

6-9-2017

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

Steven W. Strack

*Deputy Attorney General, State of Idaho*

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## Recommended Citation

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LAWRENCE G. WASDEN  
Attorney General

CLIVE J. STRONG, ISB No. 2207  
Deputy Attorney General  
Chief, Natural Resources Division

STEVEN W. STRACK, ISB. No. 3906  
Deputy Attorney General  
700 W. State Street – 2<sup>nd</sup> Floor  
P.O. Box 83720  
Boise, Idaho 83720-0010  
(208) 334-2400  
Facsimile: (208) 854-8072

*Attorneys for the State of Idaho*

LODGED

DISTRICT COURT - CSRBA	
Fifth Judicial District	
County of Twin Falls - State of Idaho	
JUN - 9 2017	
By _____	Clerk
	<i>[Signature]</i> Deputy Clerk

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

**INTRODUCTION**

The United States and the Tribe (hereinafter collectively "United States") seek the alteration or amendment of this Court's *Final Order Disallowing Purposes of Use*, based on the assertion that the Court committed an "error of both law and fact" in "dismissing 'gathering' as not comprising a primary purpose of the [Coeur d'Alene ] Reservation." 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 at 2 (hereinafter “Joint Memorandum”). The motion was filed pursuant to § 19 of CSRBA Administrative Order 1 and I.R.C.P. 59(e).

### STANDARD OF REVIEW

Because “specific grounds for a motion to alter or amend are not listed in [Rule 59(e)], the district court enjoys considerable discretion in granting or denying the motion. However, reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly.” 11 Wright & Miller, Federal Practice and Procedure § 2810.1 (2012).<sup>1</sup> “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”).

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<sup>1</sup> Aside from the time frame allowed for filing, I.R.C.P. 59(e) and F.R.C.P. 59(e) are substantively identical, though Idaho courts differ from federal courts in the application of 59(e) in that Idaho courts may not consider newly discovered or newly available facts in determining a Rule 59(e) motion. *Coeur d’Alene Mining Co. v. First Nat. Bank of N. Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990).

## ARGUMENT

### A. **The United States Fails to Identify Any Factual or Legal Errors Justifying Alteration or Amendment of the Order Identifying the Primary Purposes of the Reservation.**

The United States does not identify any errors of law or fact committed by the Court. Rather, it simply reiterates arguments previously made in its summary judgment briefing and expert reports, in the hope of reaching a different result. In fact, its argument boils down to the simple assertion that the “historical record in this case unequivocally demonstrates the Coeur d’Alene Tribe’s historical reliance upon gathering in and around the waterways for its survival.” Joint Memorandum at 4. Notably, the Joint Memorandum, in support of its assertion of “historical reliance” on gathering, cites: (1) the factual findings of the district court in *Idaho v. United States*, 95 F. Supp. 2d 1094 (D. Idaho 1998), which addressed the Tribe’s traditional subsistence practices; and (2) the affidavits of the United States’ and Tribe’s experts. The latter, in turn, cite an 1855 report from Washington Territorial Governor Isaac Stevens, an 1842 report from a Jesuit priest, and reports of various anthropologists regarding the Tribe’s subsistence practices. Joint Memorandum at 5-6.

The facts cited by the Tribe, none of which specifically address the purposes of the Reservation, are insufficient to demonstrate a clear error of fact or law justifying alteration or amendment of the *Final Order Disallowing Purposes of Use*. While gathering was part of the Tribe’s aboriginal subsistence practices, such fact alone does not imply that gathering was a primary purpose of the 1873 Reservation. The historical evidence that speaks to the primary purposes of the 1873 Executive Order Reservation addresses only the need for hunting and fishing. The Tribe’s

1872 petition to the Commissioner of Indian Affairs insisted upon a reservation that included the St. Joe and Coeur d'Alene River valleys because "we are not as yet quite up to living on farming" and "for a while yet we need have some hunting and fishing." Summary Judgment Order at 12 (quoting Hart Aff. Ex. 6). "A report forwarded from a government appointed surveyor to the Commission of Indian Affairs provided that '[s]hould the fisheries be excluded there will in my opinion be trouble with these Indians but should they be included . . . there will be no trouble.'" Summary Judgment Order at 13 (quoting Hart Aff. Ex. 6). The unratified agreement that preceded the 1873 Executive order included a provision stating that waters entering the Reservation would not be turned from their natural channel, Summary Judgment Order at 13, but did not identify gathering as a purpose of such provision.

Given the historical documents directly addressing the purpose of the 1873 Reservation, which mentioned the need for hunting and fishing but omitted any discussion of gathering, the Court did not err in concluding that "one primary purpose of the [1873] Coeur d'Alene Reservation was to provide the Tribe with the important waterways needed to facilitate its traditional hunting and fishing practices." Summary Judgment Order at 13.<sup>2</sup>

Likewise, the Joint Memorandum is insufficient to demonstrate a clear error of law justifying alteration or amendment of the *Final Order Disallowing Purposes of Use*. While the Joint Memorandum cites several court decisions citing the

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<sup>2</sup> The statement that no error occurred in determining the purpose of the 1873 Reservation should not be construed as waiving the State's assertion that the purposes of the Coeur d'Alene Reservation are properly determined by reference to the superseding congressional legislation enacted in 1891.

historical importance of gathering in the subsistence practices of other tribes, such citation does nothing to address whether the Court committed a clear error of law in its conclusion that “gathering” was not a primary purpose of the Coeur d’Alene Reservation. Indeed, while most Indian tribes historically relied upon gathering, along with hunting and fishing, for survival,<sup>3</sup> the case law is rife with instances of reservations wherein “gathering” was not identified as a primary purpose of the reservation, even where water rights were found to be reserved for other subsistence activities such as fishing. In *Dep’t of Ecology v. Yakima Reservation Irr. Dist.*, 850 P.2d 1306, 1311 (Wash. 1993), the court acknowledged that the tribes of the Yakima Nation relied on “hunting, fishing and root and berry gathering,” but affirmed reserved water rights only for agriculture and fishing. *See also, Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981) (finding reserved water right for fishing but no mention of water rights for gathering); *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984) (finding reserved water right for fishing but no mention of water right for gathering).

The primary court decision recognizing a reserved water right to support gathering was *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983). *Adair* is distinguishable, however, because it was based on the 1864 Treaty with the Klamath, which explicitly identified “gathering” as a purpose of the Klamath Reservation. *Id.* at 1409 (citing Klamath Treaty, 16 Stat. at 708).<sup>4</sup> Here, none of

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<sup>3</sup> *See* Robert H. Ruby et al., *A Guide to Indian Tribes of the Pacific Northwest* xv (Univ. Okla Press 2010) (“Before the arrival of the English, Spanish, and Americans, all the tribes of the Pacific Northwest had developed successful economies, which included hunting, fishing, and gathering”).

<sup>4</sup> The 1864 Klamath Treaty reserved the right of “gathering edible roots, seeds, and berries within [the reservation’s] limits.” 16 Stat. at 708.

the documents directly addressing the set-aside of the 1873 Reservation explicitly identified gathering as a purpose of the Reservation.

### CONCLUSION

The Court correctly relied on the historical documents that spoke directly to the purpose of the 1873 Coeur d'Alene Reservation. Given that such documents only address the need for hunting and fishing, the Court committed no clear error of law or fact, and the State submits that there is no basis for altering or amending the *Final Order Disallowing Purposes of Use*.

Respectfully submitted this 8th day of June, 2017.

LAWRENCE WASDEN  
Attorney General

CLIVE J. STRONG  
Deputy Attorney General  
Chief, Natural Resources Division



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STEVEN W. STRACK  
Deputy Attorney General

## 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 to Alter or Amend to Find Gathering as a Reservation Primary Purpose* 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:

Howard A Funke  
424 Sherman Ave Ste 308  
PO Box 969  
Coeur d'Alene, ID 83816-0969

US Department of Justice  
Environment & Nat'l Resources  
550 West Fort Street, MSC 033  
Boise, ID 83724

Vanessa Boyd Willard  
US Dept of Justice  
Environment & Nat'l Resources Div  
999 18th Street, South Terrace Ste 370  
Denver CO 80202

Albert P Barker  
Barker Rosholt & Simpson LLP  
1010 W Jefferson St Ste 102  
PO Box 2139  
Boise, ID 83701-2139

Mariah R Dunham  
Nancy A Wolff  
Morris & Wolff PA  
722 Main Ave  
St Maries, ID 83861

Norman M Semanko  
Moffatt Thomas  
101 S Capitol Blvd 10th Fl  
PO Box 829  
Boise, ID 83701-0829

Candice M McHugh  
Chris Bromley  
McHugh Bromley PLLC  
380 S 4th Street Ste 103  
Boise, ID 83702

William J Schroeder  
Paine Hamblen LLP  
717 W Sprague Ave, Ste 1200  
Spokane, WA 99201-3505

Ratliff Family LLC #1  
13621 S Hwy 95  
Coeur d'Alene, ID 83814

Ronald D Heyn  
828 Westfork Eagle Creek  
Wallace, ID 83873

John T McFaddin  
20189 S Eagle Peak Rd  
Cataldo, ID 83810

Christopher H Meyer  
Jeffrey C Fereday  
Jeffrey W Bower  
Michael P Lawrence  
Givens Pursley LLP  
601 W Bannock St  
PO Box 2720  
Boise, ID 83701-2720

Director of IDWR  
PO Box 83720  
Boise ID 83720-0098



Steven W. Strack