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

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DISTRICT COURT - CSRBA
 Fifth Judicial District
 County of Twin Falls - State of Idaho

JUN 21 2017

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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 CSRBA
Case No. 49576

-) Consolidated Subcase No. 91-7755
-)
-) **UNITED STATES' AND COEUR**
-) **D'ALENE TRIBE'S JOINT**
-) **MEMORANDUM IN REPLY TO**
-) **THE STATE OF IDAHO'S AND**
-) **HECLA'S MEMORANDA**
-) **OPPOSING MOTION TO FIND**
-) **GATHERING AS RESERVATION**
-) **PRIMARY PURPOSE**

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 to Find Gathering as a Reservation Primary Purpose* (“State Memo”) and *Hecla’s Memorandum in Opposition to United States and Coeur d’Alene Tribe’s Joint Motion to Alter or Amend to Find Gathering as a Reservation Primary Purpose* (“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 to Find Gathering as a Reservation Primary Purpose*, dated May 16, 2017 (“Joint Gathering Memo”).

The State and Hecla present two main arguments. First, as a procedural matter, they argue that the Joint Gathering Memo should be denied because it “does not identify any errors of law or fact committed by the Court” and, thus, fails to meet the requirements of Rule 59. *See* State Memo at 3. Second, the State and Hecla assert that gathering was properly found as a secondary, rather than primary, purpose of the Coeur d’Alene Reservation (“Reservation”) based on historical documents addressing the purpose of the 1873 Reservation that allegedly only mention hunting and fishing, but not gathering. *Id.* at 4.

Both arguments should be rejected. The Joint Gathering Memo squarely meets Rule 59 requirements by seeking clarification of the Court’s reasoning related to the gathering purpose in the unique context of a gathering right’s relationship to the hunting and fishing primary purposes upheld in the *Order on Motions for Summary Judgment* (“Summary Judgment Order”), dated May 3, 2017. 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. Likewise, the facts related to establishment of the Reservation demonstrate that the Tribe's gathering rights are similar to the Klamath Tribes and, thus, *United States v. Adair* supports inclusion of the gathering right as a primary purpose of the Reservation along with hunting and fishing.

ARGUMENT

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

The State is wrong that the United States and Tribe “simply reiterate arguments previously made in its summary judgment briefing and expert reports, in the hope of reaching a different result.” State Memo at 3. On the contrary, the United States and Tribe carefully chose to seek reconsideration on two, specific issues that do not clearly translate from the Summary Judgment Order to the associated May 3, 2017 orders dismissing or disallowing claims. Amendment and additional explanation of judicial reasoning will facilitate further proceedings including quantification and, if necessary, appeals. The two issues include the gathering right discussed herein and the denial of on-Reservation fish habitat water rights to support the fishing purpose addressed in the related *Joint Memorandum in Support of SF-7 Motion for Correction of Clerical Errors and/or to Alter or Amend re: Primary Purpose of Fishing (Habitat)*, dated May 16, 2017 (“Joint Fishing Habitat Memo”).

To be sure, the United States and Tribe disagree with the Summary Judgment Order's treatment of other issues which may be the subject of appeal. Those additional issues, however, were not raised in the context of a motion to alter or amend precisely because such motions were limited to the issues where the Court's May 3, 2017 orders involve what appear to be erroneous

conclusions when read within the context of the overall holdings of the Summary Judgment Order. The motions, therefore, seek to provide this “court the opportunity to correct errors of both of fact or law . . . short of an appeal.” *See* State Memo at 2, *citing Barmore v. Perrone*, 145 Idaho 340, 344, 179 P.3d 303, 307 (2008).

For example, as explained in the Joint Gathering Memo at 2, the Summary Judgment Order mentions gathering in only one instance where the Order reiterates the categories of claims asserted for the Reservation. *See* Summary Judgment Order at 9. The Summary Judgment Order then analyzes the historic record in *Idaho v. United States*, 533 U.S. 262, 265 (2001) (“*Idaho II*”) and expert affidavits to reach its holding that fishing and hunting are primary purposes of the Reservation. *Id.* at 12-13. This legal and factual record relied on for hunting and fishing is intimately intertwined with the Tribe’s exercise of its gathering rights, yet the Summary Judgment Order is silent as to gathering as a Reservation purpose. *Id.* This lack of analysis demonstrates that this Court may need an opportunity to correct its decision “short of an appeal” and provide the parties with a complete understanding of the Summary Judgment Order before any appellate proceedings. *See* State Memo at 2, *citing Barmore v. Perrone*, 145 Idaho at 344, 179 P.3d at 307.

In a similar manner, the Joint Fishing Habitat Memo also seeks clarification of an issue that is not fully explained and internally inconsistent within the Summary Judgment Order. The source of confusion is that the Summary Judgment Order at 12-13 holds that fishing is a primary purpose of the Reservation, but then dismisses the water rights that serve that purpose—instream flow claims within the boundary of the Reservation that are necessary to provide the habitat to support the on-Reservation fishery subject to the Tribe’s harvest rights. *See Final Order Disallowing Water Rights Claims*, dated May 3, 2017 (“Order Disallowing Claims”). 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.

Accordingly, the United States and Tribe infer that the dismissal of these claims was simply an error based on a lack of clarity that these streams are within the Reservation boundary and necessary to serve the fishing purpose. If so, the solution to such a problem would be correction of a clerical order. *See* Joint Fishing Habitat Memo at 4.

B. IDAHO II AND HISTORICAL DOCUMENTS DEMONSTRATE THAT GATHERING IS A PRIMARY PURPOSE FOR THE CREATION OF THE COEUR D'ALENE RESERVATION.

Idaho II and the historical record in this case unequivocally demonstrate that retaining waterways for continued subsistence uses, including gathering, was a primary purpose of the 1873 Reservation. *Idaho v. United States*, 533 U.S. 262 (2001) (“*Idaho IP*”).¹ The test applied by *Idaho II* to determine title to submerged lands underlying navigable waters overlaps with the legal standard to determine entitlement to a federal reserved water right, because both require analysis of the purpose of the reservation. The Supreme Court, in *Idaho II*, explained that courts consider “whether the purpose of the reservation would have been compromised if the submerged lands had passed to the State” and that, where the purpose would have been undermined, “[i]t is simply not plausible that the United States sought to reserve only the upland portions of the area.” 533 U.S. at 273–74 (citations omitted). While the State argues that *Idaho II* never considered Reservation purposes, the Supreme Court’s finding that the United States

¹ 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.

retained submerged lands in the Reservation for subsistence uses meant that “the purpose of the reservation” would have been compromised if the submerged lands had passed to the State.

The Ninth Circuit in *United States v. Adair* analyzed *United States v. New Mexico* and determined that an Indian tribe is entitled to water rights for subsistence purposes when those subsistence activities were of “historical importance” to the tribe. 723 F.2d 1394, 1409 (9th Cir. 1984). In that situation, the court concluded that “it seems unlikely that they would have knowingly relinquished these rights” *Id.* (quoting *Kimball v. Callahan*, 493 F.2d at 139). In considering the purpose for the creation of the Coeur d’Alene Reservation, *Idaho II* demonstrates that the Tribe was traditionally dependent upon the water resources within its territory for its subsistence fishing, hunting, and gathering needs up to and beyond the period when its reservation was created in 1873. These factors led the *Idaho II* Court to conclude that it was the mutual intent of both the United States and the Tribe to preserve the waterways as part of the reservation and to ensure the Tribe’s continued right to use those waterways.

The Supreme Court expressly noted gathering in explaining that “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.” 533 U.S. at 265. The District Court found that 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). The Court 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.* The Court 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." *Id.* The Court found that the Tribe's agricultural endeavors "did not supplant the Tribe's dependence on the waterways for a steady source of fish, fowl and plants." *Id.* at 1101.

Accordingly, "the Lake and rivers provided resources that were essential to the Coeur d'Alenes' survival" including "plant materials." *Id.* The Court found that this continued at the time of Reservation creation since "in 1873 the majority of tribal members continued to rely on the water resource for a significant portion of their needs" and that "a purpose of the 1873 Executive reservation was to retain the submerged lands for the benefit of the Tribe." *Id.* at 1102.

Hecla continues to insist, based upon the Tribe's 1872 petition, that gathering was not a primary purpose of the Reservation since the petition did not expressly mention gathering. Hecla Memo at 3-4. Hecla's argument must be rejected for two reasons. First, the test for determining whether gathering is a primary purpose of the reservation turns upon whether gathering was of "historical importance" to the Tribe. *Adair*, 723 F.2d at 1409. The historic record clearly demonstrates this historical importance. Hecla expressly recognizes that this test is met in this case, admitting that "gathering was part of the Tribe's subsistence lifestyle." Hecla Memo at 4. Second, reserved rights are *implied* rather than express rights and express mention of one type of subsistence right in a single document cannot be read to exclude other subsistence rights. Indeed, Judge Lodge cited to the very same petition relied upon by Hecla to conclude that the Tribe's rights were not limited to fishing but instead that "in 1873 the Lake and rivers were an essential part of the 'basket of resources' necessary to sustain the Tribe's livelihood" and that "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).

Further, the unrebutted expert reports in this case thoroughly document the Tribe's reliance from time immemorial through and beyond reservation creation on the waterways for fishing, hunting, and gathering. See *United States' and Coeur d'Alene Tribe's Joint Statement of Facts*, dated October 20, 2016, ¶ 5, 6, 8, 10, 11, 12, 13, 14, 37-39, 69, 71 (Tribe's overall reliance on waterways for multiple activities); 6, 8, 10, 13, 22-24, 37-39 (gathering).

C. THE HISTORIC RECORD REGARDING COEUR D'ALENE GATHERING RIGHTS DEMONSTRATES THAT THIS CASE IS ANALOGOUS TO *UNITED STATES V. ADAIR* WHICH HELD THAT GATHERING WAS A PRIMARY PURPOSE.

The State and Hecla both seek to distinguish this case from *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983). The State argues that the gathering right recognized in *Adair* differs from this case because it was based on express gathering language in the 1864 Treaty with the Klamath Tribes as compared to an alleged lack of such express documents addressing gathering as a purpose of the Coeur d'Alene Reservation. State Memo at 5. Hecla's argument is slightly different in that it appears to assert that *Adair* ultimately did not recognize a gathering right. Hecla Memo at 4-5. Neither argument is persuasive because the Klamath Tribes were awarded water rights to support a gathering purpose and *Idaho II* makes clear that the gathering activities of the Coeur d'Alene Tribe are analogous to those of the Klamath Tribes as a primary purpose of the Reservation along with hunting and fishing.

The State is simply wrong that the sole basis for the Ninth Circuit's decision in *Adair* was the express language of the Klamath Treaty. Instead, the Ninth Circuit was careful to highlight that its decision was based upon not only the language of the Klamath Treaty but also "the historical importance" of subsistence activities to the Klamath Tribe. *Adair*, 723 F.2d at 1409. This is best demonstrated by the fact that the Klamath Treaty does not mention hunting and yet the Court nonetheless found the Tribe entitled to water rights to support that activity because of

“the highly significant role hunting . . . played . . . in the lives of the Klamaths.” *Id.* (quoting *Kimball*, 493 F.2d at 566).

Like *Adair*'s analysis of implied hunting rights, the *Idaho II* analysis of gathering as a pillar of subsistence alongside hunting and fishing demonstrates that the Coeur d'Alene Tribe's gathering rights are like those exercised by the Klamath Tribes. As explained in Section B. above, *Idaho II* concluded that gathering, just like hunting and fishing, was part of the suite of subsistence activities relied on by the Coeur d'Alenes. *See* 95 F. Supp. 2d at 1100 (“The Tribe traditionally survived by fishing, hunting and gathering.”) (emphasis added). For the Coeur d'Alene Tribe, the subsistence activities formed a three-legged stool upon which the Tribe relied—gathering was required to support the stool just as hunting and fishing were required. Gathering was expressly examined in *Idaho II* and, like the express language in the Klamath Treaty, was found to be a primary subsistence purpose of the Reservation along with fishing and hunting.

In response to Hecla's argument, any argument that *Adair* recognized only hunting and fishing, without gathering, as part of the overall subsistence purpose of the Klamath Reservation must be rejected. While it is true that there are certain places in the *Adair* decision that refer only to hunting and fishing as the subsistence rights of the Tribe, the opinion read as a whole, along with the tribal water rights confirmed by the Oregon state court process, confirm gathering as a purpose of the Klamath Reservation.²

² In the same section of its response brief, Hecla cites the 2003 decision by Judge Lodge *Coeur d'Alene Tribe v. Asarco, Inc.* to argue that “the Tribe is not an owner of or trustee of the natural resources in the Coeur d'Alene Basin, but instead has an ownership or trustee interest only in its own land.” Hecla Memo at 5. This is a curious argument by Hecla since it was a party to Judge Lodge's subsequent decision revising the 2003 order. *United States v. Asarco, Inc.*, 471 F.Supp.2d 1063 (D. Idaho 2005). In that case, Judge Lodge revised his 2003 order to find that “Plaintiffs [the United States and the Tribe] are ‘trustees’ for purposes of CERCLA over federal and tribal land *as well as the migratory natural resources of: fish, wildlife, birds, biota, water and groundwater* based upon their involvement of the management and control of such natural resources and applicable federal statutes . . .” *Id.* at

An analysis of the *Adair* decision demonstrates that the Ninth Circuit viewed the Klamath Tribes' subsistence activities as a package necessarily including hunting, fishing, and gathering. Indeed, the section of the decision analyzing tribal water rights is entitled "A Reservation of Water to Accompany the Tribe's Treaty Right to Hunt, Fish, and Gather." *Adair*, 723 F.2d at 1408 (emphasis added). The question posed in *Adair* was "whether securing to the Indians the right to hunt, fish, and gather was a primary purpose of the Klamath Reservation." *Id.* at 1409 (emphasis added). In answering that question in the affirmative, *Adair* analyzed the "intent of the parties to the 1864 Treaty as reflected in its text and the surrounding circumstances." *Id.* Throughout its analysis, the *Adair* court interchangeably referred to the Klamath Tribes' suite of subsistence rights with terms that sometimes included all three activities ("hunting, fishing, and gathering lifestyle," *id.* at 1413), or sometimes just two of the activities ("hunting and gathering lifestyle," or "hunting and fishing lifestyle," *id.* at 1409). These labels were used interchangeably while answering the question presented and refer to the same package of subsistence rights that included all three activities: hunting, fishing, and gathering. *Adair* held that this suite of subsistence activities was a primary purpose of the Reservation based on its analysis of the "intent of the parties to the 1864 Treaty as reflected in its text and the surrounding circumstances." *Id.*

Similarly, *Idaho II* analyzed the intent of the United States and Coeur d'Alene Tribe regarding the 1873 establishment of the Coeur d'Alene Reservation to conclude that the surrounding circumstances demonstrate that the Coeur d'Alenes, just like the Klamaths, relied on all three legs of the subsistence stool: hunting, fishing, and gathering. For those reasons,

1068-69 (emphasis added). In so doing, Judge Lodge removed *any* limitations from his 2003 order based upon land ownership.

gathering should be recognized, like hunting and fishing, as a primary subsistence purpose of the Coeur d'Alene Reservation.

Finally, it is important to note that the Klamath Basin Adjudication in Oregon state court recognized water rights to support the Tribes' gathering rights. After proceedings before Administrative Law Judges, the Oregon Water Resource Department issued its *Amended and Corrected Findings of Fact and Order of Determination* ("ACFFOD"), dated Feb. 28, 2014, <http://www.oregon.gov/owrd/Pages/adj/index.aspx> (last visited June 19, 2017). The ACFFOD recognized water rights in Klamath Marsh and for seeps and springs throughout the former Klamath Reservation for the following purpose: "to preserve and protect the Tribes' hunting, fishing, trapping, and gathering rights on former reservation land." *See e.g.*, ACFFOD, Water Right Claim Description, KBA_ACFFOD_05021.

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.

DATED this 20th day of June, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 20th day of June, 2017, original copies of the UNITED STATES' AND COEUR D'ALENE TRIBE'S JOINT MEMORANDUM IN REPLY TO THE STATE OF IDAHO'S AND HECLA'S MEMORANDA OPPOSING MOTION TO FIND GATHERING AS RESERVATION PRIMARY PURPOSE was sent via Overnight Federal Express to:

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