be rejected.

5. *Congress did not delay ratification of the Agreements to permit the State to obtain the submerged lands in the Reservation*

Congress's failure to ratify the 1887 and 1889 Agreements with the Tribe until after Idaho's statehood has no relevance in determining Congress's intent. *Br. Amici California et al.* 16. As a threshold matter, the timing of ratification was a matter of happenstance. Ratification of the Agreements and approval of statehood proceeded on generally parallel tracks. In September 1888, the Senate passed legislation to ratify the 1887 Agreement. *J.A.* 141-143. The legislation lay dormant, however, while Congress considered seeking a reduction in the size of the Reservation. *J.A.* 269, 492.

In 1889, the Tribe signed the agreement to cede a portion of the Reservation, conditioned on ratification of the 1887 Agreement, and the Territory of Idaho adopted a consti-

tution as a prerequisite to seeking statehood. In early 1890, Congress began to act on both matters. Both pieces of legislation initially proceeded at a similar pace. By June 1890, separate bills on statehood and ratification had each been reported by the relevant committees in both Houses. Each of the bills had passed one House of Congress: ratification of the agreements had passed in the Senate, and statehood approval had passed in the House. At that point, however, two events unrelated to the content of the bills or any interrelationship between them caused the timing of action to diverge. On June 10, 1890, the House delayed action on ratifying the Agreements due to uncertainty about whether the House and Senate bills were identical. The matter was referred to committee for clarification. J.A. 368-369. Meanwhile the Senate, which had allowed the statehood bill to languish for nearly three months, suddenly acted on the legislation, presumably to pass it before Independence Day. The statehood legislation was passed by the Senate on July 1 and enacted into law on July 3, 1890. In mid-August, the House committee reported that the Senate and House treaty ratification bills were identical, J.A. 373, and the House ratified the bill early the following year. There is nothing in this sequence to suggest that Congress intended the timing of its actions to have any substantive effect whatsoever.

Furthermore, the state constitution disclaimer of all lands “owned or held” by Indian Tribes, combined with Congress’s recognition that the entire Coeur d’Alene Reservation was held by the Tribe, made the timing of ratification inconsequential. Whatever the sequence turned out to be, Congress intended to admit Idaho to the Union while at the same time honoring the United States’ agreements with the Coeur d’Alene Tribe.

CONCLUSION

The judgment of the court of appeals should be affirmed.
Respectfully submitted.

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