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Memo in Support Mtn to Set Aside and Modify (Fishing)

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ORIGINAL

LODGED
DISTRICT COURT - CSRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
MAY 17 2017
By [Signature]

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

In Re the General Adjudication of)	Subcase Nos. 91-7755 (and 353
Rights to the Use of Water from the)	consolidated subcases)
Coeur d'Alene-Spokane River Basin)	
Water System)	JOINT MEMORANDUM IN SUPPORT
)	OF SF-7 MOTION FOR CORRECTION
CASE NO. 49576)	OF CLERICAL ERROR AND/OR TO
)	ALTER OR AMEND RE: PRIMARY
)	PURPOSE OF FISHING (HABITAT)
)	

COMES NOW Claimants, Coeur d'Alene Tribe ("Tribe") and the United States, by and through their attorneys of record, and hereby jointly file this memorandum in support of their SF-7 motion to correct clerical errors in the *Final Order Disallowing Water Right Claims*, In Re CSRBA Case No. 49576, Subcase Nos. in Attached List (May 3, 2017) (hereinafter "Order Disallowing Claims").¹ This memorandum is referenced by the SF-7 form and is incorporated therein. As noted therein, the SF-7 motion is made pursuant to I.R.C.P. 59(e), 60(a), and 60(b).

¹ The Tribe and United States have filed a separate Rule 59(e) memoranda concurrently with their joint SF-7 Motion for this Court to reconsider the express denial of on-reservation gathering rights in its *Final Order Disallowing Purposes of Use*.

The clerical error was the disallowance of the fish habitat claims located within the boundary of the Coeur d'Alene Reservation that are necessary to support the Reservation's primary purpose for fishing as confirmed by this Court. Even if the Court intended to dismiss the off-reservation fish habitat claims, the *Order on Motions for Summary Judgment*, In Re CSRBA Case No. 49576, Subcase No. 91-7755 at 12-13 (May 3, 2017) (hereinafter "Order on Summary Judgment"), confirms one of the primary purposes of the Reservation was for fishing and, thus, dismissal of the on-reservation fish habitat claims was likely inadvertent.

In the alternative, should the Court clarify that disallowance of the on-reservation fish habitat claims was intended and not the result of clerical errors, the Tribe and United States move the Court pursuant to I.R.C.P. 59(e) to alter or amend the *Order on Summary Judgment* and *Order Disallowing Claims* to allow for the federally-reserved water rights claims for on-reservation fish habitat to go forward to the quantification phase of this litigation.

BACKGROUND

The Court issued three orders on May 3, 2017. The *Order Disallowing Claims* should be corrected because it is inconsistent with the Court's *Order on Summary Judgment* which held that, aside from domestic and agricultural purposes, "another primary purpose of the reservation was to provide the Tribe with waterways for hunting and fishing." *Order on Summary Judgment*, at 12. The Court found that when the United States reserved land for the Reservation, "it impliedly reserved water rights necessary to fulfill the fishing and hunting purpose of the reservation." *Id.* at 13.

The United States and Tribe filed a total of 72 non-consumptive, instream flow claims for fish habitat. *See* Claims Cover Letter to G. Spackman, Director, from V. Willard, Attorney, dated Jan. 30, 2014, at 3, 5. Fifteen (15) of those claims are located either entirely, or in significant

part, within the current boundaries of the Reservation. *See* Claim forms for water rights numbers filed January 30, 2014, specifically section “Purposes of Water Use,” Subcase Nos.: 91-7777; 92-10906; 92-10907; 93-7469; 93-7470; 94-9244; 94-9245; 94-9246; 95-16678; 95-16679; 95-16680; 95-16681; 95-16682; 95-16683; and 95-16684 (“[f]ish habitat for fish species harvested within the reservation...”² (emphasis added)). This memorandum seeks to remove these claims from the list attached to the *Order Disallowing Claims*.³

The Court determined that claims that must go forward in the quantification phase of this adjudication specifically include rights for, “fish and wildlife habitat” and “wildlife and plant habitat for hunting” purposes of use. *Final Order Disallowing Purposes of Use*, In Re CSRBA Case No. 49576, Subcase Nos. in Attached List, at 2 (May 3, 2017) (hereinafter “Order Disallowing Purposes”). The Court limited the place of use of such purposes within the boundaries of the Tribe’s Reservation. *Order on Summary Judgment*, at 15-17. Because the Court found a primary purpose of the reservation was to, *inter alia*, “provide the Tribe with waterways for fishing...” and because of the uncontroverted expert testimony of the importance of the on-reservation waterways related to the Reservation’s fishery, the United States and Tribe assume that the Court intended for on-reservation claims for “fish habitat” be allowed and move forward to quantification.

² The internal conflict of the Court’s orders can be highlighted by the fact that the Court allowed a “fish and wildlife habitat” claim to go forward (see e.g., Claim No. 95-16704 (Coeur d’Alene Lake)) for quantification in relation to one of the “important waterways” expressly enumerated by the Court in its *Order on Motions for Summary Judgment* while denying other claims for “fish habitat” in another. *See Order on Motions for Summary Judgment* at 12-13; cf. *Final Order Disallowing Water Right Claims* (attached list containing Claim No. 91-7777 (St. Joe River)).

³ The United States and Tribe are not foregoing any rights to appeal the decision rejecting off-reservation claims, however, this Memorandum does not seek an order altering or amending that portion of the *Order Disallowing Claims*.

For these reasons, the United States and Tribe respectfully request that the Court correct clerical errors in the *Order Disallowing Claims* in order to allow for the following on-reservation reaches of fish habitat claims: 91-7777; 92-10906; 92-10907; 93-7469; 93-7470; 94-9244; 94-9245; 94-9246; 95-16678; 95-16679; 95-16680; 95-16681; 95-16682; 95-16683; and 95-16684.

Should the Court determine there was no clerical error in relation to the fish habitat claims noted above, the Tribe and United States respectfully request the Court alter and amend the *Order Disallowing Claims* to allow for such claims to proceed to the quantification phase of this litigation.

STANDARD OF REVIEW

CSRBA Administrative Order 1; Rules of Procedure (July 23, 2013), ¶19, provides that parties seeking to set aside a final order disallowing water rights shall file an SF-7 and comply with I.R.C.P. 60(a) or 60(b) which provides for the correction of a clerical error.

In the alternative, if the disallowance of on-reservation fish habitat claims was not a clerical error, the United States and Tribe move to alter or amend the Order Disallowing Claims pursuant to I.R.C.P. 59(e), which allows a party to make a motion to alter or amend a judgment. Such motion must be filed and served no later than fourteen days after entry of the final judgement. *Id.*

I.R.C.P. 59(e) allows a party to make a motion to alter or amend a judgment. Such motion must be filed and served no later than fourteen days after entry of the final judgement. *Id.* The decision to grant, or deny, relief under the provisions of the Idaho Rules of Civil Procedure 59(e), 60(a) or 60(b) is a discretionary one. *Lowe v. Lym*, 103 Idaho 259, 646 P.2d 1030 (Ct. App. 1982). “Rule 59(e) proceedings afford the trial court the opportunity to correct errors both of fact or law that had occurred in its proceedings; it thereby provides a mechanism for

corrective action short of an appeal.” *Id.* (citing *First Security Bank v. Neibaur*, 98 Idaho 598, 570 P.2d 276 (1977)). Because 59(e) proceedings must be considered based upon the record as it existed when the court rendered its decision, new evidence may not be presented. *Id.*

ARGUMENT

I. FEDERAL LAW IN RELATION TO FISHING RIGHTS

When the Coeur d’Alene Reservation was set aside in 1873, the Coeur d’Alene Tribe retained the exclusive right to fish, hunt, gather, and conduct all other traditional subsistence activities throughout the entire Reservation. *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968); *Parravano v. Babbitt*, 70 F.3d 539, 547 (9th Cir. 1995); *United States v. Aanerud*, 893 F.2d 956, 958 (8th Cir. 1990).⁴ These rights “arise by necessary implication,” and “belong to the Tribe and may not be transferred to a third party.” *United States v. Adair*, 723 F.2d 1394, 1418 (9th Cir. 1983). The Tribe retains the right to fish in all streams within the Reservation and should be entitled to water rights sufficient to fulfill that fishing right. *Adair*, 723 F.2d at 1409.

II. FACTS WHICH SUPPORT ON-RESERVATION FISH HABITAT RIGHTS

a. **Historical Evidence.**

The historic record in this case further demonstrates that although the Lake and major rivers were undoubtedly of importance to the subsistence of the Coeur d’Alene Tribe, the smaller streams located within their aboriginal territory, and particularly within the current boundaries of the Reservation, were also important. Basil Peone, a Coeur d’Alene tribal elder, described the village locations in the mid-1800s; he highlights that in addition to there being “groups or clans of Coeur d’Alene Indians all along the shores of Lake Coeur d’Alene and up and down the St.

⁴ Although the right may no longer remain exclusive because of non-Indian land ownership within the reservation, the Tribe nonetheless has retained its subsistence rights on all streams throughout the Reservation. *Montana v. United States*, 450 U.S. 544 (1981); *United States v. Adair*, 723 F.2d 1394, 1418 (9th Cir. 1983).

Joe,” there were also villages on “other streams emptying into the lake.” *Hart Aff.*, Ex. 6 at 14 (emphasis added). There were likewise village sites on Hangman Creek. *Id.* at 12, 16. Father Point, a Jesuit priest, observed in the mid-1800s that “[f]ish are abundant in lakes, rivers, and small streams.” *Id.* at 64 (emphasis added).

The Tribe’s fishing, hunting, and gathering practices further demonstrate its dependence on smaller streams for subsistence. The Tribe gathered and harvested food and fiber from any waterway where it could be found. Tule, river boulders, Indian hemp, bulrushes, berries, and other important items were available in all the waterways in the Coeur d’Alene territory. *Hart Aff.*, Ex. 6, p. 34-35. The Coeur d’Alene Tribe traditionally employed several types of fish traps and nets, depending upon whether these fishing implements would be used on the large rivers or on smaller upland creeks and streams. *Id.* at 22. An image of those traps designed for smaller streams is depicted after pages 20 and 22 of Richard Hart’s report. *Id.* at 20, 22. The existence of traps and nets for smaller streams demonstrates the importance of the smaller streams for fishing purposes. Further, Tribal hunting activities noted by the Court took place not only at the Lake and the major rivers but also on smaller tributary waterways such as Benewah Creek. *Id.* at 29.

Taken together, the evidence demonstrates the Tribe traditionally utilized *all* waterways within the Reservation for the subsistence necessary to ensure its survival. As Dr. Reiser explains, such on-reservation tributary waterways require water to be present in order to continue to function as they had historically to support the Tribe’s fishing practices.

b. Biological Evidence.

The biological evidence before this Court related to the importance of the fish habitat claims in relation to fish species harvested on the Reservation can be found appended to the affidavit of Dr. Dudley Reiser. *See* *Aff. Reiser* (filed Oct. 21, 2016), Ex. 1 (cited hereafter as

“Reiser”). Dr. Reiser’s opinions are uncontested facts before the Court as they are uncontroverted by other expert testimony.

Dr. Reiser observes that many stream reaches which provide habitat for fish are within the current boundary of the Reservation.⁵ *Id.* at 7, Table 1. He also provided a corresponding map of those stream reaches. *Id.* at 8, Figure 3. Dr. Reiser explains the importance of habitat for fish species harvested within the Reservation regardless of on, or off, Reservation status of the particular stream reach. *Id.* The on-reservation stream reaches were particularly important in Dr. Reiser’s analysis. *Id.*, § 4.2 “Special Characteristics of Adfluvial Fish Populations.” The uncontroverted evidence before this Court highlights the biological necessity and importance of the on-reservation stream reaches as fish habitat in furtherance of the primary purpose to provide the Tribe with waterways for growing fish to harvest.

The fish species to which the Tribe has historically been, and is currently, reliant upon include, but are not limited to, the Westslope Cutthroat Trout (*Oncorhynchus clarkii*), Bull Trout (*Salvelinus confluentus*), and in one drainage, Hangman Creek, Chinook Salmon (*O. tshawytscha*). *United States and Coeur d’Alene Tribe Joint Statement of Facts* (“JSF”), ¶100 (citing Reiser at 1, 12). Westslope Cutthroat Trout and Bull Trout are the focus of the fish habitat claims.

Both of these species exhibit an adfluvial life history strategy that depends on a combination of lake and riverine habitats within the Reservation. JSF ¶101 (citing Reiser at 35). An “adfluvial” life history strategy means that the fish spend a substantial period of time within

⁵ See claims noted above. One of the claims was made conditional. *See* Claim form for Claim No. 93-7470. Other claims, such as Claim No. 91-7777 for the St. Joe River, were for fish habitat with claimed stream reaches both on and off reservation. Consistent with its *Order on Motions for Summary Judgment*, the Court should award water rights for habitat within the reservation.

the lake feeding and growing and maturing, but then they migrate upstream into (ad-) the rivers and streams (fluvial) seeking areas that are suitable for spawning. These areas are widely distributed within the Coeur d'Alene Basin. After spawning, the adults then move back downstream and re-enter the lake and the cycle is repeated. JSF ¶101 (citing Reiser at 29).

Adfluvial Westslope Cutthroat Trout and Bull Trout move freely within a lake environment, with movement patterns largely governed by a complex of behavioral responses largely associated with changing water quality conditions, food availability, predator avoidance, and reproductive instincts. JSF ¶104 (citing Reiser at 25). The adfluvial life history strategy requires both lake and riverine habitats, and importantly, that those habitats are available, accessible and properly functioning. This means that both habitat types must be maintained and protected so they can continue to provide the mix of biophysical parameters (e.g., flow, water quality (temperature, dissolved oxygen, etc.), sedimentation, nutrient levels, and physical structure, biological components) in which these subpopulations have evolved. JSF ¶106 (citing Reiser at 34).

It is important to include the Reservation's smaller tributary streams as well. "Adult Westslope Cutthroat Trout spawn predominantly in smaller tributary streams. They move into the tributaries with spring high flows and spawn from April to July..." Reiser at 26. "Juvenile cutthroat typically spend 2-3 years in the stream before migrating during the summer months down to the lake. Rearing Cutthroat Trout typically select cold, nutrient-poor water, including headwater streams and alpine lakes" Reiser at 28. "Bull Trout spawn in low gradient streams with clean gravel, often in conjunction with cold water input from groundwater or springs (USFWS 2015a)." Reiser at 28. Protecting both lake and riverine habitats is "vital to maintaining and or restoring healthy adfluvial fish populations" and "[p]rotecting the connectivity to and

availability of all habitats used by these adfluvial fish is important even if distal to the lake.”
Reiser at 30.

CONCLUSION

Based on the foregoing historical and biological evidence contained in the Court’s record, the Tribe and United States respectfully request that this Court correct the clerical error of listing the above-noted water rights claims on the list attached to its *Order Disallowing Claims* and allow such claims to go forward to the quantification phase of this litigation.

Should the Court determine no clerical error exists, the Tribe and United States request the Court alter and amend the *Order Disallowing Claims* to allow the on-reservation fish habitat claims to proceed in this litigation because the factual and legal record provides no basis to exclude the claims to on-reservation stream reaches.

SHOULD THIS MOTION BE UNOPPOSED, ORAL ARGUMENT IS WAIVED. IF THE MOTION IS OPPOSED, ORAL ARGUMENT IS RESERVED AND REQUESTED.

Respectfully submitted this 16th day of May, 2017.

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Certificate of Service

I hereby certify that on the 16th day of May, 2017, I caused to be served a true and correct copy of the foregoing document upon the following individuals via email and/or by placing the document in the United States Mail, postage prepaid, addressed as follows:

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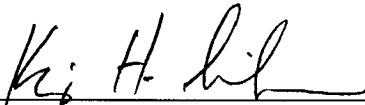
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