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Memo in Support Idaho's Mtn for Reconsideration

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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	)	STATE OF IDAHO'S MEMORANDUM IN
	)	SUPPORT OF STATE'S MOTION TO
	)	RECONSIDER ORDER ON MOTIONS FOR
	)	SUMMARY JUDGMENT
	)	

INTRODUCTION

The following Memorandum is submitted in support of the State's Motion to Reconsider Order on Motions for Summary Judgment. This Court's *Order on Motions for Summary Judgment*, citing *United States v. Anderson*, 736 F2d 1358 (9th Cir. 1984), held that the "United States is therefore not entitled to an 1873 priority date for water rights associated with reservation lands homesteaded by non-Indians and later reacquired by the Tribe." *Order* at 18. The Court's statement that the United States is not entitled to "an 1873 priority

date" on "homesteaded" lands could be misconstrued to mean that the holding does not apply to spring and wetland claims, which otherwise have a "time immemorial" priority date, or to claims on former allotments reacquired by the Tribe. Therefore, the State respectfully requests the Court to reconsider or clarify its holding by addressing the following issues:

(1) Do spring and wetland water rights on reacquired lands have a priority date as of the date of reacquisition?

(2) Does the Court's holding, which refers only to lands reacquired after being homesteaded, also apply to allotted lands that were sold to non-Indians and later reacquired by the Tribe?

ARGUMENT

A. Any Water Right Decrees for Springs and Wetlands on Reacquired Lands Should Carry a Priority Date as of the Date of Reacquisition.

In *United States v. Anderson*, 736 F2d 1358 (9th Cir. 1984), the Ninth Circuit Court of Appeals held that a homesteader of land within an Indian reservation "acquires no federal water rights incident to the transfer of public lands into private ownership." *Id.* at 1362. "*Winters* rights were only intended to assist in accomplishing the needs of the reservation," thus, "where the lands has been removed from the Tribe's possession and conveyed to a homesteader, the purposes for which *Winters* rights were implied are eliminated." *Id.* at 1363. If the homesteader had perfected a water right under state law, the Tribe succeeds to that water right and the right "carr[ies] a priority as determined under state law." *Id.* at 1361. If the homesteader had not perfected a water right, then "the purposes for which *Winters* rights are implied arise at the time of reacquisition" *id.* at 1363, and any reserved water right on the reacquired lands "will have a priority date as of the date of reacquisition, rather than an original, date-of-the–reservation priority." *Id.* at 1361.

The Ninth Circuit was addressing irrigation water rights, but its reasoning applies with equal, if not greater force, to water rights reserved for support of aboriginal subsistence hunting. This Court concluded that a primary purpose of the Coeur d'Alene Reservation was to facilitate the Tribe's traditional hunting and fishing practices. Summary Judgment Order at 13. Thus, the Court concluded the Tribe was entitled to water rights for springs and wetlands, limited to the purpose of "wildlife and plant habitat for hunting." CSRBA Consolidated Subcase 91-7755, *Final Order Disallowing Purposes of Use* (May 3, 2017).

On those lands removed from the Tribe's possession and conveyed to a homesteader, the purpose of providing the Tribe with springs or wetlands that provide "wildlife and plant habitat for hunting" was eliminated. As discussed at length in the State's summary judgment briefing, the conveyance of lands to non-Indians eliminated both the Tribe's right to access those lands for hunting and the right to protect or preserve wildlife while on non-Indian lands. *See, e.g., Montana v. United States*, 450 U.S. 544, 564-65 (1981) (tribe had no right to prohibit taking of wildlife on nonmember lands within reservation); *Blake v. Arnett*, 663 F.2d 906, 911 (9th Cir. 1981) (tribe's right to access lands for fishing was extinguished once land was homesteaded or allotment was conveyed to nonmember). The United States' claims implicitly recognize that non-Indian ownership eliminates the purpose for which springs and wetlands are claimed, for such claims are limited to "wetlands, springs, and seeps on Tribal lands within the Reservation." United States' Memorandum in Support of Motion for Summary Judgment at 44 (Oct. 21, 2016) (emphasis added).[1]

[1] In litigation of spring and wetlands claims, the State relies on the United States' repeated assurance that the claims are limited to "water to maintain wetlands, springs, and seeps on Tribal lands within the Reservation." United States' Claims Cover Letter, from Vanessa Boyd Willard, United States Department of Justice, to Gary Spackman, Director, Idaho Department of Water Resources, dated January 30, 2014, p. 4. The assurance that the place of use for such *in situ* claims is limited to Tribal lands is a fundamental component of the claims, and it is the State's expectation

In short, it is uncontested that reserved water rights for wildlife and plant habitat for hunting do not apply while the subject lands are in non-Indian ownership. The granting of unencumbered title to homesteaders and to purchasers of allotments "excluded" tribal rights of use and entry, for the "deed and patents . . . purport[ed] to convey the lands in fee simple [with] no reservation of any servitude for or other provision for hunting or fishing rights in favor of the . . . tribe or its members." *Blake*, 663 F.2d at 908, 911. The sole remaining question, then, is whether, upon reacquisition, the purpose of supporting subsistence hunting arises at the time of reacquisition, or relates back to time immemorial.

Because the purpose of providing hunting opportunities for the Tribe was eliminated while the land was in non-Indian ownership, the reacquisition of the land provides a right that the Tribe would not enjoy but for the reacquisition. The fact that all tribal rights to such land were eliminated for decades further demonstrates Congress' determination that the wildlife habitat on such lands, and the associated water, was not necessary to achieve the purposes of the Reservation. Given these facts, the right cannot bear a "time immemorial" priority date—such date is based on the assumption that the reservation of lands was intended to "guarantee continuity of the Indians' hunting and gathering lifestyle." *U.S. v. Adair*, 723 F.2d 1394, 1409 (9th Cir. 1983) (emphasis added); *see also id.* at 1413-14 ("time immemorial" water right confirms the "continued existence" of water rights that arose from "uninterrupted use and occupation of land and water"). The alienation of lands to non-Indians breaks the chain of continuity that is the basis for a "time immemorial" water right.

A Tribe's acquisition of fee lands within the bounds of an Indian Reservation does not erase history. Rather, the Tribe acquires such lands subject to whatever rights or

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that any claim found to have a place of use of non-Tribal lands would be promptly withdrawn or dismissed.

privileges were lost or extinguished as the result of their alienation to non-Indians. For example, in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), the Court held that lands reacquired by a Tribe in fee simple are subject to state and local property taxes, because Congress had provided that once the lands became alienable such taxes would apply. The mere act of tribal reacquisition did not restore the immunization from state and local taxation that such lands enjoyed when originally reserved for the tribe's use. And in *Oneida Tribe of Indians of Wisconsin b. Village of Hobart*, 542 F. Supp. 2d 908 (E.D. Wisc. 2008), the court held that reacquired land was subject to state condemnation procedures, because "federal protection cannot be restored merely upon purchase of such lands by the Tribe." *Id.* at 920.

While neither of the above-discussed cases is directly on point here, they do demonstrate that reacquired lands do not automatically assume the same status as originally-reserved lands. Rather, rights and privileges that applied upon the original reservation of the land are restored only upon compliance with congressional established procedures which "permit the orderly return of reservation lands to protected status by the Secretary of Interior upon consideration of the interests of all concerned." *Id.* at 915-16 (citing 25 U.S.C. § 465) (since recodified as 25 U.S.C. § 5108). As the court noted in *Anderson*, when such steps are taken, the reacquired lands are akin to a "newly created" reservation so that "the purposes for which *Winters* rights are implied arise at the time of reacquisition by the Tribe." 736. F.2d. at 363.[2]

In sum, where tribal use of lands for hunting was eliminated for a number of decades while such lands were in the ownership of non-Indians, there is no continuance of hunting

[2] In *Anderson*, the land in question has been "reacquired by the Tribe and returned to trust status." 736 F.2d at 1361.

rights from time immemorial—in such circumstances, any hunting rights, and associated water rights, on the reacquired are essentially "new" rights that had no existence prior to the reacquisition. In such circumstances, the appropriate priority date, under *Anderson*, is the date of re-acquisition.

B. The Court's Holding that the Priority Date for Water Rights on Reacquired Homesteaded Lands is the Date of Reacquisition or the Date of a Perfected State Water Right Applies with Equal Force to Reacquired Allotments.

The Court's *Order on Motions for Summary Judgment* held that the United States is not entitled to a date-of-reservation priority date "for water rights associated with reservation lands homesteaded by non-Indians and later reacquired by the Tribe," but did not explicitly address the priority date for former allotments that were conveyed to non-Indians, held for decades in private ownership, then reacquired by the Tribe.

Prior to 1906, the United States held all land within the Coeur d'Alene Reservation in trust for the Tribe as a whole. In the Act of June 21, 1906, 34 Stat. 335, Congress ordered that the Coeur d'Alene Reservation be "allotted," i.e., that every tribal member be granted a patent to 160 acres of land "under the provisions of the general allotment law of the United States." 34 Stat. at 336. Under the general allotment law, patents issued to tribal members were initially held in trust for a term of years and could not be alienated, but at the expiration of the trust period the allottee could apply for a fee simple patent that rendered the land alienable. 25 U.S.C. § 349. On the Coeur d'Alene Reservation 104,076 acres were allotted to tribal members. State's Statement of Additional Facts ¶ 55. It is undisputed that almost half of all allotments eventually passed out of tribal ownership. State's Statement of Additional Facts ¶ 58; E. Richard Hart, *A History of Coeur d'Alene Tribal Water Use 1780-1913* at 290 (Exhibit to Affidavit of E. Richard Hart (Oct. 21, 2016)).

On information and belief, a large percentage of the lands reacquired by the Tribe are former allotments. The same principles that compelled the conclusion that the priority date for water rights on reacquired homesteaded lands is either the date of reacquisition or the date that an applicable state water right was perfected apply with equal force to former allotments.

In *Anderson*, the court addressed the issue of water rights on reacquired allotted lands by noting the possibility that an allottee's share of tribal reserved water rights for irrigation could be conveyed to a non-Indian purchaser, who could retain the date-of-reservation priority date by putting such water "to beneficial use with reasonable diligence following the transfer of title." 736 F.2d at 1362. But:

> Where "the full measure of the Indian's reserved water right is not acquired by this means and maintained through continued use, it is lost to the non-Indian successor." Consequently, on reacquisition the Tribe reacquires only those rights which have not been lost through nonuse and those rights [i.e., those rights not lost by non-use] will have an original, date-of-the-reservation priority.
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> *Id.* (citations omitted).

Thus, reacquired allotted lands differ from reacquired homestead lands in one respect only: there is a possibility that the Tribe could retain a date-of-reservation priority date if the non-Indian purchaser succeeded to the allottee's water right and continued to put the water to beneficial use up to the date of reacquisition by the Tribe. While such a possibility exists for irrigation water rights, it does not exist for spring and wetland claims for the purpose of supporting tribal hunting rights—the non-Indian purchaser of an allotment could not, under state law, put water to beneficial use to maintain springs or wetlands for the benefit of wildlife or wildlife habitat on the former allotment.

Thus, for spring and wetlands claims, the non-Indian purchaser could not succeed to the allottee's share, if any,[3] of a reserved water right for wildlife or wildlife habitat. And, the reserved water right could not have existed independently of the non-Indian's land ownership because, as discussed above, the Tribe's hunting right and its right to protect and maintain wildlife does not apply to Reservation lands while in non-Indian ownership. Thus, on reacquired allotments, any reserved water right for the purpose of maintaining wildlife or wildlife habitat necessarily bears a priority date no earlier than the date of the Tribe's reacquisition of the property.

CONCLUSION

The State respectfully requests that, upon reconsideration, the Court clarify that reserved water rights for the support of wildlife or wildlife habitat on reacquired lands bear a priority date as of the date of the Tribe's reacquisition of the former homestead or allotment.

Respectfully submitted this 16th day of May, 2017.

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[3] There is no authority for the proposition that allottees are entitled to a share of water rights that are reserved to support hunting rights, which, as a matter of law, are "communal rights of the tribe" and held by the tribe, not by individual tribal members. *United States v. State of Wash.*, 520 F.2d 676, 688 (9th Cir. 1975) (addressing treaty fishing rights).

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