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5-17-2017

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

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Recommended Citation
Funke, Howard; Wood, Jeffrey H.; and Willard, Vanessa Boyd, "Memo in Support Mtn to Set Aside and Modify (Gathering)" (2017). *In re CSRBA (Coeur d'Alene)*. 64.
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ORIGINAL

LODGED
DISTRICT COURT - CSRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
MAY 17 2017
Clerk
Deputy Clerk

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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 CSRBA	Subcase Nos. 91-7755 (and 353 consolidated subcases)
Case No. 49576	THE UNITED STATES AND COEUR D'ALENE TRIBE'S JOINT MEMORANDUM IN SUPPORT OF MOTION TO ALTER OR AMEND TO FIND GATHERING AS A RESERVATION PRIMARY PURPOSE

BACKGROUND

On May 3, 2017 this Court found that a "primary purpose of the reservation was to provide the Tribe with waterways for fishing and hunting." *Order on Motions for Summary Judgment*, In Re CSRBA Case No. 49576, Consolidated Subcase No. 91-7755 at 12 (May 3, 2017) (hereinafter "Order on Summary Judgment"). In so doing, this Court recognized the Tribe's emphasis, in negotiations preceding the 1873 Agreement and Executive Order, on continuing traditional subsistence practices for survival, including hunting and fishing. *Id.* at 12.

This Court likewise recognized that, at the time of Reservation negotiations and creation, the Tribe could not rely solely on agriculture for subsistence. *Id.* at 13.

Although the opinion further notes that the United States and Tribe claim water rights for maintenance of wetlands, springs, and seeps for Tribal plant gathering, Order on Summary Judgment at 9,[1] it mentions gathering only in this instance. The *Final Order Disallowing Purposes of Use*, In Re CSRBA Case No. 49576, Consolidated Subcase Nos. in Attached List at 2 (May 3, 2017) (hereinafter "Order Disallowing Purposes") dismisses purposes including "wildlife and plant habitat for gathering rights."

The United States and Tribe read the combination of these orders as dismissing "gathering" as not comprising a primary purpose of the Reservation. The United States and Tribe respectfully assert that the Court's dismissal of the water right claims for plant habitat for Tribal gathering is an error of both fact and law because the historical record demonstrates gathering, as a traditional subsistence practice, to be a primary purpose of the Reservation along with fishing and hunting. Accordingly, the United States and Tribe respectfully request that the Court alter or amend its dismissal of the water rights for plant gathering because, along with the important fishing and hunting purposes already recognized by this Court, the Tribe's plant gathering was a pillar of its subsistence, necessary for its survival, and a driver of the negotiations for the 1873 Reservation. United States and Coeur d'Alene Tribe Joint Statement of Facts (October 20, 2016), ¶22 (citing *Smith Aff.*, Ex. 1, p. 23; *Hart Aff.*, Ex. 6, p. 35).

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[1] The United States and Tribe claim sufficient water to maintain wetlands, springs, and seeps on Tribal lands within the Reservation to provide for Tribal plant gathering. These claims seek non-consumptive water rights to ensure sufficient surface and/or groundwater to maintain habitat at wetlands, springs and seeps. *See, e.g.*, United States' Notice of Claim # 91-7779 (January 30, 2014).

STANDARD OF REVIEW

CSRBA Administrative Order 1; Rules of Procedure, ¶19, provides that parties seeking to set aside a final order disallowing water rights shall file an SF-7, which includes I.R.C.P 59(e) as a basis for such a motion. 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 I.R.C. P. 59(e) 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 in conjunction with a 59(e) motion. *Id.*

ARGUMENT

1. GATHERING IS A PRIMARY PURPOSE FOR THE CREATION OF THE COEUR D'ALENE RESERVATION

As this Court has highlighted, "[t]o ascertain the reservation's primary purposes, the Court looks to the document and circumstances surrounding the creation of the reservation and the history of the Indians for whom it was created." Order on Summary Judgment at 8 (citing *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1891)). For example, in *United States v. Adair*, the Ninth Circuit confirmed water rights for hunting, fishing, and gathering based upon "the historical importance" of those activities to the Klamath Tribes. 723 F.2d 1394, 1409 (9th Cir. 1983). In so holding, the Court reaffirmed *Kimball v. Callahan* that "in light of the highly significant role that [subsistence activities] played (and continue to play) in the lives of

the Klamaths, it seems unlikely that they would have knowingly relinquished these rights at the time they entered into the treaty." *Id.* (quoting *Kimball v. Callahan*, 493. F.2d at 566).

This Court followed the *Walton* and *Adair* analyses vis-à-vis fishing and hunting rights, finding that "[h]istorically, Tribal village life focused on fishing and hunting near rivers and lakes." Order on Summary Judgment at 12 (citing *Hart Aff.*, Ex. 6, pp. 6, 20-30). This Court went on to find that "[n]aturally Tribal fishing practices were reliant upon important waterways . . . [and that] Tribal reliance on these waterways also extended to its hunting practices." *Id.* (citing *Hart Aff.*, Ex. 6, pp. 20-28; 28-30). This Court concluded that although the Tribe was engaging in agriculture by the early 1870s, "it continued to rely upon fishing and hunting practices for its survival." *Id.* (citing *Hart Aff.*, Ex. 6, pp. 122 & 138).

The Court's conclusions regarding fishing and hunting are equally applicable to gathering. A Tribal right to hunt, fish and gather is an attribute of its inherent sovereignty and is implied from establishment of a Reservation. *See* 2.d Aff. Counsel (March 17, 2017), Ex. 3, pp. 1158-59 (18.03[1] Cohen's Handbook of Federal Indian Law – On-Reservation Indian Hunting, Fishing, and Gathering Rights) ("Exclusive on-reservation hunting, fishing, and gathering rights are implied from the establishment of a reservation for the exclusive use of a tribe, whether the reservation was set aside by executive order, statute, agreement, or treaty."). Subsistence rights are a three-legged stool that includes fishing, hunting, and gathering rights. *See e.g.*, *White Earth Band of Chippewa Indians v. Alexander,* 683 F.2d 1129, 1137 (8th Cir. 1982) ("The Band's right to hunt, fish and gather wild rice is an attribute of its inherent sovereignty.").

The historical record in this case unequivocally demonstrates the Coeur d'Alene Tribe's historical dependence upon gathering in and around the waterways for its survival. As

highlighted by the Supreme Court, "Tribal members traditionally used the lake and its related waterways for food, fiber, transportation, recreation and cultural activities. The Tribe depended on submerged lands for everything from water potatoes harvested from the lake to fish weirs and traps anchored in riverbeds and banks." *Idaho v. United States*, 533 U.S. 262, 265 (2001) ("*Idaho II*") (emphasis added).

The Supreme Court affirmed the findings of Judge Lodge, who found that "[t]he Tribe traditionally survived by fishing, hunting and gathering." *United States v. Idaho*, 95 F. Supp. 2d 1094, 1100 (D. Idaho 1998) (emphasis added). In support of his finding, Judge Lodge noted that "[t]he Tribe gathered several plants growing in the marshes and wetlands of the Coeur d'Alene waterways. Most important among these was the water potato, a plant that was and continues to be gathered annually by tribal members from shallow waters of the Lake and rivers." *Id.*; *see also*, *Hart Aff.*, Ex. 6, pp. 35-36; *Smith Aff.*, Ex. 1, p. 25; *Matheson Aff.*, Ex. 8; Joint Statement of Facts at ¶¶ 22-23; 25.

Judge Lodge further found that "[t]he Coeur d'Alenes also collected rushes and tule from alongside the waterways for use in the construction of baskets, mats and the Tribe's lodges." 95 F.Supp.2d at 1100; *see also*, *Hart Aff.*, Ex. 6, pp. 33-35; *Smith Aff.*, Ex. 1, p. 25; Joint Statement of Facts at ¶ 24. The Tribe also gathered other materials necessary for day-to-day necessities including hammers from river boulders, Indian hemp for rope, rushes and tule for mats, baskets, and rafts, as well as freshwater shells for ornamentation. *Hart Aff.*, Ex. 6, pp. 33-35; *Smith Aff.*, Ex. 1, p. 27.

The Tribe also gathered from the waterways much of the material it needed to facilitate its hunting and fishing activities. 95 F.Supp.2d at 1100. Bows, arrows, hunting clubs, and fishing

rods were made from wood gathered on or near the waterways. Fishing lines were made from Indian hemp and fish bags were made from rushes. Smith Aff., Ex. 1 at 21. Fishing line sinkers were made from river rock while line floats were made from tule. *Id.* Fishing nets were made of Indian hemp and fish traps were made from willows gathered along the waterways. *Id.* at 22; 24-26. In other words, the Tribe's fishing and hunting activities were dependent upon its gathering activities. Indeed, any fishing and hunting purpose would have been ineffective without a congruent gathering purpose in 1873.

The Tribe's reliance on gathering was no less important leading up to the creation of the Coeur d'Alene Reservation in 1873. The Jesuits noted tribal gathering practices in the mid-1800s. *Hart Aff.*, Ex. 6, p. 60; 89. Isaac Stevens likewise observed tribal gathering practices during his visits to Coeur d'Alene Country. *Id.* at 74. At the time of President Grant's 1873 Executive Order, most tribal members still resided in their traditional village sites along the numerous rivers, lakes, and waterways located throughout the Coeur d'Alenes' aboriginal territory, continuing their seasonal rounds of hunting, fishing, and gathering, which were supplemented by their farming endeavors. Joint Statement of Facts at ¶69 (citing *Smith Aff.*, Ex. 1, p. 79; *Hart Aff.*, Ex. 6, p. 138).

Ultimately, Judge Lodge found that "[b]ased upon all the above, the Court concludes that in 1873 the Lake and rivers were an essential part of the 'basket of resources' necessary to sustain the Tribe's livelihood. While tribal members were also engaged in gardening, gathering and hunting, the waterways provided a reliable, year-round source of food, fibre, and transportation without which the Tribe could not have survived." *Idaho II*, 95 F.Supp.2d at 1104 (emphasis added).

The Coeur d'Alenes continued to rely on the waterways within their traditional territory during the 1880s, 1890s, and into the early 1900s, and have never abandoned their traditional subsistence practices. They continued to rely on a mix of agriculture, hunting, fishing, and gathering activities to provide for their subsistence in the decades both leading up to and following the negotiation of the 1887 and 1889 agreements. Joint Statement of Facts at ¶89 (citing *Smith Aff.*, Ex. 1, p. 107; *Hart Aff.*, Ex. 6, p. 314-331, 385). In fact, the Coeur d'Alenes' traditional use of water potatoes has continued to the present-day and the Tribe continues to celebrate this staple with a water potato national tribal holiday; the water potatoes are a favorite of Coeur d'Alene people and are spiritually regarded and treated with reverence. Joint Statement of Facts at ¶23 (citing *Hart Aff.*, Ex. 6, p. 36); *Matheson Aff.*, Ex. 8.

CONCLUSION

For the reasons stated above, the United States and Tribe respectfully assert that the Court's dismissal of the water right claims for plant habitat for Tribal gathering is an error of both fact and law because the historical record demonstrates gathering, as a traditional subsistence practice, to be a primary purpose of the Reservation along with fishing and hunting. Accordingly, the United States and Tribe respectfully request that the Court alter or amend its dismissal of the water rights for plant gathering because, along with the important fishing and hunting purposes already recognized by this Court, the Tribe's plant gathering was a pillar of its subsistence, necessary for survival, and a driver of the negotiations for the 1873 Reservation.

Respectfully submitted this 16th day of May, 2017

for

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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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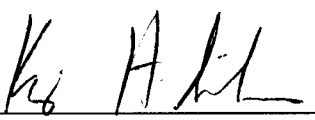

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