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

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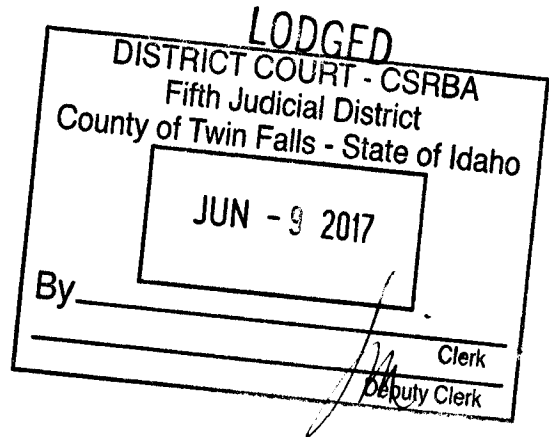
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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re CSRBA) Consolidated Subcase No. 91-7755
)
Case No. 49576) STATE OF IDAHO'S MEMORANDUM IN
) OPPOSITION TO SF-7 MOTION FOR
) CORRECTION OF CLERICAL ERROR
) AND/OR TO ALTER OR AMEND RE:
) PRIMARY PURPOSE OF FISHING
) (HABITAT)
)
_____)

INTRODUCTION

The Coeur d'Alene Tribe and the United States (hereinafter collectively "United States") seek the partial reversal of this Court's *Final Order Disallowing Water Right Claims* as it applies to fifteen streams wholly or partially within the current boundaries of the Coeur d'Alene Indian Reservation. The motion was filed

pursuant to § 19 of CSRBA Administrative Order 1 and I.R.C.P. 59(e), 60(a), and 60(b).

STANDARD OF REVIEW

Rule 59(e) proceedings afford the trial court the opportunity to correct errors both of fact or law that had occurred in its proceedings; it thereby provides a mechanism for corrective action short of an appeal.” *Barmore v. Perrone*, 145 Idaho 340, 344, 179 P.3d 303, 307 (2008). It necessarily follows that a motion filed under Rule 59(e) must identify specific errors of law or fact; the movant cannot simply repeat arguments previously made to the Court in hope of a more favorable result. *See EcoNova, Inc. v. DPS Utah*, No. 1:12-CV-174, 2013 WL 85077, at *1 (D. Utah Jan. 7, 2013) (“Courts routinely deny Rule 59(e) motions in which the movant rehashes old arguments, attempts to re-argue more persuasively issues already presented to and addressed by the court, or tries to take a second bite at the apple”); *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000) (Rule 59(e) movant must demonstrate that “there was a disregard, misapplication or failure to recognize controlling precedent”).

When the alleged error is clerical in nature, the motion is properly characterized as one for correction pursuant to I.R.C.P. 60(a). *Vierstra v. Vierstra*, 153 Idaho 873, 878, 292 P.3d 264, 269 (2012) (“not every proposed change to a judgment constitutes a motion to alter or amend”). Clerical mistakes are “those errors in which the type of mistake or omission is mechanical in nature which is apparent in the record and does not involve a legal decision or judgment by an attorney.” *Silsby v. Kepner*, 140 Idaho 410, 411, 95 P.3d 28, 29 (2004) (internal quotations and parentheses omitted).

While the United States cites Rule 60(b) as an alternative grounds for correcting the alleged mistake, such citation is without foundation. “The clerical mistake under Rule 60(a) may be differentiated from the mistake or inadvertence referred to in Rule 60(b)(1), upon the ground that the latter applies primarily to errors or omissions committed by an attorney or by the court which are not apparent on the record.” *Dursteler v. Dursteler*, 112 Idaho 594, 597, 733 P.2d 815, 818 (Ct.App.1987) (citation omitted).

In other words, clerical errors are correctable under Rule 60(a), while “[e]rrors of a more substantial nature are to be corrected by a motion under Rules 59(e) or 60(b).” *Silsby v. Kepner*, 140 Idaho 410, 411, 95 P.3d 28, 29 (2004). Here, the United States does not identify independent grounds for, or argument in favor of, its Rule 60(b) motion. Accordingly, the State will not separately address Rule 60(b), but the arguments herein addressed to the Rule 59(e) motion are intended to likewise address Rule 60(b) to the extent it is deemed to apply.

ARGUMENT

A. The Dismissal of Instream Flow Claims on Waterways Not Specifically Identified by the Court as “Important Waterways” Was Not a Clerical Error.

The United States asserts that the dismissal of instream flow claims for streams and creeks within the Reservation must be a clerical error, correctable under the terms of Idaho Rule of Civil Procedure 60(a) and 60(b).

The Court’s *Order on Motions for Summary Judgment*, however, concluded that “one primary purpose of the Coeur d’Alene Reservation was to provide the Tribe with the important waterways needed to facilitate its traditional fishing and hunting practices.” *Summary Judgment Order* at 13 (emphasis added). In turn,

the Court, echoing the findings of the United States Supreme Court, identified the “important waterways” as “Lake Coeur d'Alene and the Coeur d'Alene and St. Joe Rivers.” *Summary Judgment Order* at 12.

The Court never concluded that a primary purpose of the Reservation was to provide the Tribe with waterways other than those portions of Lake Coeur d'Alene and the Coeur d'Alene and St. Joe Rivers lying within the current Reservation. Therefore, the Court properly dismissed instream flow claims for those waterways wholly or partially within the Reservation but not designated as “important” by the Court, namely: 92-10906 (Cherry Creek), 92-10907 (Alder Creek), 93-7469 (Hangman Creek), 93-7470 (Hangman Creek “conditional”), 94-9244 (Black Creek), 94-9425 (Willow Creek), 94-9246 (Evans Creek), 95-16678 (Fighting Creek), 95-16679 (Lake Creek), 95-16680 (Plummer Creek), 95-16681 (Little Plummer Creek), 95-16682 (Pedee Creek), 95-16683 (Benewah Creek), and 95-16684 (Windfall Creek).¹

The Court’s decision concluding that water rights were reserved only in “important waterways” is consistent with the implied-reservation-of-water-rights doctrine, which, as this Court concluded in its Summary Judgment Order, is “limited to the reservation of water for the primary purposes of a reservation,” and excludes water “valuable only for a secondary use of the reservation.” *Summary Judgment Order* at 7 (citing and quoting *U.S. v. New Mexico*, 438 U.S. 696 (1978)).

¹ Of the fifteen claims that the Tribe describes as being “entirely, or in significant part, within the current boundaries of the Reservation,” eight are partially outside the current Reservation: 91-7777 (St. Joe River), 92-10907 (Alder Creek), 93-7469 (Hangman Creek), 93-7470 (Hangman Creek “conditional”), 95-16678 (Fighting Creek), 95-16679 (Lake Creek), 94-9425 (Willow Creek), and 94-9246 (Evans Creek).

Likewise, while the Court identified the St. Joe River as an “important waterway,” its dismissal of Claim No. 91-7777 was warranted in light of the Court’s decision that the 1873 Executive Order did not reserve water rights outside the boundaries of the Reservation. Claim No. 91-7777 claims instream flow water rights both inside and outside the current Reservation, reflecting the United States’ assertion that “the United States and the Tribe claim flows in streams located both on and off the Reservation because they are necessary to provide sufficient habitat for the fishery to be subject to Tribal harvest within the Reservation boundary.” United States’ Memorandum in Support of Motion for Summary Judgment at 45-46 (Oct. 21, 2016). In other words, the United States’ theory of the case is that Reservation boundaries are irrelevant to the reservation of instream flows, and its claims were written to reflect that theory. While this Court can deny a claimed water right in part, as it did in striking certain purposes of springs and wetland claims, it cannot affirmatively rewrite a water right claim to identify a new place of use or incorporate a new legal theory, as would be required to confine Claim No. 91-7777 to that reach of the St. Joe River within the current Reservation. Amendment of claims can only be accomplished in accordance with § 4(d)(2) of Administrative Order 1; *see also English v. Atl. Coast Line R. Co.*, 80 F. Supp. 681, 682 (E.D.S.C. 1948) (“the Court has no power, to rewrite their complaint and adopt a wholly different theory”).

Nor can the United States, in a motion to alter or amend, now assert that it intended to present an alternative claim for the St. Joe River limited to the reach within the Reservation. In *Pandrea v. Barrett*, 160 Idaho 165, 174, 369 P.3d 943,

952 (2016), the Court held that I.R.C.P. 11, allowing motions to reconsider, does not allow plaintiffs to pursue claims not previously raised, and stated:

Indeed, if the rule operated as Pandrea desires, there would be no reason for the rules which allow a plaintiff to amend his or her complaint to add claims in limited circumstances. If a plaintiff could merely make a motion to reconsider which includes a new claim, the rules allowing for additional supplementary claims would be superfluous. “[T]he Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant.” *State v. Schulz*, 151 Idaho 863, 866, 264 P.3d 970, 973 (2011).

Id. at 174 n. 4, 369 P.3d at 952 n.4. Likewise, nothing in Rules 59 or 60 allow a claimant to effectively alter their claims for purposes of alleging an error in law, mistake, or clerical error. In assessing a motion to alter or amend, the Court must act upon the claims as originally presented in the Notices of Claim. *See First Sec. Bank of Idaho, N.A. v. Webster*, 119 Idaho 262, 266, 805 P.2d 468, 472 (1991) (“[c]onsideration of I.R.C.P. 59(e) motions must be directed to the status of the case as it existed when the court rendered the decision upon which the judgment is based”). Because Claim No. 91-7777 includes a river reach outside the Reservation, and because this Court held that the 1873 Executive Order did not reserve any water rights outside the Reservation, there is no basis for altering this Court’s denial of the claim.

B. The Dismissal of Instream Flow Claims on Non-Navigable Waterways Does Not Conflict with the Court’s Holding Allowing a Claim for “Fish and Wildlife Habitat” in Coeur d’Alene Lake and Claims for “Wildlife and Plant Habitat for Hunting” on Springs, Seeps, and Wetlands.

The United States moves to alter or amend the Order disallowing claims for instream flows on fifteen streams wholly or partially within the Reservation, based

on the assertion that the Order conflicts with the Court's allowance of the claim for fish and wildlife habitat on Coeur d'Alene Lake and its allowance of claims for "wildlife and plant habitat for hunting" purposes on springs, seeps, and wetlands. The assertion of "internal conflict," however, ignores one fundamental distinction: the Lake claim (95-16704), and the claims for springs, seeps, and wetlands, are limited to waterways that wholly overlay lands owned by, or held in trust for, the Tribe.²

In contrast, the fifteen instream flow claims assert water rights throughout the length of the stream, regardless of underlying land ownership. And, as seen on the map accompanying this Court's *Protective Order* filed February 28, 2017, most of the claimed stream reaches are located almost entirely on land owned by non-Indians. Once lands are homesteaded, or former allotments are alienated, the fish and wildlife habitat on such lands ceases to be available for tribal use, and the Tribe cannot require that such habitat be maintained in a "natural" or productive state.

As explained in the State's summary judgment briefing, the Tribe's hunting and fishing rights are implied from the creation of the Coeur d'Alene Reservation: the Tribe has no express hunting or fishing rights. Such implicit rights do not survive the alienation of lands to non-Indians absent the express reservation of a servitude in the statute authorizing such alienation: the granting of unencumbered

² The United States has repeatedly stated that the claims for "water to maintain wetlands, springs, and seeps" are limited to "Tribal lands within the Reservation." United States' Claims Cover Letter, from Vanessa Boyd Willard, United States Department of Justice, to Gary Spackman, Director, Idaho Department of Water Resources, dated January 30, 2014, p. 4. Likewise, Claim No. 95-16704 is limited to "that portion of Lake Coeur d'Alene and its related waters that are located within the boundary of the Coeur d'Alene Reservation." Under the judgment in *United States v. Idaho*, the United States holds the beds and banks of that portion of the Lake in trust for the Tribe. Affidavit of Steven W. Strack, Ex. 21 (judgment),

title to homesteaders and to purchasers of allotments “purport[ed] to convey the lands in fee simple [with] no reservation of any servitude for or other provision for hunting or fishing rights in favor of the . . . tribe or its members.” *Blake v. Arnett*, 663 F.2d 906, 911 (9th Cir. 1981). The United States has cited no legal authority suggesting that the holding in *Blake v. Arnett* is not applicable to the Coeur d’Alene Reservation, and it is undisputed that the 1906 Act opening the Reservation to allotment and homesteading reserved no property rights whatsoever in alienated lands.³ In the absence of a right to hunt or fish on a stream reach, there is no basis for a reserved water right to protect habitat in such stream reach. *United States v. Adair*, 723 F.2d 1394, 1418 n. 31 (9th Cir. 1984) (“Where the Tribe transfers land without reserving the right to hunt and fish on it, there is no longer any basis for a hunting and fishing water right”).

Nor can the Tribe assert a general right to protect habitat on non-Indian lands that support migratory fish or wildlife that could later be harvested on tribal lands. When a reservation is widely opened to non-Indian ownership, “the governing principle is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land.” *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 430 (1989) (White., J.); *id.* at 436 (it is “improbable that Congress envisioned that the Tribe would retain its interest in regulating the use of vast ranges of land sold in fee to nonmembers who lack any voice in setting tribal policy”) (Stevens, J.). In other words, as described in *S. Dakota v. Bourland*, 508 U.S. 679 (1993), abrogation of a tribe’s property right of exclusive use and occupation likewise abrogates any

³ Act of June 21, 1906, 34 Stat. 334.

rights the tribe may have to regulate use of the land by non-Indians to protect fish and wildlife on such lands:

Like this case, *Montana [v. United States]*, 450 U.S. 544 (1981)] concerned an Indian Tribe's power to regulate non-Indian hunting and fishing on lands located within a reservation but no longer owned by the Tribe or its members. Under the General Allotment Act of 1887, and the Crow Allotment Act of 1920, Congress had provided for certain Crow lands to be conveyed in fee to non-Indians for homesteading. We held that because the Tribe thereby lost the right of absolute use and occupation of lands so conveyed, the Tribe no longer had the incidental power to regulate the use of the lands by non-Indians. Similarly, six members of this Court, in *Brendale v. Confederated Tribes*, determined that at least with regard to the “open” portion of the Yakima Reservation, the Yakima Tribe had lost the authority to zone lands that had come to be owned in fee by non-Indians. Because significant portions of that part of the reservation had been allotted under the General Allotment Act and had passed to non-Indians, those Justices concluded that the treaty's “exclusive use and benefit” provision was inapplicable to those lands and therefore could not confer tribal authority to regulate the conduct of non-Indians there. *Montana* and *Brendale* establish that when 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. The abrogation of this greater right, at least in the context of the type of area at issue in this case, implies the loss of regulatory jurisdiction over the use of the land by others.

Bourland, 508 U.S. at 688–89 (emphasis added)(citations and footnote omitted).

In short, once Reservation lands were alienated to non-Indians, the Tribe lost all property rights in the alienated lands, as well as the right to regulate the use of the lands. Thus, regardless of whether the Tribe's instream flow claims are alleged to have been reserved as a servitude or as a regulatory right to restrict diversions from a stream, such right did not survive alienation of the underlying lands.⁴

⁴ Notably, the United States has not identified the grounds upon which it asserts that instream flows water rights may be retained despite alienation of the underlying

Given the decisions in *Blake*, *Montana*, *Brendale*, and *Bourland*, the Court did not commit an error of law by failing to adopt the United States' assertion that the Tribe "retains the right to fish in all streams within the Reservation and should be entitled to water rights sufficient to fulfill that fishing right." Joint Memorandum in Support of SF-7 Motion for Correction of Clerical Error and/or to Alter or Amend re: Primary Purpose of Fishing (Habitat) at 5. The United States has failed to submit any authority for the proposition that despite conveyance to non-Indians it has the right to fish throughout the claimed places of use specified in the fifteen instream flow claims that are the subject of the pending motion. It bears repeating that "[w]here the Tribe transfers land without reserving the right to hunt and fish on it, there is no longer any basis for a hunting and fishing water right." *Adair*, 723 F.2d at 1418 n.31.

Nor does the United States identify any errors or omissions of fact that would justify alteration of the judgment under I.R.C.P. 59(e). The United States relies on the testimony of Dudley Reiser in an effort to prove that habitat throughout the fifteen stream reaches is necessary to support the fish that reside in the Lake. This mere rehashing of evidence previously presented however, is immaterial if the Tribe lacks any property interest or legal right to protect fish once they migrate off tribal lands. Even assuming for purposes of argument that the Tribe once had the right to protect fish habitat throughout the fifteen streams within the Reservation, such

properties to non-Indians. Perhaps recognizing that no servitude or other property right was retained in alienated lands, the United States has suggested, without citation of any supporting legal authority, that its instream flow claims are analogous to instream flow protections explicitly adopted by the State pursuant to its police powers. United States Response to the State of Idaho's and Objectors' Motions for Summary Judgment at 40-41 (Feb. 24, 2017).

right was abrogated when the lands underlying the streams were alienated to non-Indians. As the Supreme Court has repeatedly emphasized, "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." *Montana*, 450 U.S. at 561. Thus, even if the United States were correct in asserting that the 1873 Executive Order reserved instream flow habitat in the fifteen streams, such reservation did not survive the subsequent alienation of the underlying lands to non-Indians, regardless of the biological necessity of such streams to migratory fish. The United States has not identified any authority for the proposition that biological necessity alone is sufficient to imply the retention of reserved water rights despite the explicit alienation of all property rights to the non-Indian owners. Absent identification of such authority, and a showing that the Court overlooked such authority, there is no error requiring correction, and the United States' Rule 59(e) motion should be denied.

C. There Is No "Internal Conflict" Between the Dismissal of Instream Flow Claims and Wetland and Riparian Claims on those Same Streams Because the Claims were Presented as Alternatives to Once Another.

Another basis for rejecting the United States' assertion of "internal conflict" between the Court's dismissal of on-Reservation instream flow claims to support fishing while recognizing wetland and riparian claims to support the purpose of hunting is that the claims were presented as alternatives to one another.

In the letter accompanying the United States' claims,⁵ which the United States has repeatedly cited as an authoritative explanation of its claims,⁶ the

⁵ United States' Claims Cover Letter, from Vanessa Boyd Willard, United States Department of Justice, to Gary Spackman, Director, Idaho Department of Water Resources, dated January 30, 2014.

United States asserts that “[t]o the extent [the wetland] claims concern riparian areas along streams subject to Instream Flow claims . . . the United States does not intend to double a claim to the same surface water. Instead, the United States is providing two separate justifications for the same water flows that provide instream fish habitat and support riparian vegetation.” U.S. Cover Letter at 4-5 (emphasis added).

Thus, for example, the Court’s dismissal of the instream flow claim for Benewah Creek (Claim No. 95-16683), is consistent with its summary judgment order allowing the four claims for maintenance of wetland and riparian habitat on tribal lands along Benewah Creek⁷ to proceed to the quantification phase of this litigation. The Court’s dismissal of the instream flow claims presents no conflict with its determination that the Reservation was set aside “to provide the Tribe with waterways for fishing and hunting,” Summary Judgment Order at 12, because the Tribe’s claims for maintenance of wetland and riparian habitat are “for the same water flows that provide instream fish habitat.” U.S. Cover Letter at 4-5. The difference, of course, is that the claims for maintenance of wetland and riparian habitat are limited to those stream reaches owned by, or held in trust for, the Tribe. As discussed, above, such distinction is well supported by the case law, and no error

⁶ United States’ Memorandum in Support of Motion for Summary Judgment at 42, 44, 45, 46 (Oct. 21, 2016); United States’ Response to the State of Idaho’s and Objectors’ Motion for Summary Judgment at 58, 65 (Feb. 24, 2017); Joint Memorandum in Support of SF-7 Motion for Correction of Clerical Error and/or to Alter or Amend re: Primary Purpose of Fishing (Habitat) at 2-3 (May 17, 2017).

⁷ The four claims, Claim Nos. 95-16709, 95-16710, 95-16711, and 95-16712, identify “[g]roundwater and/or Benewah Creek” as the water source, and describe the point of diversion as “[n]ot applicable—This claim is for wetlands and/or riparian area *in situ* including sufficient groundwater and/or surface water to maintain the wetland and/or riparian habitat.”

occurred in limiting claims for maintenance of instream riparian habitat to those lands under tribal control.⁸

CONCLUSION

The State requests that the Court deny the SF-7 Motion to Set Aside and Modify Partial Decree or Final Order Disallowing Water Right Claim.

Respectfully submitted this 8th day of June, 2017.

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⁸ Of the fifteen streams or creeks that are the subject of the current motion to alter or amend, eight (Alder Creek, Evans Creek, Hangman Creek, Hangman Creek “conditional,” Lake Creek, Plummer Creek, Benewah Creek, and the St. Joe River) appear to have claims for riparian maintenance applicable to tribally-owned portions of the stream bed. Along the other claimed streams there are no tribally-owned lands. See map accompanying this Court’s *Protective Order* (filed February 28, 2017).

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing *State of Idaho's Memorandum in Opposition to SF-7 Motion for Correction of Clerical Error and/or to Alter or Amend re: Primary Purpose of Fishing (Habitat)* was sent on June 8, 2017, by overnight delivery to the SRBA Court, 253 3rd Avenue North, Twin Falls, Idaho, 83303-2702, and mailed on June 8, 2017, with sufficient first-class postage to the following:

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