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Idaho's Reply Memo on Reconsideration

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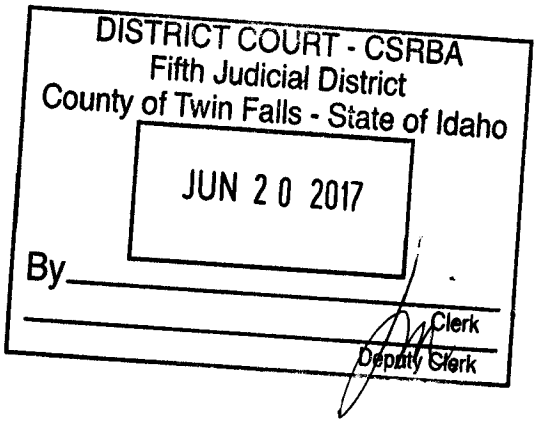

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re CSRBA	)	Consolidated Subcase No. 91-7755
	)	
Case No. 49576	)	STATE OF IDAHO'S REPLY
	)	MEMORANDUM RE: STATE'S MOTION TO
	)	RECONSIDER ORDER ON MOTIONS FOR
	)	SUMMARY JUDGMENT
	)	

INTRODUCTION

STANDARD OF REVIEW

This Court's *Order on Motions for Summary Judgment* was an interlocutory order, subject to reconsideration under I.R.C.P. 11.2(b). As the Court of Appeals has recognized in an unreported decision, "[i]f a trial court issues a ruling and a party believes that the ruling is incomplete because it fails to address an issue that was raised, one procedurally proper means to remedy that deficiency is the filing of a

motion to reconsider." *State v. Bower*, No. 41336, 2015 WL 654467, at *4 (Idaho Ct. App. Feb. 13, 2015). "A decision to grant or deny a motion for reconsideration generally rests in the sound discretion of the trial court." *Spur Prod. Corp. v. Stoel Rives LLP*, 143 Idaho 812, 817, 153 P.3d 1158, 1163 (2007).

Here, the following issues were raised during summary judgment briefing,[1] but not squarely addressed in this Court's interlocutory ruling:

> (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?

The State respectfully submits that addressing these issues now will promote the orderly resolution of the reserved water right claims at issue in Consolidated Subcase 91-7755.

ARGUMENT

1. The Principles Underlying the *Anderson* Decision Apply Equally to Homesteaded Lands and Alienated Allotments.

In *United States v. Anderson*, 736 F.2d 1358 (1984), the court held that when a tribe reacquires reservation lands that had been alienated to non-Indians, the tribe succeeds to whatever water rights the non-Indian owner held at the time of purchase. But, if "there are no [water] rights to be regained by the Indians on reacquisition of the property," *id.* at 1363, then "[w]e treat these lands in a manner

[1] State of Idaho's Memorandum in Support of Motion for Summary Judgment at 53 (discussing priority date of reacquired allotments); Coeur d'Alene Tribe's Response to the State of Idaho, Hecla, and the North Idaho Water Rights Group at 111(asserting that only irrigation water rights may have a priority date later than the date of the reservation's original creation); State Of Idaho's Memorandum In Reply to Responses off United States and Coeur d'Alene Tribe at 38-39 (addressing assertion that court holdings addressing priority dates on reacquired lands apply only to irrigation water rights).

analogous to that of a newly created federal reservation and find that the purposes for which *Winters* rights are implied arise at the time of reacquisition by the Tribe." *Id.* "This principle protects the intervening rights, if any, that may have been acquired in good faith by third party water users during the homesteading process and prior to reacquisition by the Tribe." *Id.*

The court's objective of protecting intervening water users, who had no reason to anticipate the existence of reserved water rights on lands held by non-Indians, applies whether the non-Indian lands were homesteaded or purchased from Indian allottees. On both homesteaded lands and former allotments, the priority date is the date of reacquisition, unless the prior non-Indian owner held, and conveyed to the Tribe, an earlier priority water right. *Id.* at 1362-63. The only distinction between homesteaded lands and former allotments is that on the latter, there is a possibility that the Tribe would succeed to a date-of-reservation priority date if the non-Indian owner had retained water rights held by the original Indian allottee.

The Tribe's assertion that reserved water rights should be held to persist on allotted lands, even if never used by the non-Indian purchaser, was rejected by *Anderson*, which held that water rights on reacquired allotments would have an "original, date of reservation" priority date only where those rights "have not been lost through non-use." *Id.* at 1362. The Tribe's assertion that water rights on allotments should not be lost to non-use because allotments remain part of the Reservation has no basis in law. Both allotments and homesteaded lands remain

part of the Reservation unless explicitly segregated by Congress,[2] but the inclusion of non-Indian lands in an Indian reservation does not imply that resources on such lands remain reserved for the Tribe's use. "[W]hen an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands." *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993).

In other words, even when non-Indian lands remain part of a reservation they are not available for the Indians' use and occupation. Thus, the *Anderson* court correctly concluded that "[w]here the land has been removed from the Tribe's possession and conveyed to a homesteader, the purposes for which *Winters* rights were implied are eliminated." 736 F.2d at 1363. The same principle applies to alienated allotments, the sole exception being that *Winters* rights are not alienated on such allotments if non-Indian purchaser acquires and preserves the allottee's share of *Winters* rights by putting the water "to beneficial use with reasonable diligence." *Id.* at 1362.

The Tribe provides little reason for its assertion that this Court should reverse itself and adopt the decision in *In re the General Adjudication of all Rights to Use Water in the Big Horn Water System*, 753 P.2d 76 (Wyo. 1988). The *Big Horn* decision, holding that reacquired lands are entitled to a date-of-reservation priority date, held that non-Indian purchasers of allotments held water rights with treaty priority dates so long as they put the water "to use with reasonable diligence

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[2] *See, e.g., Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 356 (1962) (act opening reservation to homesteading did not dissolve reservation absent expression of congressional intent to dissolve reservation).

thereafter." *Id.* at 113. The court went on to hold that "[t]here is no reason to deny the same priority to an Indian or tribal purchaser." *Id.* at 114. The *Big Horn* court did not address the priority date of water rights on reacquired lands where water rights had been lost to non-use or the non-Indian seller was not the successor to the original allottee's water right. Moreover, its decision was limited to irrigation water rights—the *Big Horn* court did not recognize the existence of non-consumptive reserved water rights, so never determined whether such water rights would be entitled to a date-of-reservation priority date in the event of re-acquisition.

2. There is No Authority to Support the Assertion that Non-Consumptive Water Rights Persist on Alienated Lands Until Such Time as Alienated Lands are Reacquired by the Tribe.

The Tribe alleges that an "examination of *Walton*, *Anderson*, and *Adair* demonstrates that non-consumptive water rights held by the Tribe were not disturbed by changes to land ownership status within the Reservation, and, thus, maintain time immemorial priority dates" even on lands that passed into non-Indian ownership and were later reacquired by the Tribe. *United States' and Coeur d'Alene Tribe's Joint Memorandum in Response to State of Idaho's Motion to Reconsider,* at 10. In this reply, the State will separately examine each decision to demonstrate the error in the Tribe's statement.

Anderson. The Tribe alleges that the 1979 lower court decision in *Anderson* affirms its assertion that non-consumptive subsistence water rights retain their time immemorial priority date even on reacquired lands. *Anderson*, however, never reached the issue, because it made no finding that the lands under Chamokane Creek were reacquired.

The Court held that the executive order setting aside the Spokane Reservation "acknowledged the importance of Chamokane Creek to the Spokane Indians by setting the eastern boundary of the reservation at the eastern bank of the creek, thus including the breadth of the waterway within the reservation." 1979 *Anderson* Opinion at 9-10.[3] Moreover, the Court found that the "Spokanes have reserved the exclusive right to take fish from the part of Chamokane Creek contained within the reservation . . . ." *Id.* at 10. The Court's holding that the Tribe had the "exclusive" right to fish in the Creek suggests the Creek was held by the Tribe. *See South Dakota v. Bourland*, 508 U.S. 679, 690 (1993) (tribe could not exclude nonmembers from fishing on reservation lands not held in trust for tribe).

In short, nothing in *Anderson* suggests that the lands under the creek had ever been in non-Indian ownership. Thus, its holding has no relevance to the issues presented here.

Walton. In *Walton*, the lower court denied the Colville Confederated Tribes' claim for a non-consumptive water right to support a non-indigenous "replacement" fishery in the lower section of No-Name Creek on the Colville Indian Reservation. *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320, 1330 (1978). On appeal, the Ninth Circuit reversed, noting that the Tribe had introduced the non-indigenous trout to replace fish lost due to dam construction on the Columbia River. The fish lived in Omak Lake, and the Tribe "had cultivated No Name Creek's lower reach to establish spawning grounds" for the fish. *Colville Confederated Tribes v. Walton*,

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[3] The Tribe filed a partial copy of the 1979 Memorandum Opinion and Order in *United States v. Anderson* as exhibit 5 to Affidavit of Counsel in Support of Coeur d'Alene Tribe's Responsive Briefing (Feb. 24, 2017). Whether there are additional holdings in the opinion that provide context to the pages submitted by the Tribe's counsel is unknown.

647 F.2d 42, 45 (1981). A water right was recognized for the purpose of establishing "spawning grounds for the Lahonton Cutthroat Trout." *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 399 (9th Cir. 1985).

There were three reaches of No Name Creek at issue in Walton: an upper reach passing through two allotments held "in trust for the Colville Indians," a middle reach passing through 3 allotments owned by Walton, a non-Indian, and a lower reach passing through two allotments held in trust by the United States. 647 F.2d at 45. The court "assume[d] that none of the Colville's allotments had ever passed from Indian ownership." *Id.* at 45 n.5. The spawning grounds were in that section of No Name Creek that ran over the two lower allotments. *See id.* at 45 ("[t]he Indians cultivated No Name Creek's lower reach to establish spawning grounds"); *id.* (describing ownership of allotments along No Name Creek)

Nothing in *Walton* addresses the priority date of water rights on reacquired lands, because there were no reacquired lands along No Name Creek. Nor does the decision suggest that the Tribe had a non-consumptive water right to support fish habitat in that section of the Creek that ran through the allotments owned by Walton. The court only recognized a water right to establish spawning grounds, and such grounds were located within federally-held allotments that had never passed from tribal ownership. The court held that the quantification of the amount of water necessary to fulfill spawning requirements was not reduced by the alienation of upstream allotments, with their associated *Winters* rights, to Walton. Thus, "[t]his quantity of water, unrelated to irrigation, was not affected by the allotment of reservation lands and passage of title out of the Indians' hands." 752 F.2d at 400.

In short, the *Walton* decisions simply do not address the issue of priority dates on reacquired lands, nor do they suggest that reserved water rights to preserve fish or wildlife habitat persist once the lands on which such habitat is located are alienated to non-Indians. The *Walton* litigation establishes only the unremarkable proposition that the quantification of water needed to maintain the fishery in the tribally-owned lower section of the Creek was not affected by alienation of certain allotments upstream of the spawning grounds.

Adair. The Tribe especially errs in citing *U.S. v. Adair*, 723 F.2d 1394 (9th Cir. 1983), as support for the proposition that it is entitled to a time immemorial priority date for non-consumptive water rights to maintain wildlife habitat on reacquired lands. The *Adair* court found that non-consumptive water rights persisted on lands that were alienated to non-Indians under the terms of the Klamath Termination Act. The *Adair* decision was based on the prior holding in *Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974) (*Kimball I*), that the Tribe's "exclusive" fishing and hunting rights survived the alienation of reservation lands under the terms of the 1954 Klamath Termination Act, because such Act had to be read *in pari materia* with concurrent federal legislation providing that "[n]othing in this section . . . shall deprive any Indian or any Indian tribe . . . of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, fishing, or the control, licensing, or regulation thereof." *Adair*, 493 F.2d at 568 (quoting 18 U.S.C. § 1162). Given this express statutory provision, the *Kimball* court concluded that the Klamath Indians "may exercise their treaty hunting, trapping, and fishing rights free of state fish and game

regulations [on former Reservation lands] including . . . that privately owned land on which hunting, trapping, or fishing is permitted." *Id.* at 569.

Consequently, in *Adair*, the court concluded that the Tribe's retained "hunting and fishing rights carry with them an implied reservation of water rights." 723 F.2d at 1408. Like the hunting and fishing rights, such water rights applied to waterways on non-Indian lands only because Congress had explicitly preserved such rights in section 564m(a) of the Klamath Termination Act, which provided that "nothing [in this Act] shall abrogate any water rights of the tribe and its members." *Id.* at 1412 (quoting Act).

In short, the *Kimball I* and *Adair* decisions only addressed the retention of hunting rights and associated water rights under the specific terms of the Klamath Termination Act. They did not address whether such rights persist when reservation lands are alienated by opening a reservation to homesteading and allowing sale of allotments. This fact was affirmed in *Kimball v. Callahan*, 590 F.2d 768 (9th Cir. 1979) (*Kimball II*), where the court was asked to reexamine the decision in *Kimball I* in light of the Supreme Court's holding in *Puyallup Tribe, Inc. v. Dept. of Game,* 433 U.S. 165 (1977) (*Puyallup III*). In *Puyallup III*, the Court addressed the Puyallup Tribe's assertion that a treaty provision setting aside a portion of the Puyallup River for the Tribe's "exclusive use" continued after alienation of most of the Reservation's lands to non-Indians, so that the Tribe could "fish free of state interference." *Id.* at 173.[4] The Court concluded that "[s]uch an interpretation clashes with the subsequent history of the reservation," particularly

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[4] The sale of allotted lands on the Puyallup Reservation was authorized by two Acts of Congress, 27 Stat. 633, and c. 1816, 33 Stat. 565." *Puyallup III*, 433 U.S. at 174.

the alienation of most reservation lands to non-Indians in fee simple. *Id.* Rather, the tribe retained only the treaty right to fish at "usual and accustomed fishing places," since the exercise of such right was not dependent on tribal ownership of the underlying land. *Id.*

In *Kimball II*, the court distinguished the holding in *Puyallup III* on the basis that the "Klamath Termination Act expressly provided that nothing in the Act would abrogate the fishing rights secured by the [Klamath] treaty." 590 F.2d at 774. Thus, the *Kimball* and *Adair* decisions were limited to the retention of hunting and fishing rights on lands opened to non-Indian ownership under the terms of the Klamath Termination Act, and do not provide any guidance as to retention of hunting rights or associated water rights on homesteaded lands and former allotments. Instead, communal hunting and fishing rights (and by implication, water rights) on such lands are guided by the principles established in *Puyallup III*: communal on-reservation rights implied from the setting aside of lands for a tribe's exclusive use do not survive alienation of reservation lands to non-Indians.

3. Requiring the Tribe to Provide Proof of Priority Dates for Reacquired Lands Will Not Impose an Undue Burden.

The Tribe complains that requiring it to provide proof of priority dates "would lead to a judicial black hole that would take years to sort out." Yet, this Court managed to adjudicate over 150,000 water right claims in the SRBA, each of which was examined to determine the priority date associated with each place of use. Here, the number of claims requiring such examination is much more limited: there are a total of 269 tribal claims remaining. Many of the claims are on lands that

were never alienated. The State submits that determining the priority date of the limited number of claims with reacquired parcels is easily within the capabilities of the parties and the Court.

CONCLUSION

Respectfully submitted this 19th day of June, 2017.

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CERTIFICATE OF SERVICE

I certify that on this 19th day of June, 2017, a true and correct copy of the foregoing *State of Idaho's Reply Memorandum Re: State's Motion to Reconsider Order on Motions for Summary Judgment* was delivered by the methods indicated below to the following:

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