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NIWRG's Rply Brief

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re CSRBA	Consolidated Subcase No. 91-7755
Case No. 49576	**NORTH IDAHO WATER RIGHTS GROUP'S REPLY TO RESPONSES OF THE UNITED STATES AND THE COEUR D'ALENE TRIBE**

Objectors and Respondents, members of the North Idaho Water Rights Alliance ("NIWRA"), members of the Northwest Property Owners Alliance ("NWPOA"), members of the Coeur d'Alene Lakeshore Property Owners Association ("CLPOA"), Rathdrum Power, LLC ("Rathdrum") and Hagadone Hospitality Co. ("Hagadone") (collectively, the "North Idaho Water Rights Group"), through undersigned counsel of record, hereby file this reply to the responsive

briefs filed by the United States and the Coeur d'Alene Tribe, pursuant to Idaho Rule of Civil Procedure 56 and Rule 7(f)(4)(c) of CSRBA Administrative Order 1, Rules of Procedure. This reply is supported by the Affidavit of Norman M. Semanko ("Semanko Aff."), which affidavit was previously filed in support of the North Idaho Water Rights Group's Motion for Summary Judgment in this matter.

I. INTRODUCTION

The North Idaho Water Rights Group joins in, and hereby incorporates by reference, the arguments and authorities set forth in the State of Idaho's Memorandum in Reply to Responses of United States and Coeur d'Alene Tribe. The North Idaho Water Rights Group also incorporates by reference the Fourth Affidavit of Steven W. Strack, as filed in this matter, as well as the North Idaho Water Rights Group's briefs and affidavit filed previously in this matter.

II. ARGUMENT

A. There Is No Legal Basis for Off-Reservation Federal Reserved Water Rights for Fish or Fish Habitat.

The United States stipulates in its responsive briefing that "the DCMI and PIA claims are limited to on-reservation water sources." U.S. Response Brief at 71. However, the United States and the Tribe argue that water rights can and have been reserved *in situ* for the benefit of the Tribe, with sources of water located off-reservation. As discussed in the Memorandum in Support of North Idaho Water Rights Group's Motion for Summary Judgment, this is contrary to the applicable legal authority. *See, e.g.*, *United States v. Cappaert*, 426 U.S. 128, 138 (1976) (reserved water right must be "appurtenant" to the reservation); *see also*, *United States v. City of Challis*, 133 Idaho 525, 529, 988 P.2d 1199, 1203 (1999) (A "reserved water right must be based on a reservation of land").

The United States says: "Fish need water." U.S. Response Brief at 36, n.13. The U.S. also claims that "the fishing purpose of the Reservation would be entirely defeated" without sufficient flows to sustain fish. *Id.* at 71-72. The Tribe discusses water necessary for fish habitat. Coeur d'Alene Tribe Response Brief at 91.

Of course, the relevant documents are silent regarding any reservation of water for fish, or even the right to fish. The 1873 Executive Order says nothing about fishing rights or instream flow water rights. The 1887 and 1889 Agreements are likewise silent, as is the 1891 Act of Congress ratifying the diminished reservation. None of the minutes or other accounts of any of the negotiations say anything about water rights for fish.

Despite this, the claimants ask the Court to divine a federal reserved water right for fish, to support fishing by the Tribe. This is similar to the argument made on behalf of the Nez Perce Tribe in the Snake River Basin Adjudication (SRBA). As the SRBA Court noted there: "The argument is predicated on the reasoning that since fish require water, in order to give meaningful effect to that fishing right, a water right must have also been necessarily implied, i.e., reserved to the Tribe." Semanko Aff. ¶ 4, Ex. C (SRBA Court Order on Motions for Summary Judgment Re: Nez Perce Tribe Instream Flow Claims (Nov. 10, 1999)) at 28. The Nez Perce argument went on to assert "the Tribe would not have intentionally surrendered those water rights necessary to maintain its fishing right." *Id.* Virtually the same authority was cited by the United States then as it is now. *Id.*

After an examination of the case law and the specific fishing right reserved by the Tribe, the SRBA Court rejected the Nez Perce Tribe's request "to take the additional leap and by judicial fiat declare a water right for that purpose." *Id.* at 33. "Simply put, the Nez Perce do not have an absolute right to a predetermined or consistent level of fish. . . . Consequently an

implied water right is not necessary for the maintenance of the fishing right." *Id.* "Accordingly, this Court cannot conclude, as a matter of law, that the Nez Perce or the federal government reserved an instream water right for fish." *Id.* at 37.

Of course, the Coeur d'Alene Tribe does not have the benefit of the Nez Perce Tribe's express treaty fishing right, rendering the Coeur d'Alene Tribe's argument even less compelling. The importance of the Nez Perce Tribe's "fish runs could not have been of any less significance than the fish runs were to the" Coeur d'Alene Tribe. *Id.* at 32. Accordingly, this Court cannot conclude that the Coeur d'Alene Tribe or the United States reserved an *in situ* water right for fish or fish habitat.

B. The 1891 Act Confirmed a Diminished Reservation and the Cession of All Rights, Title and Interest Outside the New Reservation.

It is beyond dispute that the Tribe ceded the lands that lie outside the boundaries of the current reservation and that Congress ratified this in the 1891 Act. This includes the submerged lands underlying the waters that lie outside of the reservation, namely significant portions of Coeur d'Alene Lake and the tributaries to the lake.

Despite this clear history, the Tribe very aggressively asserts that it has retained rights outside of the current boundaries of the current reservation. The Tribe claims "title to the submerged lands of the portion of Coeur d'Alene Lake and its related waters within the 1873 reservation boundary but outside the current reservation boundaries has never been adjudicated and remains a matter in dispute." Coeur d'Alene Tribe's Response Brief at 40-41. The Tribe's claim is sweeping, arguing that the 1873 reservation included the entire lake and water from major tributaries including the Coeur d'Alene River and the St. Joe River – and that these areas were somehow retained even after the 1887 and 1889 Agreements and the ratification of the new, diminished reservation by Congress in the Act of 1891. *Id.* at 89-92. The United States echoes

this argument, asserting that "the Tribe maintained a vested interest in the Lake which was not somehow lost when the Tribe sold the property." United States Response Brief at 57.

Faced with a similar question regarding the Nez Perce Reservation, the SRBA Court found that the 1893 Nez Perce Agreement, ratified by Congress in 1894, contained explicit language of cession, evidencing the "present and total surrender of all tribal interests," and a fixed sum payment, representing "an unconditional commitment from Congress to compensate the [Nez Perce] tribe for its opened land." Semanko Aff. ¶ 4, Ex. C (SRBA Court Order on Motions for Summary Judgment Re: Nez Perce Tribe Instream Flow Claims (Nov. 10, 1999)) at 44. Applying the test for determining whether diminishment of the reservation had occurred, as set forth in *South Dakota v. Yankton Sioux Tribe*, 118 S. Ct. 789 (1998), the SRBA Court determined that the Nez Perce Reservation had been diminished by the 1893 Agreement and the 1894 Act. *Id.* at 41-47. Specifically, the Court concluded: "In this Court's view, pursuant to the holding in *Yankton Sioux*, the boundaries of the Nez Perce Reservation was diminished to the extent of all unallotted lands not expressly reserved in the 1893 Agreement." *Id.* at 46.

The terms of the 1887 and 1889 Agreements and the 1891 Act have been set forth and discussed in detail by the State of Idaho and will not be repeated here. As the Nez Perce Tribe did (in its 1863 Treaty and 1893 Agreement, ratified by the 1894 Act), the Coeur d'Alene Tribe (through the 1887 and 1889 Agreements and the 1891 Act) likewise "reserved certain defined lands for a new reservation" and "reduced the boundaries of the former reservation." *Id.* at 40. This was done with definitive, explicit cession language and for a fixed sum payment, thereby satisfying the exacting test for diminishment set forth by the U.S. Supreme Court. *Id.* at 43-44; *Yankton Sioux*, 118 S. Ct. at 797-98.

The Tribe labels the diminished reservation as the "fabled '1891 Reservation'," as if no lands were ever ceded from the 1873 reservation. Coeur d'Alene Tribe Response Brief at 101. Of course, they were ceded. Aside from the 1887 and 1889 Agreements and the 1891 Act, this is further confirmed by the lengthy proceedings initiated by the Tribe before the Indian Claims Commission, culminating in a final order in 1957, awarding an additional $4,427,778.03 to the Coeur d'Alene Tribe for the lands ceded through agreement and ratified by Congress in the 1891 Act. Semanko Aff. ¶ 7, Ex. F, OBJ 2261-2364. Directly contrary to the Tribe's argument that this cession did not include water or water rights (Coeur d'Alene Tribe Response Brief at 93), the findings of the Indian Claims Commission found that the Tribe "held all waters of Spokane River from a little above Spokane Falls to the sources, including Coeur d'Alene Lake and all its tributaries." *Id.*, OBJ. 2297, 2316. The Commission also found that the land ceded by the Tribe included "all its incidental rights." *Id.*, OBJ. 2308, 2320. Of course, the ceded property included all lands within the territory, whether uplands or submerged lands. The agreements and the 1891 Act did not differentiate between the types of lands or retain any of them. They were all ceded and paid for.

As a result, even if there were previously any federal reserved water rights outside the boundaries of the current reservation, they have long since been relinquished as a result of the diminishment of the reservation.

C. Any Federal Reserved Water Right Appurtenant to the Submerged Lands on the Reservation Is Limited to the Lands that were Submerged at Natural Lake and River Levels.

The federal cases cited by the United States and the Tribe quieted title to the submerged lands of the reservation, as they existed prior to statehood. The claimants admit that these submerged lands, and the water rights that are now being claimed in the CSRBA, are meant

to reflect the natural conditions that existed prior to the construction of Post Falls Dam. United States Response Brief at 59; Coeur d'Alene Tribe Response Brief at 65.

As previously briefed, a federal reserved water right is not necessary to accomplish this purpose for the portions of Lake Coeur d'Alene and the St. Joe River that are within the boundaries of the current reservation. However, to the extent such a right is found to exist, it must be limited to the lands that were submerged at natural lake and river elevations, prior to the construction of Post Falls Dam. This is necessitated by the federal reserved water rights doctrine, which limits such rights to appurtenant (i.e., attached) lands, as well as the limited nature of the claim itself, as admitted to by the United States and the Tribe.

Realizing that any such right must be limited to the submerged lands that existed under natural conditions, the claimants argue in their responses that the lake level has not really changed at all. This strains credibility.

Any doubt that additional lands adjacent to the natural lake were submerged after Post Falls Dam was constructed is put to rest by the 1921 study of the lake and the overflow lands, which in pertinent part provides:

> Coeur d'Alene Lake and the lands surrounding it were included within the limits of the Coeur d'Alene Indian Reservation by Executive order November 8, 1873. The northern part of the reservation, including large part of the lake, was ceded to the United States by agreement of September 7, 1889; and the lands were opened to homestead entry in accordance with the provision of section 22 of the act of March 3, 1891 (16 Stat., 989) . . . The act of June 21, 1906 (34 Stat., 325), made provision for surveying the diminished reservation, allotting lands to Indians, and opening the unallotted lands to homestead entry . . . Soon after the lake was first used as a reservoir the [Washington Water Power] company undertook surveys of the lands below an elevation of 2,128 feet. Although the company was maintaining that it had a legal right to overflow, in 1907 and 1908 it acquired many easements from settlers by purchase at about $20 an acre, such easements generally giving overflow rights to an elevation of 2,128 feet. On April 27,

> 1908, in pursuance of representations made by the Interior Department and representatives of the Washington Water Power Co., a bill was introduced in Congress by Hon. Burton L. French authorizing the Secretary of the Interior to grant overflow easements on the affected lands in Coeur d'Alene Indian Reservation . . . On January 25, 1909, the company applied to the Department of the Interior for permit to overflow the Indian lands under the act of February 15, 1901 (31 Stat., 790). The permit was granted on February 22, 1909 . . . In pursuance of the provisions of the act of June 21, 1906, for opening the reservation lands, the proclamation of May 22, 1909 (36 Stat., 2494), was issued. This proclamation provided specifically for the opening of lands to settlement and entry beginning April 1, 1910, and general settlement and entry beginning September 1, 1910. The Government surveys included lands down to an elevation of about 2,121 feet. Most of the lands covered by the permit were immediately applied for, although their agricultural value, unless they were effectively drained, was questionable. The homesteading of these lands, which by governmental notice was subject to the rights of the Washington Water Power Co. under the overflow permit, was thus actually in progress.

Semanko Aff. ¶ 5, Ex. D ("Contributions to the Hydrology of the United States, 1921 , Nathan C. Grover, Chief Hydraulic Engineer, Coeur d'Alene Lake, Idaho, and the Overflow Lands"), OBJ 0012-0016.

The tribal lands discussed in the excerpt above were not submerged until after the construction of Post Falls Dam. The lands that were allotted to the Indians, as well as those unallotted lands open to homestead entry, were surveyed to include all lands down to an elevation of 2,121 feet. This is a full seven feet lower than the 2,128 feet at which the lake is held with Post Falls Dam in place. It is little wonder that when these lands were flooded, lawsuits ensued against Washington Water Power for compensation resulting from eminent domain, resulting in the purchase of easements for overflow rights. *See, e.g.*, *Gaskill v. Washington Water Power Co.*, 17 Idaho 128 (1909) and *Washington Water Power Co. v. Waters*, 19 Idaho 595 (1911). The tribal lands that were also subject to flooding were nonetheless

allotted or open to entry, as surveyed down to 2,121 feet. These patented lands are clearly not part of the submerged lands that were retained by the United States prior to the construction of Post Falls Dam. Those submerged lands only encompass the naturally submerged lands.

The Tribe asserts that this is "irrelevant" to the determination of the federal reserved water right. Coeur d'Alene Tribe Response Brief at 63, 70. This distinction – between naturally submerged lands prior to the construction of Post Falls Dam, and those that were artificially submerged after the construction of the Dam – is important if and only if the Court determines that a federal reserved water right exists for the portion of the natural lake and the St. Joe River that exist within the current boundaries of the reservation. In such case, it is an important distinction which necessarily limits, and defines, the extent of the federal reserved water right as overlying the naturally submerged lands. Therefore, it is a relevant issue.

III. CONCLUSION

For the reasons stated above, the North Idaho Water Rights Group's Motion for Summary Judgment should be granted.

DATED this 20th day of March, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of March, 2017, I caused a true and correct copy of the foregoing **NORTH IDAHO WATER RIGHTS GROUP'S REPLY TO RESPONSES OF THE UNITED STATES AND THE COEUR D'ALENE TRIBE** to be served by the method indicated below, and addressed to the following:

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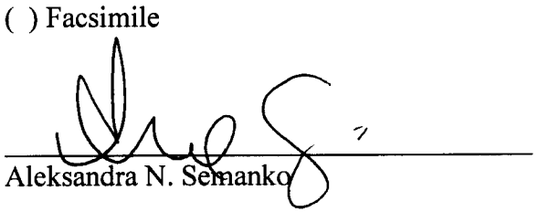

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