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Hecla's Memo in Opposition to USA-CDAT Mtn to Alter or Amend (Fishing)

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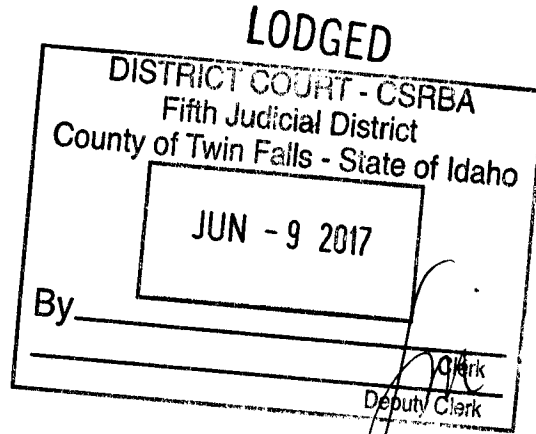
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**BEFORE THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re CSRBA

Case No. 49576

Subcase No. 91-7755, *et al.*

**HECLA'S MEMORANDUM IN
OPPOSITION TO UNITED STATES AND
COEUR D'ALENE TRIBE'S JOINT SF-7
MOTION FOR CORRECTION OF
CLERICAL ERROR AND/OR TO ALTER
OR AMEND RE: PRIMARY PURPOSE
OF FISHING (HABITAT)**

In this motion, the United States and Tribe assert that the Court has made a clerical error in dismissing certain of the in-stream flow claims and, in the event that there was no clerical error, ask for a motion to alter or amend to eliminate the dismissal of those claims. The claims that the United States and Tribe ask to correct relate to fifteen (15) in-stream flow claims asserted for fish habitat. *Joint Memorandum*, p. 2. Significantly, the United States and Tribe state that these claims are located "either entirely, or in significant part, within the current boundaries of the Reservation." *Id.*

In other words, this motion involves at least some in-stream flow claims that are also ("in part") outside the current boundaries of the Reservation. The United States and Tribe ask the

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Court to remove those claims, including stream reaches “in part” outside the boundaries of the Reservation, from the Order disallowing claims. The United States and Tribe assert that this correction and/or amendment need to be made because of the Tribe’s desire to fish in on-reservation waterways.

Hecla’s Motion for Summary Judgment asked the Court to dismiss the United States and Tribe’s claims for in-stream flow rights located off of the Reservation. In ruling on this Motion, this Court specifically held that the United States is not entitled to federal reserved water rights outside the boundaries of the Reservation. *Order on Motions for Summary Judgment*, pp. 15-17. The Court determined that it was not a primary purpose of the Reservation to protect off-reservation fish habitat. *Id.* at 15. It was, on the contrary, a primary purpose of the Reservation to extinguish off-reservation tribal rights and interests. *Id.* at 15; *United States v. Idaho*, 533 U.S. 262, 275-76 (2001). The Court concluded that the language of the agreements between the United States and the Tribe is “plain, unambiguous and absolute. It establishes that the Tribe gave up all of its off-reservation rights and interests.” *Id.* at 16.

In their Motion to correct and/or alter or amend, the Tribe and the United States do not assert that this conclusion is an error, clerical or otherwise. Rather, they assert that because of the importance of on-reservation waterways for fish habitat that their claims that stretch off the Reservation must be allowed to go forward to the quantification stage. The Tribe relies on what it refers to as biological evidence about stream reaches that provide habitat for adfluvial fish, which reaches are “widely distributed within the Coeur d’Alene Basin.” *Memorandum*, p. 8. This is the same theory that the Tribe asserted for its off-reservation in-stream flow claims. It is the same theory that this Court correctly rejected. The Tribe and United States should not be allowed

to reassert those claims under the guise of a clerical error.

In its response, the State of Idaho identifies claim 91-7777 to the St. Joe River as one of the stream segments that is partially on and partially outside of the Reservation. It is not clear to Hecla from the United States and Tribe's Motion the extent to which any of the other fifteen (15) claims are located in part "within the current boundaries of the Reservation[.]" and in part outside the current boundaries. *Joint Memorandum*, pp. 2-3. To the extent that any of the claims stretch outside the boundaries of the Reservation, the claims must be denied for the reasons set forth in the Court's *Order on Motions for Summary Judgment*, pp. 15-17.

Hecla also joins with the positions set forth by the State of Idaho regarding the effect of the alienation of the land under and adjacent to the streams, even within the boundaries of the Reservation, and the case law discussed by the State of Idaho, specifically the United States Supreme Court decisions of *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. U.S.*, 450 U.S. 544 (1981), and the Ninth Circuit decision of *Blake v. Arnett*, 663 F.2d 906 (9th Cir. 1981). In addition, Hecla joins with the position of the State of Idaho related to the fact that these claims overlap the wetlands claims and the need to dispose of such duplicative overlapping claims.

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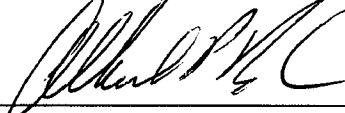
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For the reasons set forth herein, and in the State of Idaho's Memorandum in opposition, Hecla requests that the Tribe and the United States' Motion for correction of clerical error and/or to alter or amend to include an additional fifteen (15) stream segments should be denied.

DATED this 9th day of June, 2017.

BARKER ROSHOLT & SIMPSON LLP



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of June, 2017, I served true and correct copies of the foregoing upon the following by the method indicated:

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