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Hecla's Memo in Opposition to USA-CADT Mtn to Alter or Amend (Gathering)

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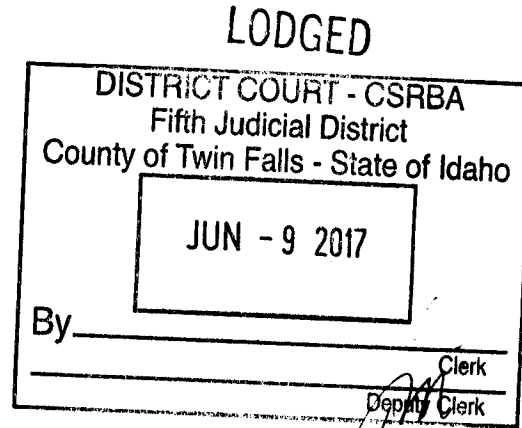
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**BEFORE THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

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
MOTION TO ALTER OR AMEND TO
FIND GATHERING AS A RESERVATION
PRIMARY PURPOSE**

The United States and Tribe's motion asks the Court to expand the "primary purposes" of the reservation to include "gathering" and to imply a water right for gathering. They do not explain what such a right would consist of or how it would differ from, if at all, a reserved right for hunting and fishing on the Reservation.

This Court's *Order on Motions for Summary Judgment*, dated May 3, 2017, comprehensively reviewed the history of the establishment of the Reservation for the Coeur d'Alene Tribe. The Court catalogued the "primary purposes" of the Coeur d'Alene Reservation and concluded that the United States impliedly reserved water rights for agriculture, fishing and hunting and domestic purposes in conjunction with the reservation of land. The Court rejected all other claims as not within the scope of a primary purpose of the Reservation. *Order*, pp. 6-8. The

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Court carefully evaluated the Tribe's "homeland" theory argued to support its expansive theory of reserved water rights. The Court noted that the homeland theory was virtually unbounded and would essentially provide no functional or practical limitation on the nature or scope of the water rights reserved.

When the United States asserted an implied reserved water right, it relied primarily upon this homeland theory and did not attempt to demonstrate that any particular use was, in itself, a primary purpose of the Reservation. Accordingly, the Court was left to its own devices to determine which of the many different types of claims asserted by the United States, as part of its homeland theory, actually were primary purposes of the Reservation. The Court settled upon agriculture, fishing and hunting and domestic based on the historic record. The Court determined that all other uses claimed by the United States fell into the category of a secondary purpose of the Reservation for which no reserved water right can be implied.

The United States Supreme Court decision in *United States v. New Mexico*, 438 U.S. 696, 700, 702 (1978), recognizes the distinction between primary and secondary purposes of a reservation of land, and holding that only primary purposes can be the basis for implying a federal reserved water right associated with that reservation. In their motion to alter or amend to add "gathering" as a primary purpose, the United States and Tribe do not contend that the *New Mexico* standard is the incorrect standard. So the question for the Court is, whether "gathering" was recognized as a primary purpose of the Reservation at the time the land was reserved? The record is devoid of any indication that it was.

In contending that "gathering" should be added as a primary purpose of the Reservation, the United States and Tribe provide no principled way to distinguish between the use of the Reservation for gathering from any of the other claimed uses that the United States made on

behalf of the Tribe, including commercial, municipal, industrial, in-stream flows, lake levels, water storage, power generation, aesthetics, recreation, religious, cultural, and ceremonial uses. According to the Tribe and United States, all these uses were in effect at the time of the reservation. This current effort to expand the primary purpose of the Reservation could easily have been stretched to include any of the other claimed purposes.

Instead, the United States and Tribe focus just on the theory that the primary purpose of the Reservation was to set aside the Reservation for gathering, and that a federal reserved water right is necessary for the Tribe to conduct gathering activities. By doing so, they must demonstrate that without a federal reserved water right for “gathering,” in addition to a reserved right for hunting and fishing and agriculture, the primary purpose of the Reservation would be “entirely defeated.” *New Mexico*, 438 U.S. at 700; *Order on Motion for Summary Judgment*, p. 9, fn. 4.

The United States and Tribe cite selected portions of Judge Lodge’s decision in the *Lake* case, recognizing that one of the subsistence practices that members of the Tribe engaged in was gathering of wild materials. As with the other secondary purposes, this Court noted that there was “limited support” for some of those uses and circumstances in the historic record of the creation of the Reservation. The same is true of gathering. Those limited references are not sufficient to transform those secondary uses, including gathering, into a primary purpose of the Reservation. *Order*, pp. 14-15. As this Court noted, citing from the opinion of the United States Supreme Court in the *Lake* case:

When the Tribe petitioned the Commissioner of Indian Affairs a second time, it insisted on a reservation and included key river valleys because “we are not as yet quite up to living on farming” and “for a while yet we need to have some **hunting and fishing.**”

Order, p. 4, quoting *Idaho v. United States*, 533 U.S. 262, 265 (2001) (**emphasis added**).

Notably absent from the Petition of the Tribe in 1873, was any attempt to elevate “gathering” or other subsistence practices to the level of hunting or fishing or indeed as a primary purpose of the Reservation. Rather, as this Court concluded, a primary purpose of the Reservation was to promote agriculture for the inhabitants of the Reservation. *Order*, p. 11. The Reservation of hunting and fishing “for a while yet” did not then, and does not now, mean that the Reservation was permanently set aside for gathering, especially because a primary purpose was to transition the inhabitants to agricultural lifestyles. All that the citations to the historic record from Judge Lodge’s decision show was that, prior to establishment of the Reservation, gathering was part of the Tribe’s subsistence lifestyle. If the Reservation intended to transition the Tribe to agricultural use, and retaining some hunting and fishing “for a while,” there is absent any proof that the Reservation was set aside for gathering purposes, even “for a while.”

Moreover, the United States and Tribe cite no case law supporting an independent federal reserved water right for the purposes of gathering. The United States and Tribe appear to rely exclusively upon the case of the *United States v. Adair*, 723 F.2d 1394, 1409 (9th Cir. 1983), for its claim to an on-reservation gathering water right. Article 1 of the Treaty at issue in *Adair* specifically reserved to the Klamath Tribe the exclusive right to hunt, fish and gather on the reservation. *Id.* at 1398.

However, the Court in *Adair* did not do what the United States claims it did. The Court in *Adair* explained, “the issue presented for a decision in this case is whether, as the district court held, these **hunting and fishing rights carry with them an implied reservation of water rights.**” 733 F.2d at 1408 (**emphasis added**). The question posed was not whether there was a separate gathering water right. Moreover, according to the Ninth Circuit, the Klamath Treaty

“expressly provides that the Tribe will have exclusive on-reservation fishing and gathering rights.” This fishing and gathering right was construed to allow the Tribe to exercise its hunting rights on the reservation. Hunting and fishing on the Klamath reservation were the rights which the court found that gave rise to a federal reserved water right. *Id.*

Here, neither the Executive Order creating boundaries of the Reservation in 1873 nor the 1891 Act of Congress expressly recognized the Coeur d’Alene Tribe’s right to “gather” on the Reservation. For this additional reason, *Adair* does not support the United States and Tribe’s claims that gathering should be considered a primary purpose of this Reservation.

In addition, the United States and Tribe rely heavily on certain statements from Judge Lodge in the district court decision in the *Lake* case. But, Judge Lodge never found that a primary purpose of the Reservation was to set aside a reservation for gathering purposes. Judge Lodge merely recognized that gathering was part of the Tribe’s lifestyle prior to, and contemporaneous with, the original Executive Order. However, the United States and Tribe fail to mention that Judge Lodge has also ruled 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. *Coeur d’Alene Tribe v. ASARCO*, 280 F. Supp. 2d, 1094, 1117 (D. Idaho 2003) (“while the Tribe may use certain natural resources in the exercise of their cultural activities, such use does not rise to the level of making a natural resource ‘belong or be connected as a rightful part or attribute’ for purposes of trusteeship analysis”). Certainly, trusteeship, for purposes of CERCLA, is not precisely the same question as what are the primary purposes of the Reservation. But, Judge Lodge’s conclusion does suggest that it was not a primary purpose of the Reservation to set aside all the natural biota and other resources for use by the Tribe for gathering purposes, except to the extent that the Tribe had ownership of tribal

land, like any other property owner. Rather, such use would properly be viewed as secondary for this Court's analysis.

The United States and Tribe have no cogent legal authority for the argument that there is an independent water right associated with gathering purposes on this Reservation. The Tribe and the United States have failed to show that gathering was a primary purpose of the Reservation and without a water right for those gathering purposes, the primary purpose of the Reservation would be entirely defeated. *U.S. v. New Mexico, supra*. Accordingly, the Tribe and the United States' motion for reconsideration on this issue should be denied.

DATED this 9th day of June, 2017.

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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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