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Joint USA-CDAT Reply Memo in Support Mtn Set Aside and Modify (Fishing)

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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

	) Consolidated Subcase No. 91-7755
In Re the CSRBA	) **UNITED STATES' AND COEUR D'ALENE TRIBE'S JOINT MEMORANDUM IN REPLY TO THE STATE OF IDAHO'S AND HECLA'S MEMORANDA OPPOSING MOTION RE: ON-RESERVATION FISH HABITAT CLAIMS**
Case No. 49576	)

INTRODUCTION

The United States of America ("United States") and Coeur d'Alene Tribe ("Tribe") hereby reply to the *State of Idaho's Memorandum in Opposition to SF-7 Motion to Alter or Amend Re: Primary Purpose of Fishing (Habitat)* ("State Memo") and *Hecla's Memorandum in Opposition to United States and Coeur d'Alene Tribe's Joint Motion to Alter or Amend Re: Primary Purpose of Fishing (Habitat)* ("Hecla Memo"), both dated June 8, 2017. These Memos were filed in response

to the *United States' and Coeur d'Alene Tribe's Joint Memorandum in Support of Motion to Alter or Amend Re: Primary Purpose of Fishing (Habitat)*, dated May 16, 2017 ("Joint Fishing Habitat Memo").

The State and Hecla present four main arguments. First, they make similar procedural arguments as they made against the Joint Gathering Memo. *See* State Memo at 2-3. Second, they assert that the Tribe and United States are only entitled to instream flow water rights in the "important waterways." *Id.* at 3. Third, they rehash their argument from summary judgment that the Tribe may not have instream flow water rights in stream reaches that run through non-Indian fee land. *Id.* at 6. Finally, the State asserts that dismissal of the fish habitat claims is acceptable where riparian habitat claims for hunting were confirmed in the same areas.

In short, the State and Hecla raise a myriad of arguments that all share a single common thread: none of them address *the test* for determining whether the Tribe is entitled to non-consumptive instream reserved water rights, as laid out in *Walton* and *Adair*. Both *Walton* and *Adair* addressed the determination of whether a tribe is entitled to instream flow water rights to support fish in the context of *New Mexico*'s primary purposes test. Further, both the Colville and Klamath Reservations had been allotted and non-Indians owned land adjacent to the streams at issue. The Court in *Walton* nonetheless found that fishing was a primary purpose of the Colville Reservation based upon the fact that "[t]he Colvilles traditionally fished for both salmon and trout. Like other Pacific Northwest Indians, fishing was of economic and religious importance to them." 647 F.2d 42, 48 (9th Cir. 1891). Likewise, the Ninth Circuit found in *Adair* that a purpose of the Klamath Reservation was to "guarantee continuity of the Indians' hunting and gathering lifestyle," based upon the language of the 1864 Treaty as well as the "historical importance of hunting and fishing" to the Tribes. 723 F.2d 1394, 1409 (9th Cir. 1984).

All of the peripheral arguments brought forth by the State and Hecla fail because none refute the fundamental fact in this case that hunting, fishing, and gathering were all of "historical," as well as "economic and religious importance" to the Coeur d'Alene Tribe. Pursuant to federal law, therefore, the Tribe is entitled to water sufficient to fulfill these primary purposes.

ARGUMENT

A. THE UNITED STATES AND TRIBE SEEK AMENDMENT REGARDING TWO, DISCRETE ISSUES BECAUSE THEY REQUIRE CLARIFICATION BEFORE PROCEEDING ON APPEAL OR IN THIS LITIGATION.

In its Standard of Review Section, State Memo at 2, the State insinuates that the United States and Tribe are simply rearguing issues from Summary Judgment. The State's argument is incorrect, however, for the reasons explained in the *Joint Memorandum in Reply to the State of Idaho's and Hecla's Memoranda Opposing Motion to Find Gathering as a Reservation Primary Purpose*, dated June 20, 2017, pp. 3-5. Those arguments are equally applicable to this memorandum and are incorporated herein.

To summarize, the United States and Tribe seek alteration of two, discrete issues that do not clearly translate from the *Order on Motions for Summary Judgment* ("Summary Judgment Order") to the *Final Order Disallowing Water Right Claims*, dated May 3, 2017 ("Order Disallowing Claims"): (1) the exclusion of gathering as a primary purpose of the Reservation and (2) the exclusion of on-Reservation instream flow claims to serve the fishing purpose of the Reservation. Specifically, the Joint Fishing Habitat Memo seeks clarification regarding the holding in the Summary Judgment Order at 12-13, which holds that fishing is a primary purpose of the Reservation but the accompanying May 3 order disallowing claims dismisses the on-reservation water rights necessary to serve that purpose. While the Summary Judgment Order at 15-17 makes clear its intent to dismiss instream flow claims outside the boundaries of the Reservation, it is silent

regarding fish habitat claims within the Reservation boundary. The purpose of the *Joint Motion to Set Aside and Modify Partial Decree or Final Order Disallowing Water Right Claim*, dated May 16, 2017 ("Joint Motion to Alter or Amend") is to clarify the Court's opinion with respect to these important water rights.

B. THE UNITED STATES AND THE TRIBE ARE NOT MOVING THIS COURT TO ALTER OR AMEND ITS DECISION REGARDING OFF-RESERVATION INSTREAM FLOWS OR DESIGNATE A "NEW" PLACE OF USE FOR CLAIMS

As an initial matter, the State and Hecla misconstrue the nature of the Joint Motion to Alter or Amend and the related Joint Fishing Habitat Memo as it relates to the fishing purpose. Hecla alleges that the United States and the Tribe are seeking the Court to allow *in whole* those non-consumptive instream flow claims for streams that cross the reservation boundary. Hecla Memo at 2. The State, for its part, argues that the United States and the Tribe are asking this Court to allow them to make an entirely new claim that "identif[ies] a new place of use." State Memo at 4. Specifically, the State asserts that "[w]hile this Court can deny a claimed water right in part . . . it cannot affirmatively rewrite a water right claim to identify a new place of use or incorporate a new legal theory." *Id.* However, the Joint Fish Habitat Memo asks this Court to do exactly what the State concedes is well within the Court's authority: for those streams that cross the Reservation's boundary,[1] amend its order to allow *in part* the portion of the claims located within the Reservation. Contrary to Hecla's assertions, the Tribe and the United States do not ask the Court to alter its order

[1] Of the claims at issue, **seven are located entirely within reservation boundaries**. Those include 92-10906 (Cherry Creek), 94-9244 (Black Creek), 94-9425, 95-16680 (Plummer Creek), 95-16681 (Little Plummer Creek), 95-16682 (Pedee Creek), 95-16683 (Benewah Creek), and 95-16684 (Windfall Creek). Accordingly, **the only stream reaches implicated by this particular argument raised by the State and Hecla are**: 91-7777 (St. Joe River), 92-10907 (Alder Creek), 93-7469 (Hangman Creek), 93-7470 (Hangman Creek "conditional"), 94-9425 (Willow Creek), 94-9246 (Evans Creek), 95-16678 (Fighting Creek), and 95-16679 (Lake Creek). See Joint Fish Habitat Memo at 4.

to allow for off-reservation water rights. Nor, contrary to Idaho's assertions, does the relief sought amount to a new claim, a new legal theory, or even an amended claim. Instead, application of the Court's rationale in its Summary Judgment Order only requires a partial allowance of the claims already filed (i.e. to the extent on-reservation) and, as the State has acknowledged, this is well within this Court's authority.

Both the State and Hecla specifically identify the St. Joe River claim (91-7777) in their arguments. The State argues that although this claim is in fact for an "important waterway" and is overwhelmingly located within the Coeur d'Alene Reservation, it should nonetheless be denied *in whole* because its beginning point is located slightly off-reservation at the confluence of the St. Maries River. State Memo at 5. Hecla further misconstrues the Joint Fish Habitat Memo as seeking to *allow in whole* this claim because of its biological connection to the Lake. Hecla Memo at 2-3.

Contrary to Idaho's and Hecla's arguments, however, the Joint Fish Habitat Memo requests that the Court *partially* allow the portion of claim no. 91-7777 (as well as the other claims listed in footnote 1) located within the Reservation to move forward. This does not amount to a new claim, "a new place of use or . . . a new legal theory," but is instead simply a reduction of place of use already claimed. This Court routinely finds reductions or limitations on claimed water right elements without disallowing them entirely. *See e.g.*, *Findings of Fact and Conclusions of Law*, In Re SRBA Case No. 39576, Subcase No. 36-00003A, et. al. (1998) (generally finding several elements to water rights differently than claimed without disallowing the water rights entirely); *Memorandum Decision and Order on Challenge*, In Re SRBA Case No. 39576, Subcase No. 34-00012 et. al. (1999) (ordering the place of use for water rights claimed be reduced to be consistent with irrigation district boundaries without disallowing the claims).

C. THERE IS NO PRECEDENT FOR PRIMARY VERSUS SECONDARY WATERWAYS---ALL WATERWAYS IN THE COEUR D'ALENE RESERVATION ARE IMPORTANT WATERWAYS

The Ninth Circuit has prescribed that non-consumptive instream flow water rights are necessary where subsistence practices such as fishing, hunting, and gathering were of "historical" or "economic and religious importance" to the Tribe. *Walton*, 647 F.2d at 48; *Adair*, 723 F.2d at 1409. This test as laid out by the Ninth Circuit exposes the flaw in the State's emphasis on the "important waterways." The test for reserved water rights focuses on determination of purposes, not particular waterways. There is no precedent to support the notion that there can be not only primary purposes for a reservation but also primary versus secondary *waterways* to support those purposes. *See* State Memo at 4.

As this Court found, a primary purpose of the creation of the Coeur d'Alene Reservation was to ensure the Tribe's continued right to engage in its subsistence activities. Summary Judgment Order at 12 ("another primary purpose of the reservation was to provide the Tribe with waterways for fishing and hunting"). These activities were not limited to the navigable waterways within the Reservation but spanned to all locations where plants, fish, and game could be found. Joint Fish Habitat Memo at 5-6. Given the highly significant role that subsistence activities played in the lives of the Coeur d'Alene people, "it seems unlikely that they would have knowingly relinquished these rights . . . ." *Adair*, 723 F.2d at 1409 (quoting *Kimball v. Callahan*, 493 F.2d 564, 566 (9th Cir. (1974)).

The State suggests that *Idaho II*'s focus on the navigable waterways demonstrates that the other waterways within the Reservation were of secondary importance to the Tribe. State Memo at

7, citing *Idaho v. United States*, 533 U.S. 262 (2001) ("*Idaho II*").[2] The reason for *Idaho II*'s strong focus on the Lake and St. Joe River is that navigable waterways were at issue due to the presumption in favor of states acquiring title to submerged lands under navigable waterways upon statehood. *Idaho II*, 533 U.S. at 265 ("The question is whether the National Government holds title, in trust for the Coeur d'Alene Tribe, to lands underlying portions of Lake Coeur d'Alene and the St. Joe River."). Ownership of non-navigable reservation streams was not at issue. Yet, the Court's discussion of the importance of subsistence use of waterways logically applies to non-navigable waterways bearing similar resources, such as fish. In finding that the submerged lands underlying the navigable waters within the reservation were of central importance to the Tribe, *Idaho II* in no way indicated that the Tribe did not rely upon the other waterways within the Reservation.

In fact, the historical evidence in the present case conclusively demonstrates that the upland non-navigable streams were every bit as important to the Tribe as the navigable streams at issue in *Idaho II*. *See* Joint Memo re Fish Purpose at 5-6. The Tribe's strong relationship to these waterways continues to this day, as evidenced by the fact that the Tribe has invested—and continues to invest—millions of dollars in restoration activities on reservation upland streams. This investment by the Tribe reflects the ongoing critical importance of these waterways to tribal cultural and subsistence practices.

Finally, as a matter of biological necessity, without water in all the reservation streams subject to instream flow claims for fish habitat, the fishing purpose in the Lake will be defeated because the Lake's adfluvial fishery cannot survive without sufficient water in the upland streams. Joint Fish Habitat Memo re Fish Purpose at 6-9. This includes smaller tributaries used for spawning and rearing life stages. Joint Fish Habitat Memo re Fish Purpose at 7-8.

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[2] For ease of reference, this brief refers to *Idaho II* as short form for the district court, Ninth Circuit and Supreme Court decisions in that case.

D. THE TRIBE AND THE UNITED STATES ARE ENTITLED TO INSTREAM FLOWS FOR FISH REGARDLESS OF ADJACENT LAND OWNERSHIP

The State argues the United States and the Tribe cannot hold non-consumptive reserved water rights in streams running over submerged lands not owned by the United States for the Tribe. State Memo at 8.

The United States and the Tribe have already thoroughly demonstrated the inapplicability of the State's arguments to this case. *See United States Response Brief on Summary Judgment* at 35-43 and reply brief at 19-21. *See also Coeur d'Alene Tribe Response Brief on Summary Judgment* at 31-40 and its Reply Brief at 39-52.

The United States Supreme Court has considered and rejected the State's argument, finding that state ownership of submerged lands underlying navigable waters "cannot be accepted as limiting the broad powers of the United States to regulate navigable waters under the Commerce Clause and to regulate government lands under Art. IV, s. 3, of the Constitution. We have no doubt about the power of the United States . . . to reserve water rights for its reservations . . . ." *Arizona v. California*, 373 U.S. 546, 598 (1963). The Idaho Supreme Court has likewise found contrary to Idaho's argument. *Potlatch v. United States*, 134 Idaho 912 (2000) (finding federal reserved water right in several navigable rivers in Idaho despite presumptive ownership by the State of the bed and banks of those rivers). While these cases apply to navigable waterways, their recognition that the United States may reserve water rights regardless of underlying land ownership is applicable here.

With respect to non-navigable streams flowing over private lands, the Ninth Circuit has addressed and rejected Idaho's argument on at least three separate occasions in *Walton*, *Anderson*,

and *Adair*.[3] Each of these cases awarded to the United States and the tribes instream flow reserved water rights notwithstanding the fact that the reservations in each case had been allotted and portions of the land adjacent to the streams at issue were owned by non-Indians. *See Walton III*, 752 F.2d 397, 400 (1985) (finding that the Colville Tribes' instream flow right "was not affected by the allotment of reservation lands and passage of title out of the Indians' hands); *Anderson*, 736 F.2d 1358, 1365-66 (9th Cir. 1984) (recognizing the lower court's award of "non-consumptive water rights to preserve" the tribal fishery in Chamokane Creek despite also recognizing that "much of the reservation land with state water rights is immediately adjacent to the creek.").

The issue was addressed most clearly in *Adair*. Importantly, the Klamath Treaty at issue in *Adair* required the Court to *imply* certain subsistence rights not expressly reserved; namely the Tribes' reserved hunting rights. *Adair*, 723 F.2d at 1409. Although the State focuses on the fact that the Klamath Reservation was terminated, the reason *Adair* is important to this case is that the Klamath Reservation had also been allotted. *Id.* at 1398; 24 Stat. 388.

The Ninth Circuit was acutely aware of the fact that land had been "transferred" from tribal ownership pursuant to both the Allotment Act and the Klamath Termination Act, observing that "[t]he balance of the reservation is in private, Indian and non-Indian, ownership through allotment or sale of reservation lands at the time of termination." *Id.* at 1398 (emphasis added). In fact, a majority of the land in non-Indian ownership had been transferred from the Tribe pursuant to the Allotment Act, not the Termination Act. The Court noted that the United States was "owner of approximately 70% of the former reservation lands," while "[u]nder the allotment system,

[3] For more specific analysis on *Walton*, *Anderson*, and *Adair* as they relate to this issue, please *see* the *Coeur d'Alene Tribe's Response Brief on Summary Judgment*, dated Feb. 24, 2017 at pp. 35-40. Many of the State's arguments in its reply brief are likewise answered in the Tribe's Reply Brief on Summary Judgment, dated Mar. 20, 2017 at pp. 40-48.

approximately 25% of the original Klamath Reservation passed from tribal to individual Indian ownership. Over time, many of these individual allotments passed into non-Indian ownership. *Id.* As a result, only 5% of the land owned by non-Indians had been acquired through the Klamath Termination Act.

Just as the State and Objectors argue here, the non-Indian "Appellants [in *Adair*] argue[d] vigorously that the Tribe can no longer hold a water right to support its treaty hunting and fishing rights because the Tribe no longer owns land to which this water right is appurtenant." *Id.* at 1415, n. 24. The Ninth Circuit summarily rejected the argument, finding "the Tribe's hunting and fishing rights guaranteed by the treaty survived despite the land transfer." *Id.* (citing *Kimball v. Callahan*, 493 F.2d at 569-70).[4] Importantly, the Court did not distinguish between lands that had been "transferred" pursuant to termination versus allotment.

In analyzing this argument, the Ninth Circuit observed that "[i]n 1864, when the Klamath Reservation was created and water was impliedly reserved for the benefit of the Tribe, the Indians owned appurtenant land. *The issue* is whether these water rights, once reserved, are terminated by a transfer of the appurtenant land." *Id.* at 1415, n. 24 (emphasis added). The Ninth Circuit determined that subsistence rights—along with the non-consumptive reserved water rights necessary to serve

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[4] The Ninth Circuit's analysis in *Kimball v. Callahan* also demonstrates the fallacy of the State's reliance on *Blake v. Arnett* by clearly demarking the fundamental difference between hunting and fishing rights and the right to *access* non-Indian fee land within a reservation. 493 F.2d 564, 569 (9th Cir. 1974). The Ninth Circuit in *Kimball* made a point of highlighting that the Tribes "seek no rights against private land owners, acknowledging that those persons might properly exclude Klamaths and anyone else from hunting if they so desire." *Id.* However, the Court went on to stress that the Tribes "do, however, seek a declaration, and we so hold, that they may exercise their treaty hunting, trapping, and fishing rights free from state fish and game regulations on the lands constituting their ancestral Klamath Indian Reservation, *including that land now constituting* United States forest land and that *privately owned* land on which hunting, trapping, or fishing is permitted." *Id.* (emphasis added). In other words, although tribal members could not legally access non-Indian lands, their subsistence rights continued to exist throughout the entire Klamath Reservation. *See also*, Coeur d'Alene Tribe Response Brief on Summary Judgment at 32-35.

those subsistence rights—do not run with the land but instead remain with the Tribe unless expressly abrogated by Congress:

> The hunting and fishing rights from which these water rights arise by necessary implication were reserved by the Tribe in the 1864 treaty with the United States. The hunting and fishing rights themselves belong to the Tribe and may not be transferred to a third party. Because the Klamath Tribe's treaty right to hunt and fish is not transferable, it follows that no subsequent transferee may acquire that right of use or the reserved water necessary to fulfill that use.

Id. at 1418. The basis for this conclusion was that:

> even when the Tribe transfers the land to which the hunting and fishing water rights might be said to be appurtenant, it is the Tribe and its members, not some third party, that retains the right to hunt and fish and needs water to support that right.

Id. at 1418, n. 31.

It is notable that the Court did not distinguish between lands transferred pursuant to the Allotment Act and lands transferred pursuant to the Klamath Termination Act. Instead, the Ninth Circuit applied its ruling to all "transfers" of land. This conclusion is important because although the Ninth Circuit had found that the Klamath Termination Act had reserved the Tribes' fishing rights, as well as water rights, no such express reservation exists in the Allotment Act. 24 Stat. 388. Indeed, the Allotment Act is silent regarding tribal subsistence rights and water rights. *Id.* Accordingly, if Idaho's theory regarding the effect of the Allotment Act were correct then the Klamath Tribes would not have been entitled to non-consumptive reserved water rights in stream reaches running through non-Indian fee land that had been alienated pursuant to the Allotment Act. However, the Ninth Circuit did not adopt Idaho's theory and instead applied the canons of construction, including the maxim that "the tribe retains all rights not expressly ceded," to conclude that the Tribes had retained their water rights for subsistence purposes throughout the former reservation. *Adair*, 723 F.2d at 1418. *See also, State v. McConville*, 65 Idaho 46 (1943) ("there is

nothing in any of the statutes or treaties subsequent to 1855 [including the allotment of the Nez Perce Reservation] indicating in the slightest degree that the Indians ever intended to or understood that by selling land to the United States they were giving up the right to fish . . . .").

In sum, the Ninth Circuit, Idaho Supreme Court, and United States Supreme Court have all found federal reserved water rights in streams with beds not wholly owned by the United States. *Walton*, *Anderson*, and *Adair* all addressed non-consumptive instream flow water rights on reservations that (1) were set aside pursuant to treaties or executive orders that did not expressly reserve some or all subsistence rights; (2) had been allotted; and (3) contained streams with non-Indian ownership. In all three cases the Ninth Circuit affirmed the Tribe's water rights to support the tribal fishing right because "even when the Tribe transfers the land to which the hunting and fishing water rights might be said to be appurtenant, it is the Tribe and its members, not some third party, that retains the right to hunt and fish and needs water to support that right." *Adair*, 723 F.2d at 1418, n. 31.

E. THE STATE AND HECLA'S ARGUMENTS REGARDING TRIBAL REGULATORY AUTHORITY ON NON-INDIAN FEE LAND IS A RED HERRING THAT IS NOT RELEVENT TO THE EXISTANCE OF A FEDERAL RESERVED WATER RIGHT

The State cites *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989); *South Dakota v. Bourland*, 508 U.S. 679 (1993); and *Montana v. United States*, 450 U.S. 544 (1981) to argue that since the Tribe cannot regulate non-Indian fee lands it likewise cannot have a non-consumptive instream flow water right in a stream that runs through non-Indian fee land. The State provides no precedential link between federal reserved water rights and the regulatory issues present in the cases it cites.

In making this argument, the State once again makes irrelevant and red herring arguments while simultaneously ignoring on-point case law. *Walton*, *Anderson*, and *Adair* are all directly on point and involve (1) treaties, agreements or executive orders where some or all of the subsistence rights at issues were not expressly reserved; (2) reservations that were allotted; and (3) instream flow water rights with reaches running through non-Indian fee land. *See generally*, *Walton*, 647 F.2d at 42; *Anderson*, 736 F.2d at 1358; *Adair*, 723 F.2d at 1394. *See also*, *United States Response Brief on Summary Judgment* at 35-43; *United States Reply Brief on Summary Judgment* at 19-21; *Coeur d'Alene Tribe Response Brief on Summary Judgment* at 31-50; *Coeur d'Alene Tribe Reply Brief on Summary Judgment* at 39-52.

These cases were also all decided *after* the Supreme Court's 1981 decision in *Montana*, which laid out the general rule regarding tribal regulation of non-Indian fee lands. In each of these cases the Ninth Circuit found implied non-consumptive instream flow water rights without turning to the question of whether the Tribe could regulate every inch of the streams in question. The reason for this is simple: regulatory authority is not part of the test for determining entitlement for non-consumptive instream flow water rights for fish. Instead, *the test* is whether the Tribe "traditionally fished . . . [and] fishing was of economic and religious importance to them." *Walton*, 647 F.2d at 48.

F. THE FISH HABITAT CLAIMS ARE NOT INTERCHANGEABLE WITH THE HUNTING CLAIMS

The State asserts that dismissal of on-Reservation fish habitat claims is acceptable based on its misinterpretation of the United States' Claims Cover Letter, which the State interprets to mean that the fish habitat claims are simply alternative claims to the hunting habitat claims. State Memo at 11-12, *citing* United States' Claims Cover Letter, from Vanessa Boyd Willard, U.S. Dept. of Justice, to Gary Spackman, Idaho Dept. of Water Resources, dated Jan. 30, 2014, pp. 4-5 ("Claims

Cover Letter"). The State's interpretation is incorrect, however, because the portion of the Claims Cover Letter cited by the State conveyed a very different message—that the water rights claims for springs, seeps and wetlands do not double-claim water which may also be subject to fish habitat claims. The letter conveyed that, to the extent that the non-consumptive water right claims for instream flows for fish is utilized by plants in riparian areas of a stream for hunting and gathering habitat, such water is not intended to be claimed twice. The United States explained that it was providing separate justifications for the same water flows that provide instream fish habitat and support riparian vegetation. Contrary to the State's assertion, the water rights to support fish in streams within the Reservation are separate in both law and fact. Therefore, dismissal of the on-Reservation fish habitat claims cannot be justified based on entitlement of claims that support the hunting purpose.

From a legal perspective, the State's argument misconstrues the issue of entitlement to a federal reserved water right. As explained in the Introduction above, the legal test under the federal reserved water rights doctrine, particularly *Walton* and *Adair* in the context of non-consumptive federal reserved water rights, turns upon the purposes of the reservation. Water rights are then implied to serve those purposes. This Court has already concluded that fishing is a purpose of the Reservation, thus water rights must be implied to serve that purpose. Water rights that are necessary to serve another Reservation purpose, such as hunting, cannot be used to defeat the water rights necessary to fulfill the other Reservation purpose such as fishing.

Factually, instream flow claims for fish habitat are wholly distinct from claims for springs, seeps and wetlands. The fish habitat claims are based on the biological needs of fish at different life stages. In contrast, the claims to support springs, seeps and wetlands seek sufficient water to support certain plant species. Moreover, at this early stage prior to quantification, there is no

assurance that one claim category would provide the equivalent water to another. While it is true that the United States and Tribe do not double-claim water to serve these two uses, *see* Claims Cover Letter at 4-5, the claims are not simply alternatives to one another. Instead, the fish habitat claims are independent claims based on fish biology that the Tribe is entitled to wholly separate from hunting claims.

CONCLUSION

For the reasons stated above, the United States and Tribe respectfully assert that the Court's dismissal of the on-Reservation portions of the non-consumptive reserved water right claims for fish habitat is an error of both fact and law. Accordingly, the United States and the Tribe request this Court affirm the Joint Motion to correct and/or alter or amend the Court's May 3rd order to the extent necessary to allow the on-Reservation portions of the non-consumptive reserved water right claims for fish habitat to move onto the quantification stage of this adjudication.

DATED this 20th day of June, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that original copies of the UNITED STATES' AND COEUR D'ALENE TRIBE JOINT MEMORANDUM IN RESPONE TO THE STATE OF IDAHO'S MOTION TO RECONSIDER ORDER ON MOTIONS FOR SUMMARY JUDGMENT was sent via fax this 20th day of June, 2017 to:

Clerk of the District Court
Coeur d'Alene-Spokane River Basin Adjudication
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I certify that on this 20th day of June, 2017, true and correct copies of the documents listed above were sent via Overnight Federal Express to:

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For

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