

9-1-2017

## Notice of Appeal- CDAT

Howard Funke

*Attorney, Howard Funke & Associates*

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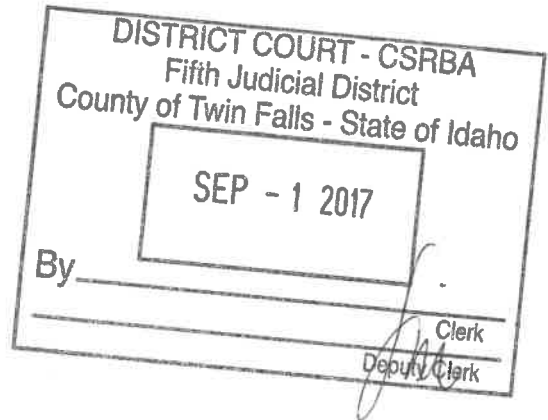
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### Recommended Citation

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*Counsel for the Coeur d'Alene Tribe*

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 )  
 )  
 Case No. 49576 )  
 )  
 COEUR D'ALENE TRIBE, )  
 )  
 Claimant/Appellant, )  
 )  
 vs. )  
 )  
 STATE OF IDAHO, NORTH IDAHO )  
 WATER RIGHTS GROUP, CITY OF )  
 COEUR D'ALENE, HECLA MINING, )  
 N KOOTENAI WATER AND SEWER, )  
 POTLATCH FOREST HOLDINGS, )  
 POTLATCH LAND & LUMBER LLC )  
 POTLATCH TRS IDAHO LLC, RATLIFF )  
 FAMILY LLC #1, JOHN T MCFADDIN )  
 AND RON HEYN, )  
 )  
 Objectors/Respondents. )  
 \_\_\_\_\_ )

Subcase No.: 91-7755  
 (and consolidated subcases)

NOTICE OF APPEAL

Fee Category: IAR 23(a)(1)  
 \$94.00

TO: ALL PARTIES IN THE ABOVE-ENCAPTIONED MATTER, AND/OR THEIR  
 ATTORNEYS OF RECORD<sup>1</sup>, AND THE CLERK OF THE ABOVE-ENTITLED COURT

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellant (“Coeur d’Alene Tribe” and/or “Tribe”), appeals against

<sup>1</sup> Such parties and attorneys are set forth in the certificate of service attached to this document.

the above named respondents to the Idaho Supreme Court from the CSRBA Court's (1) *Final Order Disallowing Purposes of Use*, (2) *Final Order Disallowing Water Rights*, (3) *Order on Motions for Summary Judgment*, all entered in the above entitled action on May 3, 2017, in addition to (4) *Amended Final Order Disallowing Water Right Claims*, (5) *Order Granting Motion to Reconsider*, and (6) *Order on Motion to Set Aside and Modify* all entered in the above entitled action on July 26, 2017, Honorable Eric Wildman presiding. Copies of the orders being appealed are attached to this notice as Exhibits "1" through "6."

2. Appellant has a right to appeal to the Idaho Supreme Court from the orders described in paragraph 1 above, which are I.R.C.P. 54(b)-certified, pursuant to I.A.R. 11(a)(1)/(3). As to the non-Rule 54(b)-certified orders noted in paragraph 1 above, a motion for this Court to accept certain issues via permissive appeal has been filed by the Tribe pursuant to I.A.R. 12(c). A ruling on the Tribe's Rule 12 motion is pending. Should this filing be made prior to the Court's ruling on the Rule 12 motion, this notice of appeal will be timely pursuant to I.A.R. 17(e)(2).

3. A preliminary statement of the issues which Appellant intends to assert on appeal is as follows:

- a. **Issue 1** – Whether the district court erred by strictly applying the *U.S. v. New Mexico*, 438 U.S. 696 (1978) primary-secondary use distinction in its denial of the claimed primary purposes of the Coeur d'Alene Indian Reservation?
  - i. Whether the district court erred in refusing to find the purpose of the reservation was, and is, to provide a homeland for the Coeur d'Alene Tribe?
  - ii. Whether the district court erred by disallowing water rights for a "gathering" purpose of the reservation despite the case of *Idaho v. U.S.*, 533 U.S. 262 (2001)?
  - iii. Whether the district court erred by disallowing water rights for "commercial" and "industrial" purposes of the reservation?

- iv. Whether the district court erred by finding fishing as a primary purpose of the creation of the reservation but disallowing instream flows for fish habitat off-reservation biologically necessary to ensure survival of the on-reservation fishery?
  - v. Whether the district court erred in limiting the purposes of use of Coeur d'Alene Lake to hunting and fishing despite the case of *Idaho v. U.S.*, 533 U.S. 262 (2001)?
- b. **Issue 2** – Whether the district court erred in refusing to apply a time immemorial priority date for non-consumptive water rights necessary to fulfill the Tribe's traditional subsistence activities on lands reacquired by the Tribe?
4. The CSRBA Court, Hon. Judge Eric Wildman presiding, entered a protective order on February 28, 2017 sealing Exhibit A thereto. *See* Protective Order dated February 28, 2016 (identified as item 6.ff. below). The CSRBA Court, Hon. Judge Eric Wildman presiding, struck Exhibit 1 and paragraphs 13, 14, 15, and 16 of the Affidavit of David Shaw (offered by the State of Idaho dated October 18, 2016 and lodged October 21, 2016) via order dated November 28, 2016.
  5. Appellant requests the following transcripts be prepared by the court reporter, in electronic format:
    - a. November 22, 2016 (hearing on *Objection to Designation of David Shaw as Expert Witness and Motion to Exclude Testimony*);
    - b. March 30, 2017 (hearing on *Motions for Summary Judgment*); and,
    - c. June 23, 2017 (hearing on *Motion for Reconsideration and Motions to Alter/Amend*).
  6. Appellant requests the following documents to be included in the Clerk's record in addition to those automatically included under I.A.R., Rule 28 and CSRBA AO-1, Rule 20.c.(4)(b):

- a. United States' transmittal cover letter with attachments I-VIII (21 pages), dated January 30, 2015 and claim forms for the claims consolidated in this matter; and,
- b. Appellant's letter with list (4 pages) dated May 4, 2015 adopting claims filed by the United States on behalf of the Coeur d'Alene Tribe;
- c. United States' and Coeur d'Alene Tribe's *Joint Motion for Summary Judgment* (5 pages), dated October 20, 2016 and lodged October 21, 2016; and,
- d. United States' and Coeur d'Alene Tribe's *Joint Statement of Facts* (57 pages), dated October 20, 2016 and lodged October 21, 2016; and,
- e. *Coeur d'Alene Tribe's Memorandum in Support of its Motion for Summary Judgment* (38 pages), dated October 20, 2016 and lodged October 21, 2016; and,
- f. *United States' Memorandum in Support of Motion for Summary Judgment* (51 pages), dated October 20, 2016 and lodged October 21, 2016; and,
- g. *Coeur d'Alene Tribe's Joinder in United States' Briefing in Support of Joint Motion for Summary Judgment* (3 pages), dated October 20, 2016 and lodged October 21, 2016; and,
- h. *Affidavit of C. Matheson* with Exhibits 1-14 (55 pages, plus DVD video (Exhibit 1)), dated October 18, 2016 and lodged October 21, 2016; and,
- i. *Affidavit of R. Hart* with Exhibits 1-7 (694 pages), dated October 19, 2016 and lodged October 21, 2016; and,
- j. *Affidavit of D. Reiser* with Exhibit 1 (77 pages), dated October 18, 2016 and lodged October 21, 2016; and,
- k. *Affidavit of I. Smith* with Exhibits 1-2 (174 pages), dated October 18, 2016 and lodged October 21, 2016; and,
- l. *Affidavit of V.B. Willard* with Exhibits 1-2 (30 pages), dated October 20, 2016 and lodged October 21, 2016; and,

- m. *Objection to Designation of David Shaw as Expert Witness and Motion to Exclude Testimony* (3 pages), dated October 20, 2016 and lodged October 21, 2016; and,
- n. *Memorandum in Support of Objection to Designation of David Shaw as Expert Witness and Motion to Exclude Testimony* (7 pages), dated October 20, 2016 and lodged October 21, 2016; and,
- o. *Affidavit of Counsel in Support of Objection to Designation of David Shaw as Expert Witness and Motion to Exclude Testimony* (4 pages), dated October 20, 2016 and lodged October 21, 2016; and,
- p. *State of Idaho's Motion for Summary Judgment* (4 pages), dated October 20, 2016 and lodged October 21, 2016; and,
- q. *State of Idaho's Memorandum in Support of Motion for Summary Judgment* (92 pages), dated October 20, 2016 and lodged October 21, 2016; and,
- r. *Errata to State's Memorandum in Support of Motion for Summary Judgment* (3 pages), dated October 21, 2016 and lodged the same day; and,
- s. *Affidavit of S. Strack with Exhibits 1-23* (287 pages), dated October 20, 2016 and lodged October 21, 2016; and,
- t. *Affidavit of D. Shaw* **WITHOUT** exhibits<sup>2</sup> (8 pages), dated October 18, 2016 and lodged October 21, 2016; and,
- u. *Hecla's Motion for Summary Judgment* (4 pages), dated and lodged October 21, 2016; and,
- v. *Memorandum in Support of Hecla's Motion for Summary Judgment* (23 pages), dated and lodged October 21, 2016; and,

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<sup>2</sup> Exhibit 1 to Mr. Shaw's affidavit, along with paragraphs 13, 14, 15, and 16 were stricken by the District Court via Order dated Nov. 28, 2016.

- w. *Declaration of Paul L. Arrington with Exhibits A-D (28 pages), dated and lodged October 21, 2016; and,*
- x. *North Idaho Water Right Group's Motion for Summary Judgment (5 pages), dated October 20, 2016 and lodged October 21, 2016; and,*
- y. *Memorandum in Support of the North Idaho Water Right Group's Motion for Summary Judgment (16 pages), dated October 20, 2016 and lodged October 21, 2016; and,*
- z. *Affidavit of Norman M. Semakno in Support of North Idaho Water Right Group's Motion for Summary Judgment (7 pages), dated October 20, 2016 and lodged October 21, 2016; and,*
- aa. *State of Idaho's Response to Objection to Designation of David Shaw as Expert Witness and Motion to Exclude Testimony (7 pages), dated November 9, 2016 and lodged on November 14, 2016; and,*
- bb. *Second Affidavit of S. Strack with Exhibit 24 (7 pages), dated November 9, 2016 and lodged on November 14, 2016; and,*
- cc. *Second Affidavit of Counsel in Support of Objection to Designation of David Shaw as Expert Witness and Motion to Exclude Testimony with Exhibits 1-6 (47 pages), dated November 18, 2016 and lodged November 21, 2016; and,*
- dd. *Coeur d'Alene Tribe's Reply Brief in Support of its Motion to Exclude David Shaw's Testimony (15 pages) dated November 18, 2016 and lodged November 21, 2016; and,*
- ee. *Order Granting Motion to Strike in Part and Denying in Part; Order Amending Summary Judgment Hearing and Briefing Schedule; Order Vacating Trial (6 pages) dated and lodged November 28, 2016; and,*
- ff. *Protective Order (5 pages) dated and lodged February 28, 2017; and,*
- gg. *Coeur d'Alene Tribe's Response to the State of Idaho, Hecla, and the North Idaho Water*

- Rights Group* (117 pages), dated February 22, 2017 and lodged February 24, 2017; and,
- hh. *Second Affidavit of E.R. Hart* with Exhibits 1-5 (58 pages), dated February 21, 2017 and lodged February 24, 2017; and,
- ii. *Affidavit of Counsel in Support of Coeur d'Alene Tribe's Responsive Briefing* with Exhibits 1-13 (65 pages), dated February 21, 2017 and lodged February 24, 2017; and,
- jj. *United States' Response to the State of Idaho's and Objectors' Motions for Summary Judgment* with Attachments A-G (181 pages), dated February 22, 2017 and lodged February 24, 2017; and,
- kk. *State of Idaho's Memorandum in Response to United States' and Coeur d'Alene Tribe's Joint Motion for Summary Judgment* (61 pages), dated February 22, 2017 and lodged on February 24, 2017; and,
- ll. *Third Affidavit of Steven W. Strack* with Exhibits 25-32 (118 pages), dated February 17, 2017 and lodged February 24, 2017; and,
- mm. *Affidavit of Stephen R. Wee* with Exhibit 1 (174 pages), dated February 10, 2017 and lodged February 24, 2017; and,
- nn. *Errata: Exhibit 1 to Affidavit of Stephen R. Wee* (19 pages), dated February 23, 2017 and lodged February 24, 2017; and,
- oo. *State of Idaho's Statement of Additional Facts* (22 pages), dated February 22, 2017 and lodged February 24, 2017; and,
- pp. *Hecla's Memorandum in Opposition to the United State's [sic] and Coeur d'Alene Tribe's Joint Motion for Summary Judgment* (27 pages), dated and lodged February 23, 2017; and,
- qq. *North Idaho Water Right Group's Memorandum in Opposition to United States' and Coeur d'Alene Tribe's Joint Motion for Summary Judgment* (19 pages), dated and lodged



- February 23, 2017; and,
- rr. *Potlatch's Consolidated Response to Motions for Summary Judgment* (6 pages), dated and lodged February 23, 2017; and,
  - ss. *Coeur d' Alene Tribe's Reply to the State of Idaho's and Objector's Response to Summary Judgment Motion* (93 pages) dated March 20, 2017 and lodged the same day.
  - tt. *Third Affidavit of E. Richard Hart* with Exhibit 1 (75 pages) dated March 16, 2017, and lodged March 20, 2017; and,
  - uu. *Affidavit of Counsel in Support of Coeur d'Alene Tribe's Reply Brief on Summary Judgment* with Exhibits 1-10 (112 pages), dated March 17, 2017 and lodged March 20, 2017; and,
  - vv. *Errata to Tribe's Responsive Briefing in Support of its Motion for Summary Judgment* (3 pages), dated March 18, 2017 and lodged March 20, 2017; and,
  - ww. *United States' Memorandum in Reply to the State of Idaho's and Objectors' Responses to Summary Judgment Motion* (41 pages), dated March 17, 2017 and lodged March 20, 2017; and,
  - xx. *Second Affidavit of Vanessa Boyd Willard* with Exhibits 1-10 (96 pages) dated March 16, 2017 and lodged March 20, 2017; and,
  - yy. *State of Idaho's Memorandum in Reply to Responses of United States and Coeur d'Alene Tribe* with Addendum (57 pages), dated March 17, 2017 and lodged March 20, 2017; and,
  - zz. *Fourth Affidavit of Steven W. Strack* with Exhibits 33-35 (72 pages), dated March 16, 2017 and lodged March 20, 2017; and,
  - aaa. *Hecla's Reply in Support of Motion for Summary Judgment* (23 pages), dated and lodged March 20, 2017; and,

- bbb. *North Idaho Water Rights Group's Reply to Responses of the United States and the Coeur d'Alene Tribe* (13 pages), dated and lodged March 20, 2017; and,
- ccc. *Poiltatch's Reply to United States' and Tribe's Responses to the State's Motion for Summary Judgment* (5 pages), dated and lodged March 20, 2017; and,
- ddd. *Order on Motions for Summary Judgment* (24 pages), dated and lodged May 3, 2017; and,
- eee. *Final Order Disallowing Purposes of Use* (4 pages), dated and lodged May 3, 2017; and,
- fff. *Final Order Disallowing Water Right Claims* (5 pages), dated and lodged May 3, 2017; and,
- ggg. *State of Idaho's Motion to Reconsider Order on Motions for Summary Judgment* (3 pages) dated and lodged May 16, 2017; and,
- hhh. *State of Idaho's Memorandum in Support of State's Motion to Reconsider Order on Motions for Summary Judgment* (9 pages) dated and lodged May 16, 2017; and,
- iii. *United States' and Coeur d'Alene Tribe's Joint SF-7 Motion to Alter/Amend* (Motion to Set Aside and Modify Partial Decree or Final Order Disallowing Water Right Claim) (3 pages), dated May 16, 2017 and lodged May 17, 2017; and,
- jjj. *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* (9 pages), dated May 16, 2017 and lodged May 17, 2017; and,
- kkk. *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)* (10 pages), dated May 16, 2017 and lodged May 17, 2017; and,
- lll. *Amended Final Order Disallowing Water Right Claims* (5 pages), dated and lodged on

- July 26, 2017; and,
- mmm. *Order Granting Motion to Reconsider* (6 pages), dated and lodged on July 26, 2017; and,
- nnn. *Order on Motion to Set Aside and Modify* (7 pages), dated and lodged on July 26, 2017; and,
- ooo. *Order Granting Motions for Permissive Appeal* (6 pages), dated and lodged August 16, 2017.

7. Appellant requests the following documents, charts, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court: None.

8. I hereby certify that:

a. A copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

Name and address: Ms. Sabrina Vasquez, Court Reporter, c/o CSRBA Court, 253 Third Ave. North, P.O. Box 2707, Twin Falls, Idaho 83303-2707.

b. The clerk of the district court has been paid the estimated fee (\$200.00) for preparation of the reporter's transcript; and,

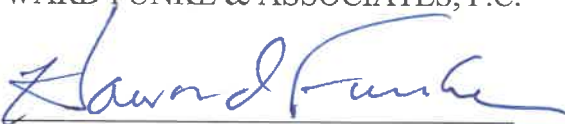
c. The estimated fee (\$100.00) for preparation of the clerk's record has been paid; and,

d. The appellate filing fee (\$94.00) has been paid; and,

e. Service has been made upon all parties required to be served pursuant to Rule 20 (and the attorney general of Idaho pursuant to Section 67-1401(1), Idaho Code).

DATED this 30<sup>th</sup> day of August, 2017.

HOWARD FUNKE & ASSOCIATES, P.C.

By: 

Howard Funke, Of the Firm

*Attorneys for the Coeur d'Alene Tribe*

**CERTIFICATE OF SERVICE**

I certify that original copies of the foregoing document was sent via First-Class Mail, Postage Pre-Paid this 30<sup>th</sup> day of August, 2017 to the following persons and/or entities:

Clerk of the District Court  
Coeur d'Alene-Spokane River Basin Adjudication  
253 Third Avenue North  
PO Box 2707  
Twin Falls, ID 83303-2707

ALBERT P. BARKER  
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CHIEF NATURAL RESOURCES DIV  
OFFICE OF THE ATTORNEY GENERAL  
STATE OF IDAHO  
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SPOKANE, WA 99201-3505

IDWR DOCUMENT DEPOSITORY  
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BOISE, ID 83720-0098

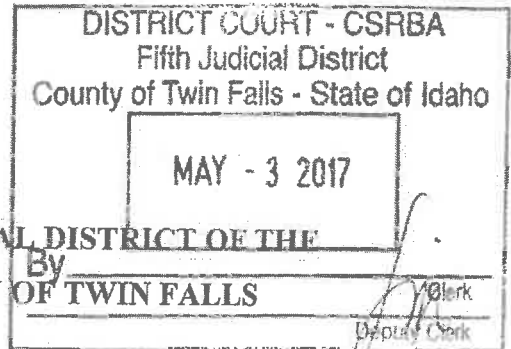
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RATLIFF FAMILY LLC #1  
13621 S HWY 95  
COEUR D'ALENE, ID 83814

RONALD HEYN  
828 WESTFORK EAGLE CREEK  
WALLACE, ID 83873

  
By: Marcella J. Harrison

# EXHIBIT 1



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 ) Subcase Nos. See Attached List
Case No. 49576 )
) FINAL ORDER DISALLOWING PURPOSES
) OF USE
)

On March 26, 2014, the United States filed the above-captioned water right claims as trustee on behalf of the Coeur d'Alene Tribe. The claims seek federal reserved water rights associated with the Coeur d'Alene Indian Reservation. With respect to water right claim 95-16704, the United States claims the following purposes of use:

Present and future uses, including but not limited to: food; fiber; transportation; recreation; religious, cultural and ceremonial; fish and wildlife habitat; lake level and wetland maintenance; water storage; power generation; and aesthetics – as a component of a water right necessary to fulfill the homeland purpose of the Coeur d'Alene Reservation. . . .

With respect to the remainder of the claims, the United States claims the following purposes of use:

Wildlife and plant habitat for hunting and gathering rights as well as other tribal traditional, cultural, spiritual, ceremonial, and/or religious uses – as a component of a water right necessary to fulfill the homeland purpose of the Coeur d'Alene Reservation. . . .

Objections and responses to some or all claims were filed by various parties.

A Motion for Summary Judgment seeking disallowal of the claims was subsequently filed by the State of Idaho. Various other Objectors joined in the Motion. Following hearing, the Court entered an Order on Motions for Summary Judgment contemporaneously herewith. In its Order, the Court held that the United States may seek federal reserved water rights for the following uses associated with the Coeur d'Alene Indian Reservation: agriculture, fishing and hunting, and domestic use. It further held that all other purposes of use may not be pursued as federal reserved water rights as a matter of law.

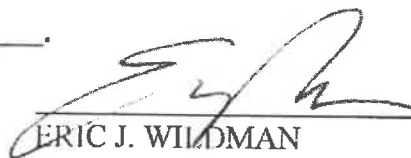
THEREFORE, BASED ON THE FOREGOING, THE FOLLOWING ARE HEREBY ORDERED:

1. With respect to water right claim 95-16704, it is ordered that the following claimed purposes of use are hereby disallowed with prejudice: food; fiber; transportation; recreation; religious, cultural and ceremonial; lake level and wetland maintenance; water storage; power generation; and aesthetics. This claim will proceed to the quantification phase of this litigation on its "fish and wildlife habitat" purpose of use.

2. With respect to the remainder of the above-captioned water right claims, it is ordered that the following claimed purposes of use are hereby disallowed with prejudice: wildlife and plant habitat for gathering rights as well as other tribal traditional, cultural, spiritual, ceremonial, and/or religious uses. These claims will proceed to the quantification phase of this litigation on their "wildlife and plant habitat for hunting" purpose of use.

IT IS SO ORDERED.

DATED May 3, 2017.



ERIC J. WILDMAN  
Presiding Judge  
Coeur d'Alene-Spokane River Basin Adjudication

#### RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED May 3, 2017.



ERIC J. WILDMAN  
Presiding Judge  
Coeur d'Alene-Spokane River Basin Adjudication



Subcase Nos:

91-07779	93-07532	93-07582	93-07632	95-16721
91-07780	93-07533	93-07583	93-07633	95-16722
91-07781	93-07534	93-07584	93-07634	95-16723
91-07782	93-07535	93-07585	93-07635	95-16724
91-07783	93-07536	93-07586	93-07636	95-16725
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91-07786	93-07539	93-07589	93-07639	95-16728
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91-07788	93-07541	93-07591	93-07641	95-16730
91-07789	93-07542	93-07592	93-07642	95-16731
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93-07506	93-07556	93-07606	94-09274	
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93-07530	93-07580	93-07630	95-16719	
93-07531	93-07581	93-07631	95-16720	

CERTIFICATE OF MAILING

I certify that a true and correct copy of the FINAL ORDER DISALLOWING PURPOSES OF USE was mailed on May 03, 2017, with sufficient first-class postage to the following:

ALBERT P BARKER  
BARKER ROSHOLT & SIMPSON LLP  
1010 W JEFFERSON ST STE 102  
PO BOX 2139  
BOISE, ID 83701-2139

PO BOX 83720  
BOISE, ID 83720-0010

IDWR  
PO BOX 83720  
BOISE, ID 83720-0098

US DEPARTMENT OF JUSTICE  
ENVIRONMENT & NATL' RESOURCES  
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CHIEF NATURAL RESOURCES DIV  
OFFICE OF THE ATTORNEY GENERAL  
STATE OF IDAHO

# EXHIBIT 2

DISTRICT COURT - CSRBA  
 Fifth Judicial District  
 County of Twin Falls - State of Idaho  
 MAY -3 2017  
 By \_\_\_\_\_  
 Clerk

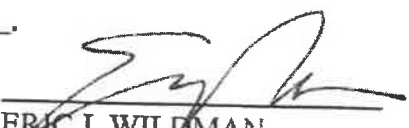
IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re CSRBA ) Subcase Nos. See Attached List  
 )  
 Case No. 49576 )  
 )  
 ) FINAL ORDER DISALLOWING WATER  
 ) RIGHT CLAIMS  
 )

On March 26, 2014, the United States filed the above-captioned water right claims as trustee on behalf of the Coeur d'Alene Tribe. The claims seek federal reserved water rights associated with the Coeur d'Alene Indian Reservation. Objections and responses to some or all claims were filed by various parties. *Motions for Summary Judgment* seeking disallowal of the claims were subsequently filed by the State of Idaho, Hecla Limited, and the North Idaho Water Rights Group.<sup>1</sup> Various other Objectors joined in the *Motions*. Following hearing, the Court entered an *Order on Motions for Summary Judgment* contemporaneously herewith. The *Order* grants the movants' *Motions* with respect to the above-captioned claims.

Therefore, IT IS ORDERED that the above water right claims are hereby disallowed with prejudice and shall not be confirmed in any partial decree or in any final decree entered in the Coeur d'Alene-Spokane River Basin Adjudication, Case No. 49576, in whatever form that final decree may take or be styled.

DATED May 3, 2017.

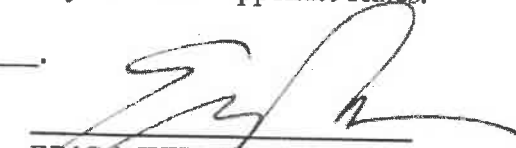
  
 ERIC J. WILDMAN  
 Presiding Judge  
 Coeur d'Alene-Spokane River Basin Adjudication

<sup>1</sup> The term "North Idaho Water Rights Group" refers collectively to the Objectors identified on Exhibit A attached hereto.

**RULE 54(b) CERTIFICATE**

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED May 3, 2017.

  
ERIC J. WILDMAN  
Presiding Judge  
Coeur d'Alene-Spokane River Basin Adjudication

Subcase Nos:

91-07755	94-09258
91-07756	94-09259
91-07757	94-09260
91-07758	94-09261
91-07759	94-09262
91-07760	94-09263
91-07761	94-09264
91-07762	94-09265
91-07763	94-09266
91-07764	94-09267
91-07765	94-09268
91-07766	94-09269
91-07767	94-09270
91-07768	95-16668
91-07769	95-16670
91-07770	95-16671
91-07771	95-16673
91-07772	95-16674
91-07773	95-16675
91-07774	95-16676
91-07775	95-16678
91-07776	95-16679
91-07777	95-16680
92-10906	95-16681
92-10907	95-16682
92-10908	95-16683
92-10909	95-16684
92-10910	95-16686
92-10911	95-16687
93-07462	95-16688
93-07463	95-16689
93-07464	95-16690
93-07465	95-16691
93-07466	95-16692
93-07469	
93-07470	
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94-09252	
94-09253	
94-09254	
94-09255	
94-09256	
94-09257	

## Exhibit A

Alan Littlejohn	Gale Briggs	Leland & Danielle Boldt	Roy & Linda Michael
Alfred Sichlinger	Gary Johnson	Leroy Bailey	Roy Mortensen
Andrew & Heather Scott	Gary Mitchell	Les Vawter	Russel & Marilyn Tanner
Annika Chatfield-Dietrick	Gary Weeks	Leslee Stanley	Russel Donohoe
Arliss Bialack	Gene L & Wesley L Warren	Linda & Dwayne Ryssman	Serena Lucas
Audrey Andersen	Gene Webb	Linda Alldredge	Sharon & Fred Smith
Barbara Harpole	Gianotti Trust DTD 1991	Linda Littlejohn	Sheila M Holm
Barney Layton	Gina Sutton	Linda Rider	Shirley Marsan
Barry & Pamela Meyers	Glennie & Elizabeth Renner	Lois Tuel	Shoshone County Commission
Ben Radford	Gordon Sanders	Margaret Sheridan	Shoshone County Public Works
Bernard & Dawn Weber	Greg Delavan	Mark P Kropf	Shoshone County Sportsmen's
Betty Hancock	Hagadone Hospitality Co	Marsha J Stewart	Stanley J Harrison
Beverly & Floyd Klein	Harmon Property Owners Assn	Martha Green	Stephen Matthews
Bill L Conner	Harry Grubham	Marvin & Maryanne Wheeler	Steve Addington
Black Bear Water Assn	Helen Jacquemin	Michael D Higbee	Steve Thomas
Blue Wolf Community Cub	Herman Fritz	Michael R Maehler	Steven M Liss
Bonnie (Eleanor Y) Donohoe	Hisaya & Dorothy Takashina	Miguel Cabeza	Susan E Dredge
Bonnie Doose	J Rachael Johnson	Mike & Tina Kuhnline	Susan Rodgers
Bruce & Carol Maddux	Jack & Eleanor Buell	Mitchell, Gary & Patricia	Sutherland Family Revocable
Bruce Cyr	Jaida Levine	Mullan School District #392	Terry & Wilma Murray
Carl Blalack	Jakar Ventris LLC	Nancy Kleinkhecht	Terry Burger
Carl Cochran	James & Molly Dolliver	Naomi Anderson	Terry Gilbreth
Carl W Anderson	James & Victoria Furth	Neil & Nancy Strom	Terry L Wall
Carla Woempner	Janet Briggs	Nona Bruns	Thomas F Dunnigan
Carol Clark	Jean Dohrman	Norman Carroll	Thomas G & Mary M Carver
Carol Felt Browning	Jed Rodgers	Norman McCall	Thomas M Patrick Revocable
Cheryl Prueher	Jeff & Dede Shippy	Pam Secord for Oceanwoods	Tim Day
Cindy Cooper	Jeff Funk	Patricele Hartel	Tim Shannon
Clyde H Sheppard	Jeff Tyler	Patricia & Kenneth Renner	Tom & Eilen Duhamel
Connie L Hasz	Jeremie Figueroa	Patricia Lozano	Tom Lucas
Crows Nest Water Association	Jodi Powell	Patricia Mitchell	Tony Zeller
Dale Herboldt	Joel & Cindy Newson	Patrick & Annette Petrie	Troy Francis
Daniel G Remmick	Johanna Renner	Paul & Colleen Smith	Verland Woempner
Darby G Donohoe	John & Agnes McFaddin	Paul Murray	Vic & Rita Brodie
Daren & Janet Labolle	John & Christine Thomas	Paul Segsworth	Vicki Carroll
Daren Labolle	John & Michelle McMahan	Peggy Timken	Vicki Hendrick & Sam Owen
Darla Noel-Wessel	John & Shirley Ferris	Perry Anderson	Warren Hall
David & Janet Weingart	John Boothe	Phillip Graves	Weber Farms
David & Jill Christiansen	John M Marsan	Phillip Levine	Wendy Jacquemin
David & Kathy McDaniel	John Neirinckx	Pinehurst Water District	Wesley & Linda Jordan
David "Brad" & Mary Corkill	John Neirinckx II	R Earl Andersen	William & Gretchen Harrison
David Sheridan	John R Kraack	Ralph & Martha Banderob	William & Nancy McAninch
Dean & Glenda Gentry	Jordon Redman	Ralph Kahn	William B & Gretchen Harrison
Dennis Backus	Joseph Rush	Randy Wilson	William K Hasz
Derald Moyer	Joyce D & Charles R Stock	Razor Family Property	William White
Dianne Anderson	Joyce Morden	Rathdrum Power LLC	
Dick & Carole Harwood	Julie Day	Richard J Clemson	
Don & Martha Vail	Kathryn Kahn	Richard L Powell	
Don H Sherfey	Kathy Jordan	Rick & Holly Day	
Donald & Christine McCaw	Kaye A Mainsey	Rickey Dunn	
Donald Sutton	Keith Kleinkhecht	Robert & Dianna Bostrom	
Doris Miller	Kellogg School District	Robert & Gail Short	
Doug Luchini	Ken & Aileen Zaken	Robert & Julie Grunzweig	
Douglas & Darcy McInturff	Ken & Yvonne Devries	Robert & Norma White	
Dwayne Layton	Kent L & Donna J Davis	Robert & Patty Anderson	
East Shoshone County Water	Kevin & Shannon Simonsen	Robert Ellis	
Eddie A Bailey	Kevin & Tiffany Renner	Robert Powell	
Edmond & Janet Ferrel	Kevin Coleman	Robert Rider	
Edward & Candace Anderson	Kim Liss	Robin & Leslee Stanley	
Elizabeth Roberts	Kristi & Doug Payne	Robin Stanley	
Eric & Susan Skidmore	Lance & J Michele McDaniel	Roderick & Beth Halvorson	
Ernest & Myra Ecklund	Lance M Jordan	Ron Mendive	
Fernwood Water & Sewer Dist	Lance Stanley	Ron Wood	
Florence Farber	Larry & Susan Sotin	Ronald & Sherlene Mendive	
Frank Frutchey	Larry Donahoe	Rosie Layton	
Fred & Marcy Hasz	Larry Lehtola		

CERTIFICATE OF MAILING

I certify that a true and correct copy of the FINAL ORDER  
DISALLOWING WATER RIGHT CLAIMS was mailed on May 03, 2017,  
with sufficient first-class postage to the following:

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ENVIRONMENT & NATL' RESOURCES  
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13621 S HWY 95  
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CHRISTOPHER H MEYER  
JEFFREY C FEREDAY  
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828 WESTFORK EAGLE CREEK  
WALLACE, ID 83873

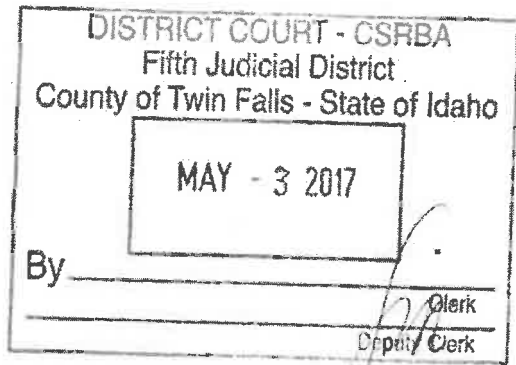
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CHIEF NATURAL RESOURCES DIV  
OFFICE OF THE ATTORNEY GENERAL  
STATE OF IDAHO



# EXHIBIT 3



**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** ) **Subcase No. 91-7755**  
 ) **(353 consolidated subcases (see attached list))**  
**Case No. 49576** )  
 ) **ORDER ON MOTIONS FOR SUMMARY**  
 ) **JUDGMENT**  
 )  
 )  
 )

**I.**

**BACKGROUND**

1. On November 12, 2008, the Court entered an order commencing the Coeur d'Alene-Spokane River Basin Adjudication ("CSRBA").

2. The United States is a party to the CSRBA. On March 26, 2014, it filed 353 water right claims as trustee on behalf of the Coeur d'Alene Tribe ("Tribe"). The claims seek federal reserved water rights associated with the Coeur d'Alene Indian Reservation. Objections and responses to some or all claims were filed by various parties.

3. The Court consolidated the United States' claims into the above-captioned subcase on February 17, 2015. It also bifurcated the litigation in this matter between issues of entitlement and quantification, with the issue of entitlement to be addressed first.

4. *Motions for Summary Judgment* on the issue of entitlement were filed by the State of Idaho, the United States and the Tribe, Hecla Limited, and the North Idaho Water Rights Group.<sup>1</sup>

5. The following Objectors join in the State's *Motion*: Hecla Limited; Benewah County; City of St. Maries; City of Harrison; Buell Bros., Inc.; Jack Buell; Eleanor Buell; David

<sup>1</sup> The term "North Idaho Water Rights Group" refers collectively to the Objectors identified on Exhibit A attached hereto.

Corkill; Mary Corkill; Whiteman Lumber Co., Inc.; Alpine Meadows Water and Sewer District; North Kootenai Water & Sewer District; Potlatch Forest Holdings, Inc.; Potlatch Land & Lumber, LLC; Potlatch TRS Idaho, LLC; and the North Idaho Water Rights Group.

6. The following Objectors join in the North Idaho Water Rights Group's *Motion*: Benewah County; City of St. Maries; City of Harrison; Jack Buell; and Eleanor Buell.

7. Responses in opposition to the *Motion* filed by the United States and the Tribe were filed by the following Objectors: the State of Idaho; Hecla Limited; the North Idaho Water Rights Group; North Kootenai Water & Sewer District; Alpine Meadows Water and Sewer District; Potlatch Forest Holdings, Inc.; Potlatch Land & Lumber, LLC; Potlatch TRS Idaho, LLC; and John McFadden.

8. The following Objectors join in the State of Idaho's response: Benewah County; City of St. Maries; City of Harrison; Buell Bros., Inc.; Jack Buell; Eleanor Buell; David Corkill; Mary Corkill; Whiteman Lumber Co., Inc.; North Kootenai Water & Sewer District; Alpine Meadows Water and Sewer District; Potlatch Forest Holdings, Inc.; Potlatch Land & Lumber, LLC; Potlatch TRS Idaho, LLC; and the North Idaho Water Rights Group.

9. The following Objectors join in the Hecla Limited's response: Benewah County; City of St. Maries; City of Harrison; Buell Bros., Inc.; Jack Buell; Eleanor Buell; David Corkill; Mary Corkill; and Whiteman Lumber Co., Inc.

10. The following Objectors join in the North Idaho Water Rights Group's response: Benewah County; City of St. Maries; City of Harrison; Jack Buell; and Eleanor Buell.

11. Responses in opposition to the *Motion* filed by the State of Idaho were filed by the United States, the Tribe, and John McFadden.

12. Responses in opposition to the *Motions* filed by the North Idaho Water Rights Group and Hecla Limited were filed by the United States and the Tribe.

13. Reply briefs were subsequently filed by the United States, State of Idaho, Hecla Limited, and the North Idaho Water Rights Group.

14. The following Objectors join in the State of Idaho's reply: Benewah County; City of St. Maries; City of Harrison; Buell Bros., Inc.; Jack Buell; Eleanor Buell; David Corkill; Mary Corkill; Whiteman Lumber Co., Inc.; North Kootenai Water & Sewer District; Alpine Meadows Water and Sewer District; Potlatch Forest Holdings, Inc.; Potlatch Land & Lumber, LLC; Potlatch TRS Idaho, LLC; and the North Idaho Water Rights Group.

15. The following Objectors join in Hecla Limited's reply: Benewah County; City of St. Maries; City of Harrison; Buell Bros., Inc.; Jack Buell; Eleanor Buell; David Corkill; Mary Corkill; and Whiteman Lumber Co., Inc.

16. The following Objectors join in the North Idaho Water Rights Group's reply: Benewah County; City of St. Maries; City of Harrison; Jack Buell; and Eleanor Buell.

17. A hearing on the *Motions for Summary Judgment* was held on March 30, 2017, at the Kootenai County Courthouse in Coeur d'Alene, Idaho.

## II.

### STANDARD OF REVIEW

Summary judgment is proper if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. I.R.C.P. 56. The burden of demonstrating the absence of a genuine issue of material fact is on the moving party. *Id.* When a court considers a motion for summary judgment, all facts are to be liberally construed in favor of the nonmoving party, and the court must draw all reasonable inferences and conclusions in that party's favor. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991). However, when an action will be tried before the court without a jury, the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant summary judgment despite the possibility of conflicting inferences. *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 237, 159 P.3d 870, 874 (2007).

## III.

### ANALYSIS

The purpose of the entitlement phase of this litigation is to determine whether the United States, acting as trustee on behalf of the Tribe, is entitled to federal reserved water rights for use on the Coeur d'Alene Indian Reservation. Resolution of the issue of entitlement requires the Court to examine the documentation, circumstances, and history surrounding the creation of the reservation. For the reasons set forth herein, the Court finds that when the United States reserved

land for use as the Coeur d'Alene Indian Reservation it impliedly reserved water rights for agriculture, fishing and hunting, and domestic purposes.

**A. History.**

The U.S. Supreme Court has had an opportunity to examine the history of the Coeur d'Alene Indian Reservation before. In *Idaho v. U.S.*, 533 U.S. 262 (2001), Justice Souter provided a detailed summary of the circumstances leading to its creation. This Court includes his summary herein, in pertinent part, to set the stage for the analysis that follows:

The Coeur d'Alene Tribe once inhabited more than 3.5 million acres in what is now northern Idaho and northeastern Washington, including the area of Lake Coeur d'Alene and the St. Joe River. 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.

Under an 1846 treaty with Great Britain, the United States acquired title to the region of Lake Coeur d'Alene . . . . In 1867, in the face of immigration into the Tribe's aboriginal territory, President Johnson issued an Executive Order setting aside a reservation of comparatively modest size, although the Tribe was apparently unaware of this action until at least 1871, when it petitioned the Government to set aside a reservation . . . . The Tribe found the 1867 boundaries unsatisfactory, due in part to their failure to make adequate provision for fishing and other uses of important waterways. When the Tribe petitioned the Commissioner of Indian Affairs a second time, it insisted on a reservation that included key 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." Following further negotiations, the Tribe in 1873 agreed to relinquish (for compensation) all claims to its aboriginal lands outside the bounds of a more substantial reservation that negotiators for the United States agreed to "set apart and secure" "for the exclusive use of the Coeur d'Alene Indians, and to protect . . . from settlement or occupancy by other persons." The reservation boundaries described in the agreement covered part of the St. Joe River (then called the St. Joseph), and all of Lake Coeur d'Alene except a sliver cut off by the northern boundary.

Although by its own terms the agreement was not binding without congressional approval, later in 1873 President Grant issued an Executive Order directing that the reservation specified in the agreement be "withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians." The 1873 Executive Order set the northern boundary of the reservation directly across Lake Coeur d'Alene, which, the District Court found, was contrary "to the usual practice of meandering

a survey line along the mean high water mark.” An 1883 Government survey fixed the reservation’s total area at 598,499.85 acres, which the District Court found necessarily “included submerged lands within the reservation boundaries.”

As of 1885, Congress had neither ratified the 1873 agreement nor compensated the Tribe. This inaction prompted the Tribe to petition the Government again, to “make with us a proper treaty of peace and friendship . . . by which your petitioners may be properly and fully compensated for such portion of their lands not now reserved to them; [and] that their present reserve may be confirmed to them.” In response, Congress authorized new negotiations to obtain the Tribe’s agreement to cede land outside the borders of the 1873 reservation. In 1887, the Tribe agreed to cede

“all right, title, and claim which they now have, or ever had, to all lands in said Territories [Washington, Idaho, and Montana] and elsewhere, except the portion of land within the boundaries of their present reservation in the Territory of Idaho, known as the Coeur d’Alene Reservation.”

The Government, in return, promised to compensate the Tribe, and agreed that

“[i]n consideration of the foregoing cession and agreements . . . the Coeur d’Alene Reservation shall be held forever as Indian land and as homes for the Coeur d’Alene Indians . . . and no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation.”

As before, the agreement was not binding on either party until ratified by Congress.

In January 1888, not having as yet ratified any agreement with the Tribe, the Senate expressed uncertainty about the extent of the Tribe’s reservation and adopted a resolution directing the Secretary of the Interior to “inform the Senate as to the extent of the present area and boundaries of the Coeur d’Alene Indian Reservation in the Territory of Idaho,” and specifically, “whether such area includes any portion, and if so, about how much of the navigable waters of Lake Coeur d’Alene, and of Coeur d’Alene and St. Joseph Rivers.” The Secretary responded in February 1888 with a report of the Commissioner of Indian Affairs, stating that “the reservation appears to embrace all the navigable waters of Lake Coeur d’Alene, except a very small fragment cut off by the north boundary of the reservation,” and that “[t]he St. Joseph River also flows through the reservation.” .

...  
...

Congress was not prepared to ratify the 1887 agreement, however, owing to a growing desire to obtain for the public not only any interest of the Tribe in land outside the 1873 reservation, but certain portions of the reservation itself. The

House Committee on Indian Affairs later recalled that the 1887 agreement was not promptly ratified for

“sundry reasons, among which was a desire on the part of the United States to acquire an additional area, to wit, a certain valuable portion of the reservation specially dedicated to the exclusive use of said Indians under an Executive order of 1873, and which portions of said lands, situate[d] on the northern end of said reservation, is valuable and necessary to the citizens of the United States for sundry reasons. It contains numerous, extensive, and valuable mineral ledges. It contains large bodies of valuable timber. . . . It contains a magnificent sheet of water, the Coeur d'Alene Lake. . . .”

But Congress did not simply alter the 1873 boundaries unilaterally. Instead, the Tribe was understood to be entitled beneficially to the reservation as then defined, and the 1889 Indian Appropriations Act included a provision directing the Secretary of the Interior “to negotiate with the Coeur d’Alene tribe of Indians,” and, specifically, to negotiate “for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell.” Later that year, the Tribe and Government negotiators reached a new agreement under which the Tribe would cede the northern portion of the reservation, including approximately two-thirds of Lake Coeur d’Alene, in exchange for \$500,000. The new boundary line, like the old one, ran across the lake, and General Simpson, a negotiator for the United States, reassured the Tribe that “you still have the St. Joseph River and the lower part of the lake.” And, again, the agreement was not to be binding on either party until both it and the 1887 agreement were ratified by Congress.

...  
On March 3, 1891, Congress “accepted, ratified, and confirmed” both the 1887 and 1889 agreements with the Tribe.

*Idaho*, 533 U.S. at 265-271 (internal citations omitted).

**B. When the United States reserved land for use as the Coeur d’Alene Indian Reservation, it impliedly reserved water rights for agriculture, fishing and hunting, and domestic purposes.**

Throughout the history of the Western United States the federal government has reserved lands from the public domain for a variety of federal purposes, including for use as Indian reservations. Many land reservations occurred during the West’s formative years. It was standard at the time for the federal government to expressly designate, whether by statute, treaty, or executive order, the lands it intended to retain. However, the issue of what corollary water rights, if any, were intended to be reserved was often neglected. This neglect led to the origin of the reserved rights doctrine.

The reserved rights doctrine was first applied by the U.S. Supreme Court in *Winters v. United States*, 207 U.S. 564 (1908). In 1888, the federal government reserved land along the Milk River in Montana for use as the Fort Belknap Indian Reservation. *Id.* at 575. The reservation was effectuated by treaty. *Id.* As was common at the time the treaty did not expressly reserve a water right. *Id.* Nevertheless, the Court found the federal government intended to reserve a water right to serve the purpose of the reservation. *Id.* at 576. It noted the policy of the government in reserving the land was to change the habits “of a nomadic and uncivilized people” to “a pastoral and civilized people.” *Id.* Further, that water was necessary to effectuate this policy as the reserved lands were arid and irrigation was required to sustain agriculture. *Id.* Given the purpose of the land reservation, the Court reasoned that the federal government intended to reserve a water right for irrigation and held that such a reserved water right was necessarily implied in the treaty. *Id.* The Court’s decision in *Winters* set the stage for what would become known as the reserved rights doctrine.<sup>2</sup>

The reserved rights doctrine is a doctrine built on implication. *U.S. v. New Mexico*, 438 U.S. 696, 715 (1978). It provides that “when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.” *Cappaert v. U.S.*, 426 U.S. 128, 138 (1976). The doctrine’s scope is limited to the reservation of water for the primary purposes of a reservation:

Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress’ express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

*New Mexico*, 438 U.S. at 702. A federal reserved water right may be implied only after the court “has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated.” *Id.* at 700.

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<sup>2</sup> The doctrine is alternatively referred to in case law and literature as the “*Winter’s* doctrine,” “implied-reservation-of-water doctrine,” and the “federal reserved water rights doctrine.” For the purposes of this opinion, the Court refers to the doctrine as the “reserved rights doctrine” consistent with the U.S. Supreme Court’s identification of the doctrine in *U.S. v. New Mexico*, 438 U.S. 696, 715 (1978).



The United States filed 353 water right claims in the CSRBA acting as trustee for the Tribe. The claims seek federal reserved water rights associated with the Coeur d'Alene Indian Reservation for a variety of purposes. As a matter of law, the scope and nature of claims the United States may seek under the reserved rights doctrine is defined by the primary purposes of the reservation. The Court thus looks to the primary purposes of the reservation.

**i. Primary purposes of the Coeur d'Alene Indian Reservation.**

When President Grant reserved the land to be used for the Coeur d'Alene Indian Reservation he did not expressly identify the primary purposes of the reservation. His Executive Order simply provided that the reserved land is “withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians. . . .” *Strack Aff.*, Ex. 3. To ascertain the reservation’s primary purposes, the Court looks to the document and circumstances surrounding the creation of the reservation and the history of the Indians for whom it was created. *See e.g., Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981). In so doing, the Court must construe any agreements between the United States and the Tribe “not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.” *Jones v. Meehan*, 175 U.S. 1, 11 (1899). Any such agreements must be liberally construed in the Tribe’s favor. *Cf., County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (“statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit”). However, agreements between the United States and the Tribe “cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.” *Choctaw Nations v. United States*, 318 U.S. 423, 432 (1943).

**a. Homeland theory.**

The positions of the parties regarding the primary purposes of the reservation differ. The United States and the Tribe advance a “homeland” primary purpose. That is, they assert the primary purpose of the reservation was to provide a permanent homeland for the Coeur d'Alene people and other Indians who reside thereon. They contend the following categories of water rights, among others, were reserved by the United States to serve the homeland purpose: domestic, commercial, municipal, industrial, instream flows for fish habitat, irrigated agriculture,

maintenance of lake levels in Lake Coeur d'Alene, water storage, power generation, aesthetics, recreation, religious, cultural, ceremonial, and maintenance of wetlands, springs, and seeps for game habitat and gathering activities.<sup>3</sup>

The Objectors assert the homeland theory is overly broad and contrary to law. This Court agrees. The reserved rights doctrine is a limited doctrine. It is meant to reserve water rights for some, but not all, uses associated with a federal reservation of land. Under the doctrine only the primary purposes of a federal land reservation may carry a federal reserved water right.<sup>4</sup> *New Mexico*, 438 U.S. at 702. Secondary purposes may not, and water rights for such uses must be pursued under state law. *Id.* The Court finds that the homeland theory advanced by the United States and the Tribe exceeds the doctrine's limitations and effectively eliminates the primary-secondary purposes distinction set forth by the U.S. Supreme Court.

A review of the United States' claims illustrates the point. The CSRBA is a general stream adjudication. Subject to certain exceptions not applicable here, water users within the adjudication boundaries are required to file claims for all existing water uses in the adjudication. I.C. §§ 42-1401A(5), 42-1409(4), and 42-1420. This requirement extends to the United States and the Tribe under the McCarren Amendment. 43 U.S.C. § 666. Presumably, the United States in exercising its fiduciary duty to the Tribe has filed claims in the CSRBA for all existing water uses associated with the reservation.<sup>5</sup> A review of the United States' claims reveals that they are all pursued under federal law as federal reserved water rights. Implicit in the claims then is the United States' assertion that every use of water associated with the Coeur d'Alene Indian Reservation dating back to its inception over 130 years ago has served the primary purpose of the reservation (i.e., serves the "homeland"). This is the shortcoming of the homeland theory. It

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<sup>3</sup> See e.g., *Notice of Claim* for water right claim 95-16704, which claims the following purposes of use associated with Lake Coeur d'Alene and its tributary sources, including surface water and groundwater: "[p]resent and future uses, including but not limited to: food; fiber; transportation; recreation; religious, cultural and ceremonial; fish and wildlife habitat; lake level and wetland maintenance; water storage; power generation; and aesthetics – as a component of a water right necessary to fulfill the homeland purpose of the Coeur d'Alene Reservation. . . ." See also e.g., *Notice of Claim* for water right claim 95-16708, which claims the following purposes of use associated with springs and/or seeps: "Wildlife and plant habitat for hunting and gathering rights as well as other tribal traditional, cultural, spiritual, ceremonial, and/or religious uses – as a component of a water right necessary to fulfill the homeland purpose of the Coeur d'Alene Reservation. . . ."

<sup>4</sup> Even then, a primary purpose may only carry a federal reserved water right if "without the water the purposes of the reservation would be entirely defeated." *New Mexico*, 438 U.S. at 700.

<sup>5</sup> Subject to certain exceptions not here applicable, the deadline for the filing of all water right claims based on either state or federal law has passed.

effectively eliminates the primary-secondary purposes distinction set forth by the U.S. Supreme Court by proposing that all water use associated with an Indian reservation serves the primary purpose of that reservation. In so proposing, the homeland theory fails to accommodate the notion of secondary purposes or, for that matter, the notion that the reserved rights doctrine is intended to reserve water rights for some, but not all, uses associated with a federal reservation of land.

Indeed, under the homeland theory advanced by the United States and the Tribe it is difficult to conceive a beneficial use of water that would not serve the expansive concept of “the homeland.” Any beneficial use of water, being beneficial by its very nature, benefits and serves the homeland. That is the position of the United States and Tribe. They concede no use of water in the history of the reservation that serves a secondary purpose of the reservation. If they did, they would have filed claims for such secondary uses in the CSRBA under state law. They did not file any such state law based claims, and the time for filing such claims has passed. Rather, they assert all uses of water associated with the reservation may be pursued as federal reserved water rights on the grounds they benefit the homeland. This Court disagrees and finds that the homeland theory offends the limited nature of the reserved rights doctrine by failing to place any functional limitations on the nature or scope of water rights that may be reserved under the doctrine.

Additionally, the Court notes that the U.S. Supreme Court has not applied the homeland theory advanced here. There is no doubt that the United States intended to move the Coeur d’Alene people onto the lands reserved to be the reservation with the aim that those lands be their homeland. However, this is true of all Indian reservations – their aim is to provide a homeland to those who inhabit them. Certainly the United States intended the lands reserved to be the Fort Belknap Indian Reservation to be the homeland of the Gros Ventre and Assiniboine Tribes. Yet, the U.S. Supreme Court in *Winters* did not find a homeland primary purpose for that reservation. It held the reservation carried only a reserved water right for irrigation to serve the agrarian purpose of the reservation. Likewise, in *U.S. v. Arizona*, 373 U.S. 546 (1963), the U.S. Supreme Court held that the Indian reservations at issue carried only reserved water rights for irrigation. *Arizona*, 373 U.S. at 600-601. The U.S. Supreme Court has never adopted or applied a homeland theory primary purpose and this Court declines to do so for the reasons

stated herein. The Court, therefore, finds the homeland theory advanced by the United States and the Tribe must be rejected as a matter of law.

**b. Agriculture.**

The parties are in agreement that one primary purpose of the reservation was to promote an agrarian lifestyle for its inhabitants. This Court agrees. The 1873 agreement entered into by the United States and the Tribe reveals an intent on behalf of the Tribe to pursue an agrarian lifestyle and an intent on behalf of the United States to encourage that pursuit. The agreement provided the Tribe would cede its claims to much of its aboriginal territory in exchange for a reservation and other consideration. In so ceding, the Tribe manifested an intent to move away from traditional lifestyle activities that required such an expanse of land in favor of an agrarian lifestyle more conducive to a reservation. The agreement contemplated that various implements would be conveyed from the United States to the Tribe to promote that agrarian lifestyle:

In consideration of the relinquishment of the title to all the lands described in article second of this agreement by said Indians, and in consideration of their removal within the reservation described in article first of this agreement, the government of the United States agrees as soon after the approval of this agreement as practicable, to furnish to said Indians at said reservation the following articles, to-wit:

10 wagons; 10 setts wagon harness; 50 sett plow harness; 50 ten inch plows; 10 Span [pair of matched working] American mares; 10 whip saws; 10 cross cut saws; 2 mowers with reapers combined; 1 sett blacksmith tools; 2 horse rakes; 20 harrows; 10 grain cradles.

Also to furnish material and construct on said reservation, for the use of said Indians 1 grist and saw mill combined; 1 School house with apartments for male and female pupils; 1 boarding and lodging house for pupils; 1 smith shop.

*Hart Aff.*, Ex. 2.<sup>6</sup>

Therefore, the Court concludes that one primary purpose of the reservation was to establish an agrarian lifestyle for its inhabitants. It follows that when the United States reserved land for use as the Coeur d'Alene Indian Reservation it impliedly reserved the water rights necessary to fulfill that purpose. There is some contention among the Objectors that agriculture

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<sup>6</sup> A transcribed type-written copy of the 1873 agreement may be located at pages 391-393 of E. Richard Hart's *A History of Coeur d'Alene Tribal Water Use: 1780-1915*, a copy of which is attached as Exhibit 6 to the *Hart Affidavit*.

can be sustained to various degrees on the reservation without irrigation given local precipitation levels and climatic conditions. This contention raises issues regarding the amount of reserved water necessary to fulfill the agrarian purpose of the reservation. However, the State concedes that “such a determination will involve contested issues of fact not suitable for summary judgment, and may best be incorporated into the quantification phase of this litigation.” *State of Idaho’s Memorandum in Support of Motion for Summary Judgment*, p.45.<sup>7</sup> Since the issue is one of quantification, the Court does not reach the Objectors’ contention here.

**c. Fishing and hunting.**

The Court finds another primary purpose of the reservation was to provide the Tribe with waterways for fishing and hunting. President Grant’s 1873 Executive Order followed a period of negotiation between the United States and the Tribe. Prior to 1873, President Johnson issued an Executive Order reserving lands for use as an Indian reservation for the Tribe. *Idaho*, 533 U.S. at 265. These lands were apparently reserved without the knowledge or consent of the Tribe. *Id.* at 266 (finding that the Tribe was “apparently unaware of this action until at least 1871”). When the Tribe learned of the Executive Order they found the lands reserved to be unsatisfactory. *Id.* Of primary concern was the fact they did not include important waterways such as Lake Coeur d’Alene or the Coeur d’Alene or St. Joe Rivers. *Id.*; *Hart Aff.*, Ex.6, pp.115 & 121-122. The Tribe petitioned the Commissioner of Indian Affairs for a reservation that included these waterways, thereby commencing a period of negotiation.

At the forefront of these negotiations was the Tribe’s need to access the waterways to facilitate its traditional fishing and hunting practices. Historically, Tribal village life focused on fishing and hunting near rivers and lakes. *Hart Aff.*, Ex.6, pp.6, 20-30. Naturally Tribal fishing practices were reliant upon important waterways such as Lake Coeur d’Alene and the Coeur d’Alene and St. Joe Rivers. *Id.* at pp.20-28. Tribal reliance on these waterways also extended to its hunting practices. *Id.* at 28-30. By the early 1870s, the Tribe had developed agriculture to a limited degree. *Id.* at 116. However, it continued to rely upon fishing and hunting practices for its survival. *Id.* at 122 & 138. During negotiations the Tribe made clear to the United States “we are not as yet quite up to living on farming” and “for a while yet we need . . . some hunting and fishing.” *Idaho*, 533 U.S. at 266; *Hart Aff.*, Ex.6, pp.118 & 122.

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<sup>7</sup> The Objectors join in the State’s *Motion for Summary Judgment*.

The intent of the Tribe to negotiate a reservation that included important waterways for fishing and hunting was known to the United States. *Hart Aff.*, Ex. 6, pp.144-146. So was the vigor with which the Tribe would defend its territory and important waterways if necessary. *Id.* at 137 &146. A report forwarded from a government appointed surveyor to the Commissioner of Indian Affairs provided that “[s]hould the fishing be excluded there will in my opinion be trouble with these Indians but should they be included . . . there will be no trouble.” *Hart Aff.*, Ex.6, p.127. It was the intent of the United States to avoid such trouble while at the same time extinguishing Tribal claims to much of its aboriginal territory so as to clear the way for non-Indian settlement. *Id.* at 146-150. The negotiations of the parties resulted in the 1873 agreement and corresponding Executive Order. Under the agreement, the Tribe agreed “to relinquish to the government of the United States all their right and title in and to” much of its aboriginal territory. *Hart Aff.*, Ex. 2. In exchange, the United States agreed, among other things, to “secure as a Reservation for the exclusive use of the Coeur d’Alene Indians” lands that included Lake Coeur d’Alene, the Coeur d’Alene River, and a stretch of the St. Joe River.<sup>8</sup> *Id.* That waterways were a significant aspect of the agreement is reflected in the concession that “the waters running into said reservation shall not be turned from their natural channel where they enter said reservation.” *Id.*

The history and circumstances surrounding the 1873 agreement and resulting Executive Order thus establish 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. The very locale and construct of the reservation was tailored to serve this purpose, as the Tribe was not in a position to rely solely upon agricultural practices for its subsistence. The Court therefore concludes that when the United States reserved land for use as the Coeur d’Alene Indian Reservation, it impliedly reserved water rights necessary to fulfill the fishing and hunting purpose of the reservation.

#### **d. Domestic.**

The reservation of land for use as an Indian reservation carries the implied reservation of water rights necessary “to make the reservation livable.” *Arizona v. California*, 460 U.S. 605,

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<sup>8</sup> The Tribe subsequently ceded “the northern portion of the reservation, including approximately two-thirds of Lake Coeur d’Alene . . .” *Idaho*, 533 U.S. at 269-270.

616 (1983). This includes water rights for domestic use. In this case, the parties do not dispute the reservation carries federal reserved water rights for domestic use. However, concerns have been raised by the Objectors over whether the United States' domestic claims seek the right to develop water rights outside the boundaries of the reservation. At the hearing, counsel for the United States clarified that this is not the case. She represented that despite some ambiguity in the way the rights are claimed, the United States does not seek to develop points of diversion or places of use for domestic use outside the boundaries of the reservation.<sup>9</sup> Therefore, the Court finds that water rights for domestic use were impliedly reserved by the United States to serve the Coeur d'Alene Indian Reservation limited to points of diversion and places of use located within the reservation's boundaries.

Last, the Court notes that some courts have quantified domestic water use associated with an Indian reservation as encompassed within an agricultural reserved water right. *See e.g., In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 99 (Wyo. 1988) (domestic use "has traditionally been subsumed in agricultural reserved rights"). The State asserts that the issue of whether that should be done here, or whether domestic use should be quantified independently, may best be addressed in the quantification phase of this litigation. The Court agrees and does not reach that issue here.

**ii. Secondary purposes.**

The Court has identified the primary purposes of the Coeur d'Alene Indian Reservation as agricultural, fishing and hunting, and domestic. The United States claims water rights were reserved to serve many other categories of water use such as industrial, commercial, water storage, power generation, aesthetics, recreation, and maintenance of Lake Coeur d'Alene lake levels.<sup>10</sup> Limited support for certain of these uses may be found in the circumstances surrounding the creation of the reservation. For instance, Tribal requests for mills during the negotiations leading to the 1873 agreement may indicate the Tribe arguably had some concern with future commercial and/or industrial development. But these concerns were certainly

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<sup>9</sup> The ambiguity arises from the way the United States has claimed the place of use and point of diversion associated with its domestic use claims. Water right claim number 95-16672 for domestic use identifies the point of diversion as "Undetermined Current and Future Locations, 979 wells in Kootenai and Benewah Counties," and the place of use as "Undetermined Locations in Kootenai and Benewah Counties."

<sup>10</sup> This list is illustrative of other categories of water use claimed by the United States. It is not exhaustive.

secondary to the primary purposes of the reservation set forth above. With respect to other claimed uses, such as maintenance of Lake Coeur d'Alene lake levels, the Court finds no support. In any event, since the scope of claims the United States may pursue as federal reserved water rights is limited to those that serve the primary purposes of the reservation, the Court finds that its claims for purposes of uses other than agriculture, fishing and hunting, and domestic use must be disallowed as a matter of law.

**C. The United States is not entitled to federal reserved water rights outside the boundaries of the reservation.**

The United States claims a number of federal reserved water rights for instream flows outside of the boundaries of the reservation. The stated purpose of the claims is to provide fish habitat for fish species harvested within the reservation. The Objectors oppose the claims and assert they should be disallowed as a matter of law. This Court agrees.

An examination of the history surrounding the reservation provides no support for these claims. It was not a primary purpose of the reservation to protect off-reservation fish habitat. In the negotiations leading to the 1873 Executive Order, there is no discussion concerning off-reservation fish habitat or the need to preserve off-reservation instream flows. To the contrary, the 1873 agreement contemplated that “the waters running into said reservation shall not be turned from their natural channel *where they enter said reservation.*” *Hart Aff.*, Ex. 2. (emphasis added). There is no similar provision made for instream flows located outside of the reservation.

On the other hand, one of the purposes behind the creation of the reservation was to extinguish all off-reservation Tribal rights and interest. *See e.g., Idaho*, 533 U.S. at 275-276 (goals of the United States were “promoting settlement, avoiding hostilities and extinguishing aboriginal title”). This intent was manifest not only by the United States, but also by the Tribe which intended to give up its off-reservation rights and interests in exchange for a reservation “that created a strong wall around them” and “where they could continue to live as a cohesive tribe, without intrusions by Whites.” *Hart Aff.*, Ex.6, p.143. That the Tribe did relinquish its off-reservation rights and interests is reflected in the agreements between the United States and the Tribe.

For instance, the 1873 agreement contemplated that the Tribe would cede all rights and interests outside the reservation:



And the said Tribe of Coeur d'Alene Indians agree to relinquish to the government of the United States all their right and title in and to all of the lands heretofore claimed by them, and lying and being outside of said described Reservation . . . .

*Hart Aff.*, Ex. 2. Likewise, in 1887 the Tribe agreed to cede:

all right, title, and claim which they now have, or ever had, to all lands in said Territories [Washington, Idaho, and Montana] and elsewhere, except the portion of land within the boundaries of their present reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation.

26 Stat. 989, 1027. Then, in 1889, the United States and the Tribe reached a new agreement under which the Tribe would cede the northern portion of the reservation, including approximately two-thirds of Lake Coeur d'Alene. Under that agreement, the Tribe agreed to “cede, grant, relinquish and quitclaim to the United States, all the right, title and claim which they now have, or ever had” to those ceded portions of the 1873 reservation. 26 Stat. at 1030.

The language of the agreements is plain, unambiguous, and absolute. It establishes that the Tribe gave up all its off-reservation rights and interests.<sup>11</sup> The Tribe did not expressly reserve any water rights beyond the boundaries of the reservation in the agreements. Nor did the United States impliedly reserve such water rights, as protection of off-reservation fish habitat and instream flows is not a primary purpose of the reservation. Therefore, the United States' claims for federal reserved water rights for off-reservation instream flows must be disallowed as a matter of law.

The Court's disallowal of these claims is consistent with case law. In Idaho, the Court previously rejected similar claims for off-reservation water rights filed by the United States in the Snake River Basin Adjudication on behalf of the Nez Perce Tribe. *Order on Motions for Summary Judgment*, Twin Falls Case No. 39576, SRBA Subcase No. 03-10022 (Nov. 10, 1999). Looking to other jurisdictions, the Court finds no support for the proposition that the United States can impliedly reserve water rights for instream flows located, as is the case here, many miles outside the boundaries of the lands reserved. To the contrary, the U.S. Supreme Court has directed that under the reserved rights doctrine the federal government “reserves *appurtenant* water then unappropriated to the extent needed to accomplish the purpose of the reservation.” *Cappaert*, 426 U.S. at 138 (emphasis added). Likewise, the Ninth Circuit has provided:

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<sup>11</sup> A water right is a real property interest under Idaho law. See e.g., *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 78 (2011) (“[i]n Idaho, water rights are real property”).

Apart from the requirement that the primary purpose of the reservation must intend water use, the other main limitation of the reserved rights doctrine is that the unappropriated water must be “appurtenant” to the reservation. Appurtenance, however, simply limits the reserved right to those waters which are attached to the reservation.

*Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1271 (9th Cir. 2017) (internal citations omitted). Therefore, in addition to a lack of historical evidence to support these off-reservation claims, the Court also finds the claims are not supported by case law.

**D. Priority Date.**

With respect to its claims for agriculture, the United States claims a priority date of November 8, 1873. That is the date of President Grant’s Executive Order. The State asserts that the earliest priority date possible for the claims is March 3, 1891. That is the date Congress accepted, ratified, and confirmed the 1887 and 1889 agreements with the Tribe. Under the reserved rights doctrine “the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.” *Cappaert v. U.S.*, 426 U.S. at 138. It has been determined that the reservation of land creating the Coeur d’Alene Indian Reservation occurred on November 8, 1873. In *State v. Andrus*, 720 F.2d 1461, 1463 (9th Cir. 1983), the United States Court of Appeals for the Ninth Circuit found that “[t]he Coeur d’Alene Indian Reservation was established by Executive Order in 1873 . . . .”

Likewise, in *Idaho v. U.S.* the U.S. Supreme Court found the reservation of land occurred in 1873, holding that “Congress [in 1891] recognized the full extent of the Executive Order reservation lying within the stated boundaries it ultimately confirmed.” *Idaho*, 533 U.S. at 281. In so holding, the Supreme Court rejected arguments made by the State that the submerged lands at issue were not reserved by the United States prior to Idaho statehood for purposes of the equal footing doctrine. *Id.* The Court is bound by the Supreme Court’s decision in *Idaho v. U.S.* and, consistent with that decision, holds that the reservation of land creating the Coeur d’Alene Indian Reservation occurred on November 8, 1873. It follows that the United States is entitled to a priority date of November 8, 1873, for its agricultural claims as a matter of law.

With respect to its claims for fishing and hunting, the United States claims a priority date of time immemorial. Although the U.S. Supreme Court has not squarely addressed the issue, in

*U.S. v. Winans*, 198 U.S. 371, 381 (1905), it recognized that a treaty is “not a grant of rights to the Indians, but a grant of right from them . . . .” Lower courts have applied this principle in finding a priority date of time immemorial for reserved water rights that accompany aboriginal practices. See e.g., *U.S. v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983) (holding that reserved water rights for hunting and fishing on the Klamath Reservation “carry a priority date of time immemorial”). In this case, one of the primary purposes of the Coeur d’Alene Indian Reservation was to allow the Tribe to maintain its traditional fishing and hunting practices. Therefore, the Court finds a time immemorial priority date to be appropriate for the United States’ claims for fishing and hunting.

With respect to its claims for domestic use, the United States claims a priority date of “[t]ime Immemorial, or in the alternative, November 8, 1873.” The Court finds November 8, 1873, to be appropriate as a matter of law. The United States’ claims for domestic use seek the right to divert groundwater via 979 current and future wells located throughout the reservation. While the use of surface water for domestic purposes was surely an aboriginal practice of the Tribe, the diversion and use of groundwater via wells was not. Therefore, it is not entitled to a priority date of time immemorial for its domestic use claims.

Last, the State argues the Tribe is not entitled to a date of reservation priority date for water rights associated with reservation lands homesteaded by non-Indians and later reacquired by the Tribe. The Court agrees. In 1906, lands comprising the Coeur d’Alene Indian Reservation were allotted to members of the Tribe.<sup>12</sup> 34 Stat. at 335. Reservation lands remaining after allotment were then opened to non-Indian homesteading. The Tribe has since reacquired some of these homestead lands. Under *U.S. v. Anderson*, 736 F.2d 1358, 1363 (9th Cir. 1984), an Indian tribe that reacquires reservation land homesteaded by a non-Indian is not entitled to a date of reservation priority date. Rather, it is entitled to the earlier priority date of either (1) the date the homesteader perfected a water right on the homesteaded lands under state law, or (2) if no water right was so perfected, then the reserved water right will carry a priority date as of the date of reacquisition. *Id.* The Court finds the holding in *Anderson* persuasive. The United States is therefore not entitled to an 1873 priority date for water rights associated with reservation lands homesteaded by non-Indians and later reacquired by the Tribe. The

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<sup>12</sup> The allotment occurred under the General Allotment Act of 1887, which provided that lands on Indian reservations could be granted to individual Indians in fee. 24 Stat. 388 (1887). Remaining reservation lands could then be made available for homesteading by non-Indians. *Id.*

appropriate priority date for water rights associated with such lands is the date the homesteader perfected a water right on the homesteaded lands under state law, or if no water right was so perfected, then the date of reacquisition.

**E. The United States' claim for lake level maintenance of Lake Coeur d'Alene is disallowed as a matter of law.**

The United States seeks a federal reserved water right for a sufficient flow of water into and out of Lake Coeur d'Alene to maintain lake levels at certain elevations. The Objectors protest this claim, and the Court finds it must be disallowed as a matter of law. Lake level maintenance was not a primary purpose of the reservation for reasons set forth above. Moreover, the outflow component of the claims seeks to develop a place or use outside the boundaries of the reservation.<sup>13</sup> The Court held above that the United States is not entitled to federal reserved water rights outside of the boundaries of the reservation as a matter of law. Therefore, the Court will disallow the United States' claim for lake level maintenance of Lake Coeur d'Alene.

**F. The Court does not reach the issue pertaining to the extent of submerged lands owned by the United States raised by the North Idaho Water Rights Group.**

The North Idaho Water Rights Group raises an issue in its *Motion* regarding the extent of submerged lands owned by the United States in trust for the Tribe. Counsel for the North Idaho Water Rights Group represents that the issue relates to the United States' lake level maintenance claim. The Court has determined that the United States is not entitled to a federal reserved water right for lake level maintenance as a matter of law. Therefore, the Court does not reach the issue.

**G. The Court does not reach the issue raised by Objector John McFaddin.**

Objector John McFaddin argues the United States, acting as trustee for the Tribe, cannot claim water rights associated with reservation lands allotted to individual Tribal members or to Indians that are not members of the Tribe. McFaddin admitted at the hearing that he is making this argument on behalf of other persons and entities, and that none of his own rights or interests

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<sup>13</sup> Specifically, the claim seeks the right to maintain certain monthly outflows as measured by the United States Geological Survey gage located on the Spokane River near Post Falls, Idaho. This location is outside the boundaries of the reservation.

are affected under the argument he advances. Objector McFaddin is not a licensed attorney. Under Idaho law, a non-lawyer can represent himself in a legal proceeding but he may not represent others without engaging in the unlawful practice of law. I.C. §§ 3-104 & 3-420. Accordingly, the Court does not entertain the arguments made by McFaddin on behalf of others.<sup>14</sup> Additionally, McFaddin does not support his argument with citation to any statute, case law, or other legal authority, and therefore the Court does not address it. See e.g., *State v. Orr*, 157 Idaho 206, 210, 335 P.3d 51, 55 (Ct.App.2014) (courts will not address arguments where a party “has provided no citation to authority to support [the] proposition”).

#### IV.

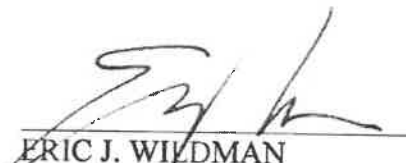
#### ORDER

THEREFORE, BASED ON THE FOREGOING, THE FOLLOWING ARE HEREBY ORDERED:

1. The State of Idaho’s *Motion for Summary Judgment* is granted in part and denied in part consistent with this *Order*.
2. The United States’ and Tribe’s *Joint Motion for Summary Judgment* is granted in part and denied in part consistent with this *Order*.
3. The North Idaho Water Rights Group’s *Motion for Summary Judgment* is granted save the issue pertaining to the extent of submerged lands owned by the United States which the Court does not reach.
4. Hecla Limited’s *Motion for Summary Judgment* is granted.

IT IS SO ORDERED.

Dated: May 3, 2017



ERIC J. WILDMAN

Presiding Judge

Coeur d’Alene-Spokane River Basin Adjudication

<sup>14</sup> The Court notes that none of the persons or entities on behalf of which McFaddin argues have appeared in this proceeding despite having notice and opportunity to do so.

Subcase Nos:

91-07755	92-10921	93-07510	93-07560	93-07610	94-09251
91-07756	92-10922	93-07511	93-07561	93-07611	94-09252
91-07757	93-07462	93-07512	93-07562	93-07612	94-09253
91-07758	93-07463	93-07513	93-07563	93-07613	94-09254
91-07759	93-07464	93-07514	93-07564	93-07614	94-09255
91-07760	93-07465	93-07515	93-07565	93-07615	94-09256
91-07761	93-07466	93-07516	93-07566	93-07616	94-09257
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Subcase Nos:

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95-16739

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Daren Labolle	John & Michelle McMahon	Peggy Timken	Vicki Hendrick & Sam Owen
Darla Noel-Wessel	John & Shirley Ferris	Perry Anderson	Warren Hall
David & Janet Weingart	John Boothe	Phillip Graves	Weber Farms
David & Jill Christiansen	John M Marsan	Phillip Levine	Wendy Jacquemin
David & Kathy McDaniel	John Neirinckx	Pinehurst Water District	Wesley & Linda Jordan
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Dennis Backus	Joseph Rush	Randy Wilson	William K Hasz
Derald Moyer	Joyce D & Charles R Stock	Razor Family Property	William White
Jianne Anderson	Joyce Morden	Rathdrum Power LLC	
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Donald Sutton	Keith Kleinkhecht	Robert & Dianna Bostrom	
Joris Miller	Kellogg School District	Robert & Gail Short	
Joug Luchini	Ken & Aileen Zaken	Robert & Julie Grunzweig	
Douglas & Darcy McInturff	Ken & Yvonne Devries	Robert & Norma White	
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Florence Farber	Larry & Susan Sotin	Ronald & Sherlene Mendive	
Frank Frutchey	Larry Donahoe	Rosie Layton	
Fred & Marcy Hasz	Larry Lehtola		



CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON MOTIONS FOR SUMMARY JUDGMENT was mailed on May 03, 2017, with sufficient first-class postage to the following:

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OFFICE OF THE ATTORNEY GENERAL  
STATE OF IDAHO

# EXHIBIT 4



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 ) Subcase Nos. See Attached List
Case No. 49576 )
) AMENDED FINAL ORDER DISALLOWING
) WATER RIGHT CLAIMS
)

On March 26, 2014, the United States filed the above-captioned water right claims as trustee on behalf of the Coeur d'Alene Tribe ("Tribe"). The claims seek federal reserved water rights associated with the Coeur d'Alene Indian Reservation. Objections and responses to some or all claims were filed by various parties. Motions for Summary Judgment seeking disallowal of the claims were subsequently filed by the State of Idaho, Hecla Limited, and the North Idaho Water Rights Group. Various other Objectors joined in the Motions. On May 3, 2017, the Court entered a Final Order Disallowing Water Right Claims setting forth a list of claims to be disallowed. On May 17, 2017, the United States and the Tribe filed a Motion to Set Aside and Modify Partial Decree or Final Order Disallowing Water Right Claim ("Motion"). The Court entered an Order on the Motion contemporaneously herewith. The Court now amends its Final Order Disallowing Water Right Claims consistent with that Order.

Therefore, IT IS ORDERED that the above water right claims are hereby disallowed with prejudice and shall not be confirmed in any partial decree or in any final decree entered in the Coeur d'Alene-Spokane River Basin Adjudication, Case No. 49576, in whatever form that final decree may take or be styled.

DATED July 26, 2017.

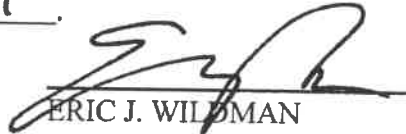
ERIC J. WILDMAN
Presiding Judge
Coeur d'Alene-Spokane River Basin Adjudication

1 The term "North Idaho Water Rights Group" refers collectively to the Objectors identified on Exhibit A attached hereto.

**RULE 54(b) CERTIFICATE**

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED July 26, 2017.



ERIC J. WILDMAN

Presiding Judge

Coeur d'Alene-Spokane River Basin Adjudication

Subcase Nos:

91-07755	94-09266
91-07756	94-09267
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94-09265	

(Subcase list: SETASIDE )  
6/28/17

## Exhibit A

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Alfred Sichlinger	Gary Johnson	Leroy Bailey	Roy Mortensen
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Frank Frutchey	Larry Donahoe	Rosie Layton	
Fred & Marcy Hasz	Larry Lehtola		

**CERTIFICATE OF MAILING**

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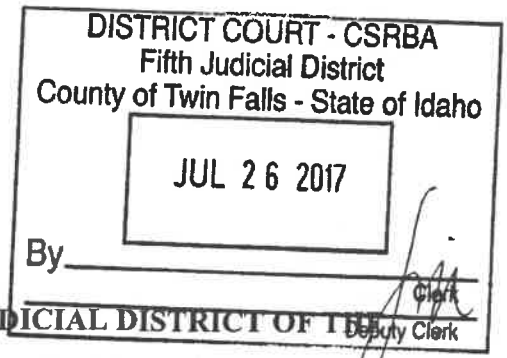
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# EXHIBIT 5





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 ) Subcase No. 91-7755  
Case No. 49576 ) (353 consolidated subcases (see attached list))  
 )  
 ) ORDER GRANTING MOTION TO  
 ) RECONSIDER  
 )  
 )

I.  
BACKGROUND

1. On May 3, 2017, the Court entered an *Order on Motions for Summary Judgment*. The background set forth in the *Order on Motions for Summary Judgment* is incorporated herein by reference and will not be repeated. Among other things, the *Order* addresses the priority date for federal reserved water rights claimed by the United States on behalf of the Coeur d'Alene Tribe ("Tribe").

2. On May 16, 2017, the State of Idaho filed a *Motion to Reconsider* ("Motion"). The *Motion* requests that the Court clarify its holding regarding the following issues:

- (a) Do spring and wetland water rights on reacquired lands have a priority date as of the date of reacquisition?
- (b) Does the Court's holding, which refers only to lands reacquired after being homesteaded, also apply to allotted lands that were sold to non-Indians and later reacquired by the Tribe?

3. The following Objectors join in the State's *Motion*: Benewah County; City of St. Maries; City of Harrison; Buell Bros., Inc.; Jack Buell; Eleanor Buell; David Corkill; Mary Corkill; Whiteman Lumber Co., Inc.; and the North Idaho Water Rights Group.<sup>1</sup> The United States and the Tribe filed a response in opposition to the *Motion*.

<sup>1</sup> The term "North Idaho Water Rights Group" refers collectively to the Objectors identified on Exhibit A to the Court's *Order on Motions for Summary Judgment*.

4. A hearing on the *Motion* was held on June 23, 2017, at the Kootenai County Courthouse in Coeur d'Alene, Idaho.

## II. ANALYSIS

In its *Order on Motions for Summary Judgment*, the Court addresses the priority date of federal reserved water right claims filed by the United States on behalf of the Tribe. With respect to reacquired lands, the Court found that the appropriate priority date for water rights associated with lands homesteaded by non-Indians and later reacquired by the Tribe “is the date the homesteader perfected a water right on the homesteaded lands under state law, or if no water right was so perfected, then the date of reacquisition.” The Court did not limit its holding in this respect to federal reserved claims for agricultural and domestic use. The holding applies equally to spring and wetland water rights on homesteaded lands reacquired by the Tribe. Thus, the appropriate priority date for federal reserved spring and wetland water rights is the date the homesteader perfected a water right on the homesteaded lands under state law - to the extent such a right could even be perfected under state law - or if no water right was so perfected, then the date of reacquisition.

The *Order on Motions for Summary Judgment* did not address the priority date for water rights appurtenant to lands that were reacquired by the Tribe after allotment and sale to non-Indian purchasers. The Court again finds the holding in *U.S v. Anderson*, 737 F.2d 1358 (1984), to be persuasive on this issue. These claims, which were not lost to non-use, carry a date of reservation priority date. *Id.* at 1362. The caveat is with respect to non-diversionary springs and wetlands claims, which carry a time immemorial priority date. However, non-Indian successors cannot hold, appropriate or exercise non-diversionary or instream rights, except for stockwater. As a result, to the extent such rights are non-diversionary or are for instream purposes, such rights would be lost through non-use. Springs and wetlands as well as other rights lost to non-use would carry a date of reacquisition priority date.

**III.**  
**ORDER**

Therefore, based on the foregoing, IT IS ORDERED that the State of Idaho's *Motion* is hereby granted.

Dated: July 26, 2017



ERIC J. WILDMAN  
Presiding Judge  
Coeur d'Alene-Spokane River Basin Adjudication

Subcase Nos:

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ST MARIES, ID 83861

CHIEF NATURAL RESOURCES DIV  
OFFICE OF THE ATTORNEY GENERAL  
STATE OF IDAHO

# EXHIBIT 6





Harrison; Buell Bros., Inc.; Jack Buell; Eleanor Buell; David Corkill; Mary Corkill; Whiteman Lumber Co., Inc.; and the North Idaho Water Rights Group

4. A hearing on the *Motion* was held on June 23, 2017, at the Kootenai County Courthouse in Coeur d'Alene, Idaho.

## II.

### ANALYSIS

The *Motion* seeks two categories of relief. First, it requests that the Court set aside and modify its *Final Orders* to allow the United States' federal reserved water right claims for gathering to proceed in the adjudication. Second, it requests that the Court set aside and modify its *Final Order Disallowing Water Right Claims* to remove certain water rights disallowed by that *Order*.

**A. The Court declines to amend the *Final Orders* to allow the United States' federal reserved water right claims for gathering to proceed in the adjudication.**

The United States and the Tribe ask the Court to reconsider its disallowal of the United States' federal reserved claims for plant habitat for Tribal gathering. Rule 59(e) allows a district court to "correct legal and factual errors in proceedings before it." *Straub v. Smith*, 145 Idaho 65, 71 (2007). A Rule 59(e) "motion to amend a judgment is addressed to the discretion of the court." *Lowe v. Lym*, 103 Idaho 259, 263 (Ct. App. 1982). In its *Order on Motions for Summary Judgment*, the Court analyzed the United States' claims under the reserved rights doctrine. Pursuant to the primary-secondary purposes distinction set forth in *U.S. v. New Mexico*, 438 U.S. 696, 715 (1978), the Court found the primary purposes of the Coeur d'Alene Indian Reservation to be agriculture, fishing and hunting, and domestic. It disallowed the United States' claims for all other purposes of use as a matter of law. The United States and Tribe do not offer any new argument regarding the Court's primary-secondary purposes analysis, but simply reiterate arguments already made to this Court. The Court fully addressed the primary purposes of the reservation in its *Order on Motions for Summary Judgment* and does not find any legal or factual error in the analysis. It therefore declines to amend its *Final Orders* as requested by the United States and the Tribe.

**B. The Court will amend its *Final Order Disallowing Water Right Claims* to remove water right claims erroneously included therein.**

The United States and the Tribe ask the Court to remove the following water right claims from its *Final Order Disallowing Water Right Claims*: 91-7777; 92-10906; 92-10907; 93-7469; 93-7470; 94-9244; 94-9245; 94-9246; 95-16678; 95-16679; 95-16680; 95-16681; 95-16682; 95-16683; and 95-16684. The claims seek federal reserved water rights for “fish habitat for fish species harvested within the Reservation . . . .” On summary judgment, the Court found fishing and hunting to be a primary purpose of the Coeur d’Alene Indian Reservation. That said, it limited the United States’ claims to those located within the boundaries of the reservation. The Court therefore disallowed the United States’ claims for off-reservation federal reserved water rights in its *Final Order Disallowing Water Right Claims*.

The United States and Tribe assert that water right claims 92-10906, 94-9244, 94-9245, 95-16680, 95-16681, 95-16682, 95-16683, and 95-16684 are located entirely within the boundaries of the reservation. Since the claims are for on-reservation water rights it was not the intent of the Court to disallow these claims. The claims were included on the list of rights disallowed by the Court’s *Final Order* as a result of clerical error. Therefore, the claims will be removed from the Court’s *Final Order* pursuant to Idaho Rule of Civil Procedure 60(a).

The United States and the Tribe assert that water right claims 91-7777, 92-10907, 93-7469, 93-7470, 94-9245, 94-9246, 95-16678, and 95-16679 straddle the reservation boundaries. Portions of these claims are located within the boundaries of the reservation and portions are located outside the boundaries of the reservation. Since the claims seek on-reservation water rights in part, it was not the intent of the Court to disallow these claims. Rather, it was the intent of the Court to allow the claims to proceed limited to points of diversion and places of use located within the reservation’s boundaries. The claims were included on the list of rights disallowed by the Court’s *Final Order* as a result of clerical error. Therefore, the claims will be removed from the Court’s *Final Order* pursuant to Idaho Rule of Civil Procedure 60(a).

The Objectors contend the United States’ claims for fish habitat in waterways other than Lake Coeur d’Alene and the Coeur d’Alene and St. Joe Rivers were correctly disallowed. They assert the Court’s *Order on Motions for Summary Judgment* concluded the primary purpose of the reservation was to provide the Tribe with the important waterways needed to facilitate its traditional fishing and hunting practices. Further, that those important waterways are limited to

Lake Coeur d'Alene and the Coeur d'Alene and St. Joe Rivers. In its *Order*, the Court found fishing and hunting to be a primary purpose of the reservation. It did not limit claims for such purposes to Lake Coeur d'Alene and the Coeur d'Alene and St. Joe Rivers. The Court found that the Tribe's historic fishing and hunting practices "were reliant upon important waterways *such as* Lake Coeur d'Alene and the Coeur d'Alene and St. Joe Rivers." The Court's identification of these three waterways provided an illustrative list, not an exhaustive one. Since the Court found fishing and hunting to be a primary purpose of the reservation the United States may seek such claims within the boundaries of the reservation necessary to fulfill that purpose.

### III.

#### ORDER

THEREFORE, BASED ON THE FOREGOING, THE FOLLOWING ARE HEREBY ORDERED:

1. The *Motion* is granted in part and denied in part.
2. The request that the Court amend its *Final Orders* to allow federal reserved water right claims for plant habitat for Tribal gathering is hereby denied.
3. The request that the Court amend its *Final Order Disallowing Water Right Claims* to remove water right claims 91-7777; 92-10906; 92-10907; 93-7469; 93-7470; 94-9244; 94-9245; 94-9246; 95-16678; 95-16679; 95-16680; 95-16681; 95-16682; 95-16683; and 95-16684 is hereby granted.

IT IS SO ORDERED.

Dated: July 26, 2017

  
ERIC J. WILDMAN  
Presiding Judge  
Coeur d'Alene-Spokane River Basin Adjudication

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