

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 IDAHO, :

4 Petitioner :

5 v. : No. 00-189

6 UNITED STATES, ET AL. :

7 - - - - - X

8 Washington, D.C.

9 Monday, April 23, 2001

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States at

12 10:04 a.m.

13 APPEARANCES:

14 STEVEN W. STRACK, ESQ., Deputy Attorney General,

15 Boise, Idaho; on behalf of the petitioner.

16 RAYMOND C. GIVENS, ESQ., Coeur d'Alene, Idaho;

17 on behalf of Respondent Coeur d'Alene Tribe.

18 DAVID C. FREDERICK, ESQ., Assistant to the Solicitor

19 General, Department of Justice, Washington,

20 D.C.; on behalf of Respondent United States.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 00-189, Idaho versus the United States. Mr. Strack.

ORAL ARGUMENT OF STEVEN W. STRACK, ESQ.  
ON BEHALF OF THE PETITIONER

MR. STRACK: Mr. Chief Justice, and may it please the Court:

Four years ago in a decision that involved these same parties, the court affirmed the principal that submerged lands are an essential attribute of state sovereignty. Today the court is asked to determine whether this essential attribute of sovereignty was defeated by the Act of March 2nd, 1889, an Act that authorized negotiations for the purchase of timber and mineral lands. Under law, the 1889 Act embodies a presumption against defeat of state title.

QUESTION: Would you mind if I just get a little background that helps me understand better the practical issues involved here. We're talking about roughly one-third of the lake, the submerged lands and about one-third of Lake Coeur d'Alene; is that right?

MR. STRACK: Actually the acreage would be more like one-fourth of the lake.

1 QUESTION: About one-fourth.

2 MR. STRACK: Yes.

3 QUESTION: In the southern part of the lake?

4 MR. STRACK: This is the southern part of Lake

5 Coeur d'Alene and we're also talking about the lower 15 or

6 20 miles of the St. Joe River.

7 QUESTION: And what are the practical

8 consequences of a finding one way or the other? What as a

9 practical matter difference does it make who has the

10 submerged lands.

11 MR. STRACK: Well, I think it makes a very large

12 difference from the state's viewpoint, Justice O'Connor,

13 because this is a public highway. This is not just an

14 isolated body of water.

15 QUESTION: Well, just tell me what's involved.

16 Is it fishing rights or regulation of boating, what is it?

17 Why does the state care, what is involved as a practical

18 matter.

19 MR. STRACK: We care because the majority of the

20 users on the Lake are not Indians and because of that we

21 have a significant interest in protecting their safety,

22 for example, citing people who are boarding in an unsafe

23 manner or if citing someone who doesn't have the requisite

24 amount of life vests on board for small children. It's

25 not clear the tribe could fill that role --

1                   QUESTION: I'll pursue Justice O'Connor's  
2 question, why can't the State, why can't the tribe have  
3 the patrol boat just like a tribe has a patrol car on the  
4 road?

5                   MR. STRACK: Because this is a public highway  
6 and the court has been very clear that on a public highway  
7 tribes usually do not have general sovereign authority  
8 over non-Indians. That's because they don't have the  
9 power to exclude generally and that's the basis of tribal  
10 authority over non-Indians, in most instances.

11                  QUESTION: Well, then, why can't the state's  
12 boat go into the southern part of the lake?

13                  MR. STRACK: Because the tribe has basically  
14 precluded us from that and I believe the Court's decree  
15 precludes us from doing that also.

16                  QUESTION: You can't work -- all this is about  
17 is whether or not the State wants to have a policeman in a  
18 boat cite somebody for not wearing a life vest and the  
19 tribe just won't agree to figuring out some method so that  
20 people boat safely? It sounds like is that all that's at  
21 stake and you can't work it out with the tribe?

22                  MR. STRACK: Justice Breyer, I think there's a  
23 lot more at stake than simply that.

24                  QUESTION: I'm not saying in principle. I want  
25 to know what does this come down to as a practical matter

1     that has led the State of Idaho to say it's important. I  
2     mean all kinds of principles, you may even be right, they  
3     may be right, but sometimes -- what is the practical  
4     application, anything else?

5             MR. STRACK: I think there's many practical  
6     applications, Justice Breyer, as we spoke about in our  
7     brief.

8             QUESTION: Well, name one. Could you just name  
9     one. So far I have the fact that you told Justice  
10    O'Connor that it's not been possible for you to work out  
11    with the tribe whether a policeman could cite somebody in  
12    a boat for not wearing a life jacket. Now what's the next  
13    one?

14            MR. STRACK: Oh, for example, we have an  
15    in-stream flow, a statutory in-stream flow that protects  
16    the lake level and that's certainly broadened the question  
17    by this concept of tribal ownership of at least a portion  
18    of the lake. We have --

19            QUESTION: Mr. Strack, may I ask that you raise  
20    the podium a bit because I'm having difficulty hearing.

21            QUESTION: You're lowering. Other way.

22            QUESTION: There.

23            MR. STRACK: Another practical aspect would be,  
24    for example, our statute that prevents dredging on this  
25    portion of the river. That would no longer have any

1 validity because now it's tribal land. And so generally  
2 this, we treat this lake as a public resource and a  
3 recreation place. The State protects public access and  
4 because it is a public resource, the public, if we fail in  
5 our duties the public can sue us. That wouldn't  
6 necessarily be true of the tribe on the lake because then  
7 it becomes managed not for public uses necessary but for  
8 whatever use --

9 QUESTION: Well, does the Federal Government in  
10 its capacity as a trustee, if you will, have any role in  
11 how the lake is managed or used if it belongs to the  
12 tribe?

13 MR. STRACK: Justice O'Connor I haven't seen any  
14 evidence of that to date. They have simply stepped back  
15 and let the tribe regulate. I haven't seen any evidence  
16 of the Federal Government having any interest in doing  
17 that.

18 QUESTION: Let me ask you another question.  
19 After Idaho became a state, I think there were at least  
20 two conveyances by the United States to people of land in  
21 that area, one to Frederick Post and the other to someone  
22 named Harrison; is that right?

23 MR. STRACK: Justice O'Connor, actually the  
24 Harrison session was not a conveyance of land, they simply  
25 bought land from the tribe.

1 QUESTION: Ceded.

2 MR. STRACK: Got a cession of land from the  
3 tribe but they never exercised any ownership right over  
4 that little corner of the lake. That was part of that  
5 Harrison cession. They never conveyed it to anybody.

6 QUESTION: And how about Post the Frederick Post  
7 property.

8 MR. STRACK: The Post cession occurred in the  
9 1880 -- 1891 Act.

10 QUESTION: So is it your position that both of  
11 those are void, that there was no authority because Idaho  
12 had already become a state.

13 MR. STRACK: First of all, on the Harrison  
14 cession, I don't think that would be void because they  
15 were simply changing the boundary across a navigable  
16 waterway. They could do that today if they wanted to and  
17 we would have no problem with that if they wanted to take  
18 a portion of the lake out of reservation. We would have a  
19 problem if they attempted to convey it to somebody, but  
20 they didn't do that in --

21 QUESTION: But if the tribe doesn't own it, I  
22 don't see how you could take the position that the  
23 conveyance by them would be valid. I don't understand.

24 MR. STRACK: It's a simple cession. I think the  
25 tribe could agree that we're going to cede this portion of



1 the lake out of the reservation.

2 QUESTION: Something they don't own.

3 MR. STRACK: Yes. I think it's a jurisdictional  
4 boundary, not just a property boundary so they can  
5 certainly say yes, we'll agree to moving this  
6 jurisdictional boundary over to this part of the lake, and  
7 I don't think that would have any violation of the state's  
8 rights under the equal footing doctrine.

9 QUESTION: You're making a distinction between  
10 property and regulation and I gather from your answers so  
11 far what you're saying is property rights are not at  
12 stake, only sovereign rights to police, is that accurate?

13 MR. STRACK: Well, Justice Ginsburg, the way I  
14 view submerged lands is that they're a blend of sovereign  
15 rights and property rights, and so -- but there is  
16 examples where if there is a conveyance of property and a  
17 conveyance of sovereignty, the submerged lands go with the  
18 sovereignty because they're an attribute of sovereignty.  
19 It's a very loose situation. But what I was talk --  
20 referring to before was the fact that reservation  
21 boundaries are not just property boundaries, they're also  
22 jurisdictional boundaries, especially nowadays where we  
23 have allotted reservations such as this one, and so they  
24 can move the reservation boundary without necessarily  
25 applying anything as to property rights on either side of

1     that --

2                   QUESTION:  What about as to sovereignty rights?  
3     When you say jurisdictional boundary, I assume you mean a  
4     boundary of sovereignty.  You don't mean that?

5                   MR. STRACK:  Justice Scalia, yes, I do mean a  
6     boundary of sovereignty.

7                   QUESTION:  You do mean that.  Well, then, that  
8     brings back the question of how the tribe could cede  
9     jurisdictional rights without ceding sovereign rights.

10                  MR. STRACK:  I think in the case of the Harrison  
11     cession, Justice Scalia, again there was no exercise of  
12     property rights once that cession occurred but --

13                  QUESTION:  But we're not talking about property  
14     rights.  We're talking about sovereignty rights, aren't  
15     we?

16                  MR. STRACK:  That's correct.

17                  QUESTION:  And you acknowledge that the  
18     consequence of the cession was an alteration of  
19     jurisdiction, which I assume is the same as an alteration  
20     of sovereignty.

21                  MR. STRACK:  Justice Scalia, I think I see the  
22     source of your confusion and perhaps I could clear that up  
23     a bit.

24                  QUESTION:  I hope so.

25                  MR. STRACK:  And the fact is that within an

1 Indian reservation there is a shared sovereignty. State  
2 sovereignty extends over jurisdictions, but so does  
3 federal sovereignty, and so a jurisdictional line as I'm  
4 speaking of it here would be a line wherein in this would  
5 define Indian country in which the Federal Government  
6 would have perhaps special preemptive powers over State  
7 sovereignty. We don't view this as an either/or situation  
8 where you either have State sovereignty or you have  
9 Federal sovereignty. There's always going to be shared  
10 sovereignty within Indian country, and as a matter of fact  
11 here, there's numerous examples of this kind of shared  
12 sovereignty or special beneficial rights that tribes own  
13 in sovereign lands without defeating State title.

14 I think a wonderful example is the usual and  
15 accustomed fishing right that many tribes have in the  
16 Northwest and there they have the right to fish at these  
17 places, occupy these places, it's a special right in  
18 submerged lands but it does not defeat State sovereignty  
19 over those lands. And so certainly there's a number of  
20 examples where we have this beneficial interest in a tribe  
21 that does not necessarily imply anything as far as a  
22 State's sovereign right to regulate itself.

23 QUESTION: It also doesn't apply anything as to  
24 the tribal sovereignty. I mean that's the source of my  
25 confusion. You don't think that sovereignty is at issue

1       when there are just the fishing rights involved, correct?

2               MR. STRACK: I think that would be correct,  
3       Justice Scalia.

4               QUESTION: You get to the 1899 Act, as I  
5       understand it the premise of the 1899 Act was that the  
6       United States would not take any portion of the  
7       reservation except by agreement; is that correct.

8               MR. STRACK: They would not take the portion  
9       that they were authorized to purchase except by agreement  
10      and that would have been the timber and mineral lands,  
11      yes.

12              QUESTION: Well, and are you saying that the --  
13      that the Act had no significance for any other portion of  
14      the reservation?

15              MR. STRACK: In terms of submerged lands, I  
16      think, Justice Souter, that is what we are submitting,  
17      that this was an act that sought diminishment of the  
18      reservation and Congress knew that it would be focused on  
19      the northern part of the reservation and they knew that  
20      the northern part of the reservation contained submerged  
21      lands. That was all contained in the 1888 report to  
22      Congress. But, in seeking that diminishment, they did not  
23      authorize the purchase of submerged lands, so how could  
24      they seek diminishment --

25              QUESTION: Do we know, is that true as a matter

1 of law, I mean couldn't submerged lands also have mineral  
2 deposits or have been thought to have mineral deposits and  
3 therefore be subject to the purchase power under the  
4 statute?

5 MR. STRACK: There's no evidence at all in the  
6 record, Justice Souter, that Congress believed these  
7 submerged lands to have any mineral value whatsoever.

8 QUESTION: Well, let's assume then that the --  
9 that the Act referred only to lands that were not  
10 submerged lands. Wouldn't it have been very -- a very  
11 strange construction on the intentions and the acts of the  
12 United States to assume on the one hand that with respect  
13 to specified kinds of lands, timber and minerals, it  
14 wouldn't touch the reservation except by agreement, and at  
15 the same time assume that without any agreement and in  
16 fact without any express reference, it was divesting the  
17 tribe of the submerged lands which were also part of the  
18 reservation. Wouldn't that have been -- I mean wouldn't  
19 anyone looking at the Act say gee, if they're not going to  
20 take timber and minerals except by agreement they're not  
21 going to take anything else either. Apparently the only  
22 thing they intend to take, if they can get an agreement,  
23 is timber and minerals. They don't intend to take  
24 anything else and we may safely assume that they won't  
25 except by agreement. Wouldn't that be a fair

1 interpretation of the significance of the 1899 Act.

2 QUESTION: 1889.

3 QUESTION: -- '89 Act.

4 MR. STRACK: Justice Souter, I think we would  
5 disagree for the fact that I -- in fact, it would be  
6 strange if we believed that the tribe had owned these  
7 lands prior to the 1889 Act.

8 QUESTION: Well, I thought it was -- I thought  
9 it was conceded in this case that the reservation included  
10 -- the reservation as originally set aside by executive  
11 order included submerged lands.

12 MR. STRACK: We conceded the fact, Justice  
13 Souter, that the President intended to reserve those  
14 submerged lands but we made that concession in light of  
15 the trial court's finding that the President was not  
16 authorized to permanently reserve those lands.

17 QUESTION: Well, but he wasn't authorized  
18 permanently to reserve anything, I presume, was he? The  
19 submerged lands are in the same position as any other  
20 portion of the reservation, isn't that so?

21 MR. STRACK: No, I think I would disagree with  
22 that, Justice Souter, because I think submerged lands are  
23 in a special status. Certainly the President has the  
24 authority to set aside lands, prevent settlement on those  
25 lands, but submerged lands usually are not public lands in

1     that sense.

2                   QUESTION:  What about heavenly authority?

3                   QUESTION:  I don't see then why you made the  
4     concession.

5                   MR. STRACK:  We made the concession that he  
6     intended to reserve the submerged lands because that was  
7     basically a factual finding and we did not view it  
8     significant in light of the fact that you would have to  
9     have the subsequent congressional ratification and we  
10    wanted to focus the Court of Appeals on this second  
11    element of the Alaska test which is the need for  
12    ratification.

13                  QUESTION:  Okay, but before you get to the  
14    second element I just want to get clear on the terms that  
15    are being used.  You conceded that the President intended  
16    to include submerged lands in the reservation and I take  
17    it you don't dispute the fact that the commissioner had by  
18    this time filed a -- a report saying that submerged lands  
19    were included in the reservation.  Isn't it therefore fair  
20    to assume that when Congress was talking about the  
21    reservation in the 1889 Act, that it was talking about the  
22    reservation as so understood, i.e., the reservation as the  
23    President intended to create it and as the commissioner  
24    had described it to include submerged lands.

25                  MR. STRACK:  Justice Souter, we certainly

1 recognize that Congress was looking at the reservation  
2 boundaries as established and working on the basis of the  
3 information that was provided in the 1888 report. But we  
4 would agree with that, but we would question whether or  
5 not Congress actually approved that inclusion because of  
6 this omission of submerged lands.

7 QUESTION: Well, I'm just asking right now what  
8 Congress meant when it was talking about the reservation  
9 in the 1889 Act, and isn't it reasonable to suppose that  
10 it meant by reservation the reservation as intended, the  
11 reservation as described by the commissioner, i.e., the  
12 reservation that included submerged lands. Isn't that  
13 probably what it meant by the word?

14 MR. STRACK: Looking at the 1889 Act as a whole,  
15 Justice Souter, I don't think I would agree that statement  
16 because of this omission of the submerged lands to my mind  
17 raises a question as to whether Congress recognized that  
18 inclusion. And if we look back at the 1888 report, it  
19 does not mention submerged lands per se. It does not  
20 mention of bed of the lake. It mentions the fact that the  
21 reservation embraces these navigable waters.

22 QUESTION: Why do you have to take that  
23 position? I mean, can't you acknowledge that when  
24 Congress was speaking about the reservation it was talking  
25 about the reservation that President Grant had created,



1 but that Congress knew that that reservation was not  
2 legally effective to create it because it needed  
3 ratification which had not occurred.

4 But nevertheless Congress, out of an abundance  
5 of goodwill to the Indians, was not willing to go back on  
6 the 1873 executive order without the express consent of  
7 the Indians, but that still doesn't amount to any  
8 effective action by Congress creating the reservation.

9 I mean, your basic point is that the 1873  
10 executive order doesn't do anything without Congressional  
11 ratification, which never occurred. So does it make any  
12 difference whether Congress in the 1889 Act viewed the  
13 1873 order which it knew was ineffective absent  
14 ratification as including the submerged lands or not?  
15 What difference does it make?

16 MR. STRACK: Justice Scalia, I don't think it  
17 makes any difference. I think you're correct in that  
18 assumption.

19 QUESTION: Might it not make a difference in  
20 what Congress thought it was doing when it was in fact  
21 passing the Statehood Act which referred to reservations  
22 of the -- reservation of the Indian reservation? Might  
23 that not inform us in what Congress had in mind?

24 MR. STRACK: Justice Souter, when I say it  
25 doesn't make a difference I'm referring to the second

1     prong of the Alaska test. Under that prong you would  
2     still have to have this affirmative declaration of intent.

3             QUESTION: Well, we do because in Alaska we're  
4     dealing with. In effect, a two-party situation. We're  
5     dealing with the relationship between the national  
6     government and the new State. Here we're dealing with a  
7     three party situation and one of the things I would think  
8     that would be an indication of what Congress meant in  
9     dealing with the State was what Congress understood in its  
10    dealings with the Indians.

11            MR. STRACK: Your Honor, I would agree with that  
12    but I think an essential background fact that perhaps  
13    we're not taking into account is the fact that executive  
14    orders at this point were not thought to convey any  
15    property interest to tribes.

16            QUESTION: Mr. Strack, did the Court of Appeals  
17    in its opinion place any reliance on the Statehood Act?  
18    As I read it, it didn't, did it?

19            MR. STRACK: Your Honor, it mentioned the  
20    Statehood Act but it did not rely on it for a finding that  
21    State title had been defeated, that's correct.

22            QUESTION: Mr. Strack, do I understand your  
23    position correctly that it's the 1889 agreement, the  
24    ratification of that, if that had come nine months  
25    earlier, if that had come before statehood instead of

1 after you would concede that the tribe, United States in  
2 trust for the tribe, should prevail. Is that what this  
3 whole thing turns on, that it was nine months after rather  
4 than before?

5 MR. STRACK: Justice Ginsburg, I don't think we  
6 would agree with that because if the 1891 Act had in fact  
7 been enacted before statehood, then we would have to look  
8 at this under the conveyance rules of Holt State Bank and  
9 Montana, and there the court said that where a tribe is  
10 simply granted a continuing right of aboriginal occupation  
11 that that right usually would not carry with it title to  
12 submerged lands. It may have an interest in submerged  
13 lands, but not sufficient to defeat State title.

14 And here, all of the rights vested in the tribe  
15 came as a result of the 1887 agreement which provided that  
16 these lands would be held as Indian land which is simply a  
17 restatement of this principle of aboriginal occupation.  
18 There was no additional rights vested in the tribe as the  
19 result of the 1889 agreement.

20 QUESTION: I'm getting confused. You said a  
21 moment ago the 1887 agreement, did you misstate that or  
22 are there two agreements, one 1887 and one 1889?

23 MR. STRACK: Mr. Chief Justice, there is two  
24 agreements here. Maybe I could walk through it.

25 QUESTION: Tell us what they are and what the

1 difference is.

2 MR. STRACK: In 1887, the tribe and the United  
3 States negotiated an agreement that would cede all lands  
4 outside the 1873 boundaries and as part of that agreement  
5 they agreed that the tribe would continue to hold the land  
6 within the reservation as Indian land.

7 Then in 1889 we have the second agreement which  
8 was only a cession agreement specifically limited to  
9 purchase of lands by the 1889 Act and in the agreement  
10 there was no additional rights of conveyance. There's no  
11 language of conveyance in the 1889 agreement itself. It's  
12 simply a quit claim to the northern portion of the  
13 reservation.

14 So whatever rights the tribe holds in the  
15 southern third of the lake and the remainder of the  
16 reservation are necessarily going to be founded in the  
17 language of the 1887 Act which defines the tribe's rights.  
18 And under Montana, where we simply have a continued right  
19 of aboriginal occupation, that type of conveyance to a  
20 tribe would not normally carry with it an interest in a  
21 lake bed that would be sufficient to defeat State title.

22 QUESTION: If it says in this kind of grant,  
23 suppose it said specifically we're going to give to the  
24 Indian tribe and not to Idaho the right to use navigable  
25 waters on the lake would that be sufficient to carry with

1 it submerged lands?

2 MR. STRACK: Justice Breyer, I would say it  
3 would not because again that would simply be a beneficial  
4 interest and we have numerous examples of where tribes  
5 have beneficial interest in submerged lands without a  
6 defeat of State title. For example, they could reserve an  
7 exclusive fishing right. They could reserve a fishing  
8 right in common with other people.

9 But I think the point I want to make is that  
10 because of this presumption against defeat of State title  
11 that we should always assume that Congress would try to  
12 accommodate tribal rights and State interest in public  
13 ownership of these lands to the extent possible. And here  
14 where all we have is a simple right of use, that would  
15 probably not be sufficient. Again, I think it's worth  
16 pointing out that in neither of these agreements is there  
17 a fishing right provided to the tribe expressly, which is  
18 very unusual for a northwestern tribe.

19 I think that admission by itself is very telling  
20 in the legislative history leading up to the 1889 Act and  
21 the 1889 agreement, again we see numerous references to  
22 this tribe as a farming tribe, not as a fishing tribe.

23 QUESTION: So what would it have taken, if the  
24 1873 reservation had been ratified, would that have done  
25 it, would there then be no dispute? I'm trying to

1 determine what it is in the State's view that would have  
2 plainly conferred this submerged land right on the tribe.

3 MR. STRACK: Justice Ginsburg, I think it would  
4 take something akin to section 6 C which was reviewed in  
5 the Alaska case which would be reratified as reservation  
6 and prevent any passage of lands to the future State of  
7 Idaho.

8 QUESTION: So ratifying the 1873 reservation  
9 executive order, that would not have been sufficient  
10 either?

11 MR. STRACK: I don't believe it would be a  
12 ratification just by itself because the courts always look  
13 for that additional affirmative language somehow, like in  
14 the Choctaw case where you have fee title but it was  
15 suggested that even that fee title might not be sufficient  
16 because the court then relied on that passage which said  
17 no part of this reservation shall ever be part of any  
18 future State. And again, we see that in the Alaska case,  
19 none of these lands will ever be passed to the future  
20 State.

21 QUESTION: And that position explains why you  
22 were willing to leave uncontested any of the fact findings  
23 and said the only question is what did Congress do. You  
24 didn't question what the executive meant or any of the  
25 fact findings but only what Congress did or didn't do.

1 MR. STRACK: Your Honor, that's correct.

2 QUESTION: In terms of what Congress set to do,  
3 should it make a difference whether we're talking about a  
4 reservation which on the one hand has simply been set  
5 aside by executive or Congressional action to which  
6 Indians were moved as in the Cherokees and so on or  
7 whether we're talking about a reservation which in fact  
8 covers land to which the Indians have an aboriginal title  
9 or an aboriginal claim which I take it is the case here.

10 MR. STRACK: Justice Souter, I believe the  
11 distinction the court has made in the past is between an  
12 affirmative grant of rights and a continuing aboriginal  
13 occupation of rights. I don't know that it would make a  
14 difference if the tribe had not aboriginally occupied the  
15 territory or not. Certainly what it looks for is that  
16 affirmative grant in that language which says that no  
17 party's land shall ever pass to the future State. I'd  
18 like to reserve the remainder of my time.

19 QUESTION: Very well Mr. Strack. Mr. Givens,  
20 we'll hear from you.

21 ORAL ARGUMENT OF RAYMOND C. GIVENS, ESQ.

22 ON BEHALF OF THE RESPONDENT COEUR D'ALENE TRIBE

23 MR. GIVENS: Mr. Chief Justice, may it please  
24 the court:

25 There are six prestatehood acts of Congress or

1 items that occurred that Congress was specifically  
2 informed of that establish that the State title to these  
3 submerged lands was defeated at statehood.

4 QUESTION: When you say, Mr. Givens, that  
5 Congress was specifically informed of, I gather you're not  
6 suggesting that Congress took any action in response to  
7 them.

8 MR. GIVENS: Oh, yes they did.

9 QUESTION: Okay, well then, are these Acts of  
10 Congress you're talking about.

11 MR. GIVENS: Some are and some are information  
12 provided to Congress that form the basis for those  
13 Congressional Acts, Your Honor. Let me run through them  
14 briefly. I think --

15 QUESTION: Well, do that, please.

16 MR. GIVENS: -- it will become clear. The first  
17 is the 1873 agreement, executive order, and the reports of  
18 that. The executive order, of course, established the  
19 reservation, withdrew it and set it apart, set the  
20 boundaries and the reports provided that information to  
21 Congress. So Congress knew about it from the beginning.

22 QUESTION: Well, you know, of what significance  
23 is the, quote, the language, quote, Congress, quote, knew  
24 about it from the beginning. Are you suggesting that every  
25 member of Congress read these reports?



1                   MR. GIVENS: Your Honor, Congress as an  
2 institution had knowledge of the reservation and the  
3 specific --

4                   QUESTION: Well, what is your authority for  
5 saying that it is crucial whether or not Congress had  
6 notice.

7                   MR. GIVENS: Because in --

8                   QUESTION: Your case authority.

9                   MR. GIVENS: Well, what is important, Your  
10 Honor, is that in the later acts Congress by statute  
11 specifically referred to three times before statehood  
12 either the Coeur d'Alene reservation, the present Coeur  
13 d'Alene reservation or talking about the tribe and its  
14 reservation, so Congress knew of the reservation and they  
15 knew of it because of the second one Your Honor, and that  
16 was the 1883 survey and plat of the reservation which is  
17 at page 49 of the record.

18                  QUESTION: And how did Congress know of that  
19 survey?

20                  MR. GIVENS: They knew of it, Your Honor,  
21 because of the third one and the third one is in 1888 the  
22 Senate made specific requests of the Department of  
23 Interior concerning the reservation asking is the lake in  
24 the reservation, and if so, should we get any of it back,  
25 and they were provided, the Department of Interior

1 provided Congress with that same plat that showed the  
2 detail of the lake.

3 QUESTION: Was this a joint resolution of the  
4 Senate?

5 MR. GIVENS: It was only of the Senate, it was  
6 not of the House, but prestatehood the record also  
7 establishes, Your Honor, in the March 1890 House report  
8 that the House also had knowledge of that and the House  
9 March report makes that clear.

10 QUESTION: Well, you say the House report showed  
11 that the House had not -- was this a report of the full  
12 House or of a committee of the House.

13 MR. GIVENS: This was a report of the Committee  
14 on Indian Affairs of the House, Your Honor.

15 QUESTION: On that specifically, that's why I  
16 asked the question, I think Mr. Strack said, well, the  
17 1887 is it, the question that they put in 1888 was does it  
18 include any portion of the navigable waters of the lake  
19 and then it comes back it does include all the navigable  
20 waters. But he said the navigable waters has nothing to  
21 do with the submerged land, that it's, maybe they gave him  
22 the navigable waters but that's not the submerged land  
23 underneath the navigable waters. I think that was his  
24 answer.

25 I'd like you to respond to that because all the

1 documents you rely upon refer to navigable waters, as none  
2 of them says anything about submerged land.

3 MR. GIVENS: In spending ten years with these  
4 documents, there can be really no dispute that whether  
5 it's called navigable waters or submerged lands or lake  
6 just like it's called land or ground or soil the meaning  
7 of the -- was the same throughout.

8 QUESTION: I haven't spent ten years with them  
9 so -- so I mean, and they're arguing the opposite --

10 MR. GIVENS: Yeah.

11 QUESTION: And therefore I'd like to know what  
12 specifically it is that allows me to say that those words  
13 navigable waters includes submerged lands.

14 MR. GIVENS: It is this, Your Honor, and that's  
15 why this survey and plat is so important in that the -- in  
16 the sur -- in the plat, in the survey they calculated the  
17 actual acreage and in 1888 the Department of Interior did  
18 an interesting thing. Not only did they provide Congress  
19 with the plat, they provided Cong -- or the Senate with  
20 another map that showed the acreage and actually the  
21 acreage is right over the top of the lake and this is at  
22 135 of the record, and Coeur d'Alene reservation is  
23 written right through the lake and in the text that they  
24 talk about of that '88 question and answer which is the  
25 third of these items, they use the word embrace both for

1 the acreage and for the navigable waters.

2 QUESTION: Mr. Givens, I don't think there's a  
3 big dispute about the extent of the reservation. I mean  
4 that isn't really what the dispute's about. The dispute  
5 is whether, when you describe the boundaries of the  
6 reservation, it means that the Indians have aboriginal  
7 occupation rights or whether it means the extraordinary  
8 thing that when we create a new State, the land under  
9 navigable waters will not go to the new State, and how do  
10 you get that out of simply the description of the  
11 boundaries of the reservation?

12 MR. GIVENS: You get to that through the next  
13 three items, Your Honor, and they are the '89 statute  
14 where it talked about its reservation and they knew that  
15 reservation included the lake because of the detail in the  
16 plat. They --

17 QUESTION: How do we know that it included the  
18 submerged lands as opposed to the surface of the lake. I  
19 mean, we describe water area in acreage just as well as  
20 land area, so how do you get from acreage necessarily  
21 submerged land?

22 MR. GIVENS: We know that because of the next  
23 item, Your Honor, and that was the two reports in 1890,  
24 and particularly the first one from the commissioner that  
25 said that the United States got back most of the lake but

1 specifically the executive specific report on these  
2 negotiations that included a map again, a second map  
3 showing the reservation boundary dotted line crossing the  
4 lake showing that these submerged lands were part of the  
5 -- more particularly --

6 QUESTION: Well, now, I don't see that it shows  
7 that at all because as I understand it, that map was there  
8 at the time of the negotiations between General Simpson  
9 and a tribal chief whose name I forget and General Simpson  
10 started out with the proposition in those negotiations  
11 that in fact both the Indians and the whites would have  
12 the use of the lake and that led to an immediate  
13 disagreement.

14 The one thing it does seem to show is that  
15 General Simpson did not understand that a line across the  
16 lake necessarily conveyed either an exclusive right to  
17 navigate, let alone land underneath the water.

18 MR. GIVENS: But then, Your Honor, it went on to  
19 say you will still have under the -- if you take this  
20 agreement, you will still have the southern part of the  
21 lake, I think it said the lower part of the lake and the  
22 St. Joseph River, you would still have.

23 QUESTION: That may be, because you would get it  
24 by the agreement and the agreement in fact had not been  
25 ratified by the time of statehood. I mean, I know what he

1     said but its significance for this case, it seems to be  
2     equivocal.

3             MR. GIVENS:  And at statehood what, which is the  
4     final one, or actually just prior to statehood the people  
5     of Idaho ratified the Idaho constitution which disclaimed  
6     any ownership or any jurisdiction over Indian lands until  
7     that title is extinguished by Congress, so the title that  
8     had been the ownership interest that Congress knew of that  
9     had been established by the '73, initially by the 73  
10    executive order, none of the Coeur d'Alene country had  
11    been extinguished, not just --

12            QUESTION:  All right, so you're assuming that  
13    Indian lands in the Idaho Statehood Act referred to lands  
14    as defined by the 19 -- by the 1873 executive order and I  
15    don't -- I don't know why we necessarily should make that  
16    assumption.

17            MR. GIVENS:  Well, one reason to make that  
18    assumption, Your Honor, is the 1887 agreement had a very  
19    unusual clause in it, the reports from the negotiators  
20    explained it was so unusual that the tribe insisted that  
21    the provision be put in that the land could never be sold  
22    or otherwise disposed of without the consent of the tribe,  
23    any part of the reservation.

24            QUESTION:  That was in which agreement; I'm  
25    sorry?

1 MR. GIVENS: Pardon?

2 QUESTION: Which agreement was that in?

3 MR. GIVENS: '87. Article five of the '87  
4 agreement, which is equivalent of fee.

5 QUESTION: Okay, but that -- and once again  
6 that agreement had not been ratified at the time of  
7 statehood; is that correct?

8 MR. GIVENS: It was not ratified at the time of  
9 statehood but what happened with that disclaimer act is  
10 the disclaimer act put all of this on hold. It pushed the  
11 hold button. It said the United States still has  
12 ownership and complete jurisdiction, absolute jurisdiction  
13 is the words out of the --

14 QUESTION: Well, but that took place in 1887 and  
15 1890 Idaho was admitted to the union and a subsequent  
16 Congress can do things differently than an earlier  
17 Congress.

18 MR. GIVENS: Certainly they can, but this is  
19 what Idaho did to itself. Idaho itself adopts its  
20 constitution and says we disclaim it, we don't have any  
21 jurisdiction over it.

22 QUESTION: Yeah, but the question is what are  
23 they disclaiming? Justice Souter asked you a few minutes  
24 ago how do we know that what was defined in the 1873  
25 reservation was what Idaho disclaimed in its 1890

1 constitution?

2 MR. GIVENS: We know because, also because this  
3 '87 agreement specifically refers to the reservation as  
4 Indian lands which is the same word used in the Idaho  
5 disclaimer.

6 QUESTION: Thank you, Mr. Givens. Mr. Frederick,  
7 we'll hear -- did United States have statutory authority  
8 to bring this action, Mr. Frederick?

9 ORAL ARGUMENT OF DAVID C. FREDERICK, ESQ.

10 ON BEHALF OF RESPONDENT UNITED STATES

11 MR. FREDERICK: Yes, we did.

12 QUESTION: What is it?

13 MR. FREDERICK: Well, the statutory authority  
14 would have been under quiet title principles. This -- the  
15 purpose of this action was to quiet title in the lands.

16 QUESTION: So the right to quiet title in lands  
17 which the government claims an interest.

18 MR. FREDERICK: That's correct, Mr. Chief  
19 Justice.

20 QUESTION: Mr. Frederick, can I ask you the  
21 question that was asked of Mr. Strack, why does it matter  
22 to the Indians, they don't want people to have to wear  
23 life jackets, is that -- must be something more than that.

24 MR. FREDERICK: There certainly are very serious  
25 issues at stake here. Tribal ownership of the souther --



1 tribal ownership of the southern third of Lake Coeur  
2 d'Alene implicates such issues as the extent to which the  
3 tribe can have a role in anti-pollution measures for the  
4 lake, what consequences would flow from pollution of  
5 tribally owned lands, as well as to the extent to which  
6 the tribe could regulate non-Indian uses on the southern  
7 third of the lake.

8 QUESTION: Could the tribe engage in dredging  
9 activities that would affect either the water quality or  
10 the level of the portion of the lake that is not within  
11 the tribe's jurisdiction even under your theory?

12 MR. FREDERICK: Well, it would have to work with  
13 the Corps of Engineers which would have paramount  
14 authority under various laws, but yes, that would be one  
15 of the questions.

16 QUESTION: Why does the United States have  
17 paramount authority under various laws?

18 MR. FREDERICK: Well under the Rivers and  
19 Harbors Act the Corps of Engineers has control over  
20 navigable waterways.

21 QUESTION: Whether the State or the tribe?

22 MR. FREDERICK: That's correct. That's correct.  
23 But from the United States' point of view one of the  
24 reasons why this case is so important is because it  
25 involves the good faith of the United States. In 1891

1     when Congress ratified this statute it ratified  
2     understandings that had been reached between United States  
3     negotiators and it is unthinkable that Congress under the  
4     equal footing doctrine would have conveyed the submerged  
5     lands to all of the lake while simultaneously negotiating  
6     to ratify an agreement that would convey the southern  
7     third to the tribe.

8             QUESTION:  You know, there's certainly something  
9     to what your say, but that just totally disparages the  
10    equal footing doctrine as if it's of no consequence and it  
11    seems to me it's equally possible that Congress may have  
12    been at varying states of mind in varying years.

13            MR. FREDERICK:  Mr. Chief Justice, here the  
14    negotiating history makes quite clear on page 183.

15            QUESTION:  Yeah, but the idea that every member  
16    of Congress knew that negotiating history when they voted  
17    to admit Idaho as a state doesn't make any sense at all.

18            MR. FREDERICK:  The Statehood Disclaimer Act,  
19    Mr. Chief Justice, disclaims --

20            QUESTION:  The ninth circuit didn't rely on that  
21    at all.

22            MR. FREDERICK:  I recognize that, but what it  
23    does show is Congress' intent to ratify the Constitution  
24    disclaiming that the State would not have any interest in  
25    lands owned or held by the United States -- held by the

1       tribe until the United States extinguished title.

2               QUESTION: We don't know that the reference in  
3       the Statehood Act was to the same lands as in the 1873  
4       reservation.

5               MR. FREDERICK: It was well-known, Mr. Chief  
6       Justice.

7               QUESTION: Well known to whom?

8               MR. FREDERICK: To everyone who was involved in  
9       the negotiations and the dealings between the United  
10      States and the tribe.

11              QUESTION: Well, but that doesn't mean that  
12      every member of Congress, and that's the question here,  
13      what did Congress mean when it admitted Idaho to the  
14      union?

15              MR. FREDERICK: In 1889, Mr. Chief Justice,  
16      Congress passed a law that authorized negotiations for  
17      cessions of the Coeur d'Alene reservation by the tribe as  
18      such tribe shall consent to sell.

19              QUESTION: And it was never ratified.

20              MR. FREDERICK: It was ratified six months after  
21      the Statehood Act.

22              QUESTION: Yes, but that's too late under the  
23      equal footing doctrine.

24              MR. FREDERICK: The question is whether Congress  
25      had manifested its intent to defeat State title and under

1 Alaska, the test is whether Congress intended to retain  
2 the executive reservation and knew that reservation  
3 contained submerged lands.

4 QUESTION: How do you manifest your consent  
5 when, by a subsequent act, you're relying on the  
6 negotiations and the negotiations are not a manifestation  
7 of consent? You need something before the Statehood Act  
8 that shows the consent of Congress.

9 MR. FREDERICK: The '89 Act does that by showing  
10 that Congress recognized the present reservation which was  
11 the reservation embraced within the 1873 executive order  
12 and the '86 Act which authorized the negotiations for the  
13 lands outside the present reservation.

14 QUESTION: They don't necessarily show that they  
15 recognize the kind of title that could not be defeated by  
16 a subsequent creation of a state. They just show that the  
17 Indians had this as their reservation.

18 MR. FREDERICK: As the executive had defined it,  
19 Justice Scalia, and that's the key point here. The State  
20 has conceded that the executive order reservation is what  
21 it is and those boundaries that were defined in the  
22 geological survey had angles drawn in the lake itself,  
23 it's simply not tenable to suggest that when the lines are  
24 bent and a point is drawn in the lake and that the line  
25 crosses the lake that the lands underneath those navigable

1 waters are not also included.

2 QUESTION: Well, hy is that so when we have said  
3 expressly in Montana and in Utah that the fact that a lake  
4 is included within the boundaries of the reservation does  
5 not itself mean that the submerged lands are also within  
6 the reservation? We've been very clear on that in Alaska  
7 and Alaska repeated that.

8 MR. FREDERICK: In Alaska, however, and the  
9 reason why this is closer to Alaska than it is to Utah and  
10 to Montana is that the line actually was drawn on the  
11 submerged lands as it was in Alaska where the line was  
12 drawn out in the coastal waterway area. In Montana the  
13 reservation simply crossed a river, lines crossed the  
14 river and there was no survey in Montana that this Court  
15 discusses that would show acreage as being included.

16 In fact, Montana is distinguishable there  
17 because the rights that were given by the treaty of 1868  
18 only were residential rights.

19 QUESTION: Well, how can you tell that this  
20 particular reservation the line was drawn across the  
21 submerged lands? It could just as easily have referred to  
22 the navigable waters.

23 MR. FREDERICK: Because the map and the  
24 geological survey say so. If I could direct the court's  
25 attention to two maps, the first is on page 135 of the

1 joint appendix and in -- that map was given to Congress in  
2 response to the Senate resolution asking specifically does  
3 the reservation include the navigable waters.

4 QUESTION: Yes, but that's -- I just looked at  
5 that because it was decided and I can't find a word there,  
6 of course they get the navigable waters. That's why I  
7 wanted to ask and Mr. Strack said that the fact that they  
8 are given navigable waters means that they can go and fish  
9 on the lake, it doesn't mean they have a right to the  
10 submerged lands, that's what I took him as saying. Now,  
11 that, therefore that to me is an important question to me  
12 that I'm asking. What reason is there for thinking that  
13 if they gave them 42 documents, a hundred documents, a  
14 million documents, say you have navigable waters, what  
15 reason is there for thinking that that includes submerged  
16 lands?

17 MR. FREDERICK: Two reasons, first the executive  
18 enforced anti-liquor prohibitions on Indian country and as  
19 this court decided in Bates versus Clark in 1877, Indian  
20 country for purposes of that law was defined until tribal  
21 ownership was extinguished. The executive treated that  
22 land on the lake as tribal land for enforcing the Indian  
23 country prohibitions on liquor. Secondly --

24 QUESTION: I'm sorry, that doesn't get me  
25 underneath the water unless they're wearing diving

1 helmets.

2 MR. FREDERICK: No, it does get you under the  
3 water because the enforcement was not occurring on that  
4 sliver of the lake that was not within the reservation.  
5 Moreover, the Senate said there are problems with trespass  
6 on the lake by whites not authorized to be within the  
7 reservation and the concept of trespass is traditionally  
8 thought of as ownership of the property.

9 QUESTION: Well, was the -- were they snorkeling  
10 on the submerged lands? I mean surely they were talking  
11 about trespass on the water of the lake.

12 MR. FREDERICK: Yes, and the question, Mr. Chief  
13 Justice, is who owns the lake and in 1889 when General  
14 Simpson negotiated with the tribe they drew the line from  
15 one part directly across the lake to a different part  
16 directly across the lake. That map which is set out at  
17 page 202 of the joint appendix --

18 QUESTION: Let me try it once more because I was  
19 thinking my answer when I asked it would be nobody has  
20 ever doubted that if you give navigable lands to the  
21 Indian tribe you're giving them the submerged land, I mean  
22 nobody has ever tried to drive a wedge between navigable  
23 waters and submerged land, but that wasn't the answer I  
24 got. I got the answer yes, they're totally different. So  
25 this case has been around for some time and I guess by now

1     you've thought of what's the response to that and that's  
2     what I'm trying to get.

3                 MR. FREDERICK: The submerged lands were  
4     important to the tribe for a number of different reasons.  
5     Unlike the Crow tribe in Montana, this tribe depended on  
6     water resources and they recognized the value of submerged  
7     lands even before the 1873 executive order when they made  
8     an agreement with a man named Post to convey the river  
9     channels which can be nothing but submerged lands for the  
10    purpose of Post building a mill on that site. This tribe  
11    harvested water potatoes, it built fishing weirs that were  
12    affixed to the submerged lands of the lake and the  
13    associated waterways and the executive knew that.

14                When they negotiated for the land, Chief Seltice  
15    insisted that the line be drawn in such a way that the  
16    tribe would understand what was theirs. And General  
17    Simpson in his response on page 183 of the joint appendix  
18    says quite clearly after this agreement when the line is  
19    redrawn you shall have the lower part of the lake. That  
20    could not be clearer that the executive understood that  
21    the submerged lands south of where the line was to be  
22    drawn were to be owned by the tribe.

23                So the question then becomes this is in a sense  
24    an amalgam of Alaska and Utah lands because had this  
25    occurred before statehood this would have been a



1 conveyance case and the question would have been what did  
2 Congress intend by the conveyance. And I would direct the  
3 court to the 1987 agreement which we have set forth in the  
4 --

5 QUESTION: 1887.

6 MR. FREDERICK: 1887 agreement. On page 93 the  
7 language here is quite clear. It says, quote, it is  
8 agreed that the Coeur d'Alene reservation shall be held  
9 forever as Indian land and as homes for the Coeur d'Alene  
10 Indians. And then skipping down a few lines, and no part  
11 of said reservation shall ever be sold, occupied, open to  
12 white settlement or otherwise disposed of without the  
13 consent of the Indians residing on said reservation.

14 QUESTION: And that was ratified in 1891 after  
15 Idaho was already a State.

16 MR. FREDERICK: That's correct, Justice Scalia,  
17 but --

18 QUESTION: So I mean, that's a lovely agreement  
19 but it's not an agreement by Congress.

20 MR. FREDERICK: Justice Scalia, in the Alaska  
21 case the executive had set apart certain lands for a  
22 wildlife refuge which had not been finalized prior to  
23 Alaska statehood, but this court held that that executive  
24 reservation because Congress understood that it included  
25 submerged lands and was to meet the purposes behind the

1 reservation defeated the State --

2 QUESTION: There you had an actual reservation  
3 of jurisdiction on the part of the United States that was  
4 not -- not present here in the act.

5 MR. FREDERICK: To the contrary, Mr. Chief  
6 Justice. Here the 1873 executive order set apart the  
7 reservation.

8 QUESTION: I mean in the Statehood Act.

9 MR. FREDERICK: And in this case the disclaimer  
10 clause says until the United States extinguishes title to  
11 lands owned or held by Indians, the State of Idaho will  
12 disclaim all right and title to that land. The executive  
13 order reservation boundaries were well-known well before  
14 statehood and --

15 QUESTION: What do you make the argument that  
16 the reference to title doesn't cover this because  
17 submerged lands really is an incident of sovereignty, it  
18 is jurisdictional rather than proprietary.

19 MR. FREDERICK: It is proprietary in the sense  
20 of ownership, Justice Souter. The fact that the State may  
21 have some regulatory interest even over the southern third  
22 of the lake under even our theory because under the  
23 Mescalero Apache Indian case the State might still have a  
24 regulatory role, given a range of factors that would be  
25 involved in even if the tribe owns the southern third.

1                   But the important point is that we do know that  
2     it included submerged lands because the Post, the  
3     Frederick Post patent expressly included river channels  
4     which is submerged lands when they drew the Harrison  
5     cession in 1894. At first they started it, it meandered  
6     to the coast but because the town of Harrison wanted to  
7     build docks and wharfs, they redraw the line at a right  
8     angle in the middle of the lake so that the town of  
9     Harrison could build out that wharfage on to the submerged  
10    lands of the lake. So in this case the boundary lines are  
11    quite clear that the parties understood submerged lands  
12    were at issue and they drew the lines accordingly.

13                  QUESTION: The language in the Statehood Act  
14    itself which through cross-reference to the understanding  
15    would be taken to have reserved the submerged lands for  
16    the Indian tribes.

17                  MR. FREDERICK: No, the language that is the  
18    disclaimer clause that we have set out and I can direct  
19    the court to that language which we have put in the joint  
20    appendix, it's on page -- sorry, that language is on page  
21    371 of the joint appendix and it provides as I have said,  
22    but I would point out that at this time Idaho had a number  
23    of Indian tribes that were resident there and so it would  
24    be unusual for a State and its constitution to single out  
25    a particular tribe when there are multiple tribes, when

1 the purpose of this disclaimer clause was to emphasize  
2 that the State of Idaho would renounce and forever  
3 disclaim all right and title to the unappropriated public  
4 lands that were owned by the United States until such  
5 title had been extinguished by the United States.

6 QUESTION: May I just ask this question and be  
7 sure I have your theory. I don't see how an Idaho  
8 disclaimer can be the ratification by Congress that is  
9 necessary here. So you're actually relying on the  
10 Statehood Act itself as a congressional act that did the  
11 job despite the fact the ninth circuit did not?

12 MR. FREDERICK: The State -- no, two things,  
13 Justice Stevens. Our theory depends upon the court  
14 recognizing the executive reservation through statehood  
15 which the '89 Act is clear --

16 QUESTION: But would it be enough if Congress  
17 knew all about it but did nothing but perfect and clear --  
18 every Cong -- every congressperson was aware of the  
19 executive's view of the reservation, would that have been  
20 enough?

21 MR. FREDERICK: That would have raised an Alaska  
22 question and I think that that would have been enough in  
23 light of the executive having set forth the boundary.  
24 What the Statehood Act does for us is that it shows what  
25 Congress intended because Congress specifically adopted

1 the Idaho constitution in the Statehood Act. So that is  
2 also an expression of congressional intent that Congress  
3 ratified and adopted the Idaho constitution and the  
4 Statehood Act which contained the disclaimer.

5 QUESTION: How does it do it? How -- what's the  
6 language that Congress passes that incorporates the  
7 provision which you read to me which wasn't from the  
8 Congressional resolution but was from the Idaho  
9 constitution which Idaho says doesn't mean this now.

10 MR. FREDERICK: It's in the Idaho admission  
11 bill.

12 QUESTION: What does it say? I mean, is there  
13 --

14 MR. FREDERICK: Well, it says section one, the  
15 State of Idaho is hereby declared to be a State and that  
16 the constitution which the people of Idaho have formed or  
17 themselves be in the same is hereby accepted, ratified,  
18 and confirmed. So Congress in section one of the Idaho  
19 Admission Act ratified the Idaho constitution which  
20 contained the disclaimer clause language.

21 QUESTION: Mr. Frederick, can I come back to  
22 this pollution thing? Part of Lake Coeur d'Alene has, I  
23 understand, is badly polluted from mine tailings, some  
24 such thing; is that stuff on the portion that's at issue  
25 here or is it on another portion?

1                   MR. FREDERICK: It's throughout the lake,  
2     although the principal portion of the polluted part is on  
3     the northern part of the lake. The southern part at least  
4     I'm reliably informed, and this is matter that's outside  
5     of the record, is not as polluted, although it is subject  
6     to pollution problems and issues.

7                   I would like to just make a couple of points in  
8     conclusion and that is the Idaho issue in terms of  
9     submerged lands is also implicated by the 1888 railroad  
10    statute which Congress passed and that passage which came  
11    after the Senate resolution asking about the navigable  
12    waters included a right of way that crossed across Lake  
13    Coeur d'Alene to a point on the lake itself and requires  
14    that the secretary provide compensation to the tribe for  
15    that easement and it further provided that no rights for  
16    the railroad shall accrue unless and until they obtained  
17    the consent of the tribe.

18                  So read together and this court's cases makes  
19    very clear two overarching propositions, that these Indian  
20    statutes should be read as a series and that doubts should  
21    be construed in favor of the tribe suggest that Congress  
22    did understand that the submerged lands were at stake,  
23    that the tribe had control over those submerged lands and  
24    that the United States would not take them without the  
25    consent of the tribe. If there are no further questions.

1                   QUESTION: Thank you, Mr. Frederick. Mr. Strack,  
2     you have four minutes remaining.

3                   REBUTTAL ARGUMENT OF STEVEN W. STRACK, ESQ.

4                   ON BEHALF OF THE PETITIONER

5                   MR. STRACK: On this question of whether or not  
6     there's a difference between beds and navigable waters, I  
7     think the court has made that very clear in the Alaska  
8     decision where the court looked to purposes that required  
9     ownership of the beds themselves; for example, the need to  
10    own the bed to preserve the oil deposits.

11                  QUESTION: We've just heard about wharfs, about  
12    harvesting potatoes, about grants for the mill, does that  
13    indicate the sort of purposes that we thought were  
14    important in Alaska?

15                  MR. STRACK: Looking back at the 1889 Act I  
16    don't think any of those purposes are evident on the face  
17    of the 1889 Act. If there was a purpose and the only  
18    purpose they have identified is fishing, and that itself  
19    does not require ownership of the beds of the navigable  
20    waters themselves unless they're fishing methods for some  
21    reason required ownership of the bed like a fishing weir,  
22    but we don't see any evidence that they were doing that in  
23    1889.

24                  So again I think we need to look at the purposes  
25    here and see whether or not those require ownership of

1 navigable waters, ownership of the beds of navigable  
2 waters as opposed to the waters themselves.

3 I'd like to go back too to the question  
4 practical effect because I think it obviously is a concern  
5 here. And I think it's important to note that all of the  
6 lands along the shore of the lake are owned by non-Indians  
7 and that's been true since 1910 when the reservation was  
8 allotted.

9 Those lands, those people have riparian rights  
10 which they look to the State to protect and define. Many  
11 of those people have encroachments on the lake and that's  
12 where our ownership of the beds comes into play because we  
13 regulate those encroachments so that they do not go out  
14 far enough to impair navigation and other uses of the  
15 lake.

16 So all of these people along the lake, now their  
17 riparian rights are called into question because the State  
18 no longer owns the beds of the lake according to the  
19 decree and so we don't know what the effect of that would  
20 be.

21 On the issue of pollution it works both ways, so  
22 the tribe has an interest in protecting the lake from  
23 pollution and the State has an equal interest, if not more  
24 so, because we own the remainder of the lake, and when you  
25 split a system like this in two it becomes very hard to



1 regulate that in a consistent manner. For example --

2 QUESTION: As far as encroachments on the lake,  
3 doesn't the Corps of Engineers have authority no matter  
4 whether the tribe owns the submerged lands or the State of  
5 Idaho? Doesn't the Corps get to say what can encroach out  
6 in the navigable water?

7 MR. STRACK: Justice O'Connor, for the most part  
8 the Corps is not involved in these kinds of encroachments  
9 unless there's dredging and filling.

10 QUESTION: Do you dispute the fact that the  
11 Corps does have jurisdiction to determine what  
12 encroachments are authorized in navigable water?

13 MR. STRACK: Where there's a fail interest  
14 involved, Justice O'Connor they certainly could come in  
15 and preempt, but it's my experience that we regulate all  
16 those encroachments and I'm not aware of the Corps ever  
17 being involved in those kinds of decisions.

18 QUESTION: If the State perhaps regulates more  
19 stringently then the Corps would care to, that's quite  
20 possible.

21 MR. STRACK: That is quite possible because of  
22 the statute that we have in place protecting the lake as a  
23 public resource for recreation and other public uses.

24 And so when we have a split system like this,  
25 especially on issues such as fisheries, if the tribe was

1 to introduce new species of fish that was not genetically  
2 compatible with the fisheries that we have in the  
3 remainder of the lake, we could have some real problems  
4 there. So there's tremendous practical effects that  
5 result not only from tribal ownership but tribal ownership  
6 of a small portion of the greater lake.

7 On the issue of -- Mr. Givens mentioned the  
8 acreage that included in the report, the acreage that  
9 included navigable waters but it's also important to look  
10 at the acreage of the cession that was reported. According  
11 to the United States' exit report at page 237 the acreage  
12 that was ceded in 1889 was 243,000 acres and that included  
13 37,000 acres of the lake. But the House report 1109  
14 reported that acreage as 185,000 acres. That's found at  
15 page 315 of the joint appendix. So obviously Congress did  
16 not view this cession as including the lake bed itself.  
17 They did not view themselves as having purchased that from  
18 the lake.

19 QUESTION: I SEE.

20 Chief Justice REHNQUIST: Thank you, Mr. Strack.  
21 The case is submitted.

22 (Whereupon, at 11:03 a.m., the case in the  
23 above-entitled matter was submitted.)  
24  
25