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NIWRG's Memo in Support for Mtn SJ

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LODGED

DISTRICT COURT - CSRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
OCT 21 2016
By _____ Clerk
_____ Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re CSRBA	Consolidated Subcase No. 91-7755
Case No. 49576	**MEMORANDUM IN SUPPORT OF THE NORTH IDAHO WATER RIGHTS GROUP'S MOTION FOR SUMMARY JUDGMENT**

Objectors and respondents, Members of the North Idaho Water Rights Alliance ("NIWRA"), Members of the Northwest Property Owners Alliance ("NWPOA"), Members of the Coeur d'Alene Lakeshore Property Owners Association ("CLPOA"), Rathdrum Power, LLC ("Rathdrum"), and Hagadone Hospitality Co. ("Hagadone") (collectively, the "North Idaho

Water Rights Group"), through undersigned counsel of record, hereby file this Memorandum in Support of the North Idaho Water Rights Group's Motion for Summary Judgment pursuant to Idaho Rule of Procedure 56(c) and Rule 7(f)(4) of this Court's Administrative Order 1. The Motion and this Memorandum are supported by the Affidavit of Norman M. Semanko filed contemporaneously herewith (the "Semanko Affidavit").

INTRODUCTION AND BACKGROUND

The North Idaho Water Rights Group hereby incorporates the Statement of Undisputed Facts in the State of Idaho's Memorandum in Support of Motion for Summary Judgment filed concurrently.

On January 31, 2014, the United States of America ("United States"), as trustee on behalf of the Coeur D'Alene Tribe (the "Tribe"), filed a Notice of Claim in the Coeur d'Alene Spokane River Basin Adjudication ("CSRBA") for a federal reserved water right, which included 353 claims in five (5) categories on and off the Coeur D'Alene Indian Reservation (the "Reservation"). The United States described the basis for the claim as the doctrine of federal reserved water rights articulated by the United States Supreme Court in *Winters v. United States*, 207 U.S. 564 (1908), and its progeny, "as well as the operative documents and circumstances surrounding the creation of the Coeur d'Alene Reservation." *See* Semanko Affidavit ("Semanko Aff.") ¶ 2, Ex. A.

The North Idaho Water Rights Group filed various objections and responses to the Notice of Claim filed by the United States. Specifically, on September 17, 2014, NIWRA objected to the United States' Notice of Claim, explicitly objecting to the claimed place of use "to the extent such place of use includes lands, water bodies, or waterways not constantly and

currently owned by the Coeur d'Alene Tribe or by the United States in trust for, the use and benefit for the Coeur d'Alene Tribe." *See* Semanko Aff. ¶ 3, Ex. B.

The North Idaho Water Rights Group also incorporates by reference the arguments and authorities that are set forth in the State of Idaho's Memorandum in Support of Motion for Summary Judgment filed concurrently and joins in the motion filed by the State of Idaho. As the State comprehensively addressed most of the legal entitlement issues in this consolidated subcase, the North Idaho Water Rights Group will limit its argument to the issues regarding federal reserved water rights claimed by the United States on behalf of the Tribe for lands not reserved for the Tribe. As will be established below, there is no genuine issue of material fact precluding judgment as a matter of law that: (1) the United States may only claim federal reserved water rights for those specific lands actually reserved for the Tribe, and (2) the extent of the federal lands reserved by the United States on behalf of the Tribe is limited to those lands that were reserved at the time the Reservation was set aside (e.g., the submerged lands underlying Lake Coeur d'Alene and the St. Joe River as they existed at the time of the reservation of lands), excluding the cessions of land that have been made by the Tribe and any lands that have been conveyed to others by the United States. Therefore, the North Idaho Water Rights Group's Motion for Summary Judgment should be granted in full.

LEGAL STANDARD

The present Motion for Summary Judgment is brought pursuant to Rule 56, Idaho Rules of Civil Procedure. The rule provides that summary judgment is appropriate where the pleadings, depositions, admissions, and affidavits on file show there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. If a review of the evidence reveals no disputed issues of material fact, then summary judgment should be

granted. *Smith v. Meridian Joint Sch. Dist. No. 2*, 128 Idaho 714, 718-19, 918 P.2d 583, 587-88 (1996).

"The burden of establishing the absence of a genuine issue of material fact is on the moving party," and the Court should "construe the record in the light most favorable to the party opposing the motion for summary judgment, drawing all reasonable inferences in that party's favor." *Wesco Autobody v. Ernest*, 149 Idaho 881, 890, 243 P.3d 1069, 1078 (2010). Given these standards, summary judgment is improper "if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented." *McPheters v. Maile*, 138 Idaho 391, 394, 64 P.3d 317, 320 (2003).

In addition, in the CSRBA Adjudication proceedings, cases are tried without a jury. In such circumstances:

> When an action is to be tried without a jury, however, the court is not compelled to draw inferences in favor of the party opposing the motion; rather, the court is "free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts." [Citations omitted].

Land O' Lakes, Inc. v. Bray, 138 Idaho 817, 819, 69 P.3d 1078, 1080 (Ct. App. 2003).

ARGUMENT

A. Federal Reserved Waters Rights Can Only Be Claimed for Lands Actually Reserved by the United States for the Coeur D'Alene Tribe.

The power of establishing water rights within its dominion undoubtedly belongs to the State. *Kansas v. Colorado*, 206 U.S. 46, 86 (1907). However, "an exception to the general rule is recognized when the federal government withdraws land from the public domain, either through legislation, executive order, treaty or other agreement." *See* Semanko Aff. ¶ 4, Ex. C, at 24. When the federal government withdraws land from the public domain, it may claim a "reserved" water right needed for the "reserved" federal lands. *United States v. Cappert*, 508

F.2d 313, 322 (9th Cir. 1974), *aff'd*, 426 U.S. 128 (1976). When the withdrawal of public land is silent as to the issue of water rights, the Supreme Court has said that the "implied-reservation-of-water doctrine" may give the federal government the ability to reserve "only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappert v. United States*, 426 U.S. 128, 141 (1976). The Congressional intent in this case demonstrates no such intent to reserve federal reserved water rights and therefore, the Tribe cannot claim an implied reservation of water rights. *See* Semanko Aff. ¶ 7, Ex. F, OBJ 2094-2114.

Here, the United States claimed federal reserved water rights both on and off the Reservation. *See* Semanko Aff. ¶ 2, Ex. A. However, a "reserved water right must be based on a reservation of land." *United States v. City of Challis*, 133 Idaho 525, 529, 988 P.2d 1199, 1203 (1999). "[T]he threshold question is whether the government has in fact withdrawn and reserved lands" for which those water rights are claimed. *Sierra Club v. Block*, 622 F. Supp. 842, 854 (D. Colo. 1985). In other words, implied federal reserved water rights can only be claimed in connection with federal reserved lands. When the land is not reserved, there can be no reservation of a federal water right. This distinction is of particular importance when applied to the submerged lands underlying Lake Coeur d'Alene and the St. Joe River within the current boundaries of the Reservation. Some of these lands were submerged and reserved by the United States at the time the Reservation was set aside. Other lands, which became submerged only after the construction of Post Falls Dam in 1907 and other subsequent activities, were not among the class of lands included in the federal reservation of submerged lands.

The Snake River Basin Adjudication ("SRBA") court dealt with a similar issue regarding claims made by the Nez Perce Tribe and the extent of the federal lands reserved by the United States. *See* Semanko Aff. ¶ 4, Ex. C. In the SRBA, the Nez Perce Tribe claimed implied

federal reserved water rights for fishing on lands ceded by them. *Id.* at 23. The court held that the Nez Perce Tribe was not entitled to reserve instream flow water rights extending beyond the boundaries of the present Nez Perce Tribe Reservation because the Nez Perce Tribe or the United States did not specifically intend to reserve an off-reservation instream flow water right for purposes of maintaining a fishing right and, pursuant to certain agreements, the Nez Perce Tribe ceded all interest in unalloted lands not expressly reserved to the Tribe. *Id.* at 47. This holding made the initial determination regarding the extent of the federal reservation of critical importance. Similarly, the Coeur d'Alene Tribe is not entitled to federal reserved water rights beyond the boundaries of the present Reservation or for any lands within the boundaries of the present Reservation that were not reserved by the United States, that have been ceded by the Tribe, or that have been conveyed to others by the United States.

The Reservation was established by Executive Order in 1867. *United States v. Idaho (In re Coeur d'Alene Lake)*, 95 F. Supp. 2d 1094, 1095 (D. Idaho 1998). The boundaries of the Reservation were established and significantly enlarged by a 1873 Executive reservation of lands to include "a small portion of the Lake, the Coeur d'Alene River, from its mouth to the Sacred Heart Mission, the St. Joe River, from its mouth to the present-day site of St. Maries, and a tract of land lying to the south of the Spokane River." *Id.* at 1105. In exchange for this enlarged reservation, the Tribe agreed "to relinquish all claims to the remainder of its aboriginal lands." *Id.* The Tribe subsequently agreed to cede a significant portion of the lands reserved in 1873 in the Agreement of 1889, which was approved by Congress in 1891. *Id.* at 1096-1097.

The provisions of these federal documents demonstrate two things. The first is that the reservation of lands was limited to including the submerged lands of Lake Coeur d'Alene and the St. Joe River as they existed at the time of the reservation of lands. The

reservation of submerged lands did not include lands that were not yet submerged and would not become submerged until well after the Reservation was set aside. The second is that the United States on behalf of the Tribe relinquished all claims to the remainder of its aboriginal lands not included within the boundaries of the current Reservation. As established above, federal reserved water rights cannot be established without the reservation of federal lands and are limited to those lands actually reserved.

B. The Extent of the Submerged Federal Lands Is Limited to Those Lands That Were Submerged At the Time the Reservation Was Set Aside.

The Tribe has argued that the Supreme Court in *Idaho v. United States*, 533 U.S. 262 (2001), quieted title in favor of the United States to all submerged lands of Lake Coeur d'Alene and the St. Joe River within the boundaries of the current Reservation, including lands that did not become submerged until well after the Reservation was set aside.[1] In doing so, the Tribe attempts to significantly expand its limited federal reserved lands within the current boundaries of the Reservation to all lands that are submerged by the waters of Lake Coeur d'Alene and the St. Joe River. In other words, the Tribe claims all submerged lands, even those subsequently added submerged lands on the Reservation. However, contrary to the Tribe's position, the extent of the submerged federal lands is limited to those lands that were submerged at the time the Reservation was set aside. The extent to which the footprint of Lake Coeur d'Alene and the corresponding submerged lands have expanded after the construction of Post Falls Dam in 1907 is readily apparent from historic surveys, maps and other sources. *See* Semanko Aff. ¶ 5-6, Exs. D-E and ¶ 9, Ex. H.

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[1] The Tribe has made these arguments to support objections that it filed to water right claim nos. 91-7102 and 91-7173 ("Encroachment Test Subcases"). It is instructive that the United States did not file similar objections or join in the arguments made by the Tribe in the Encroachment Test Subcases.

The United States Supreme Court and the Ninth Circuit Court of Appeals specifically recognized that the United States reserved, or set aside, the submerged lands beneath Lake Coeur d'Alene and the St. Joe River that existed prior to Statehood in 1890. *See generally Idaho v. United States*, 533 U.S. 262 (2001), and *United States v. Idaho*, 210 F.3d 1067 (9th Cir. 2000) (upholding the finding that the United States reserved 1873 submerged lands for the Tribe) (emphasis added). It is these submerged lands within the reservation—and only these submerged lands—that are owned by the United States in trust for the Tribe and which define the extent of the federally reserved submerged lands for which a water right can even be claimed. Additional lands have since become submerged subsequent to the 1873 Executive reservation of lands and the 1889 Agreement approved by Congress in 1891 due to the construction of Post Falls Dam and the activities of private owners on lands within the Reservation. *See* Semanko Aff. ¶ 5, Ex. D and ¶9, Ex. H. There is no issue of material fact that would preclude a legal finding that these classes of additional submerged lands are not part of the federal submerged lands reserved by the United States for the Tribe.

1. Additional lands submerged by the construction of Post Falls Dam after the time the Reservation was set aside are not reserved federal submerged lands.

The North Idaho Water Rights Group readily admits that there is case law quieting title in favor of the United States, as trustee, and the Tribe, as the beneficially interested party of the trusteeship, to certain submerged beds and banks of Lake Coeur d'Alene and the St. Joe River within the current boundaries of the Reservation, as those submerged lands existed at the time of the reservation of lands. *See generally Idaho v. United States*, 533 U.S. 262 (2001). However, the North Idaho Water Rights Group challenges the Tribe's expansive interpretation

and application of *Idaho v. United States* to all subsequently submerged lands in and around Lake Coeur d'Alene and its tributaries.

The Ninth Circuit specifically stated as follows:

> In construing the parties' pleadings, we bear in mind that the current physical situation in and around [Heyburn State] Park differs from the situation that existed in 1873, at the time of the executive reservation, and in 1908 and 1911, the years, respectively, that the Park was authorized and conveyed to the State. Due to the construction of [Post Falls] dam, three small lakes have combined with the [Coeur d'Alene] Lake into one large body of water. We read the United States' complaint in light of the physical situation as it existed prior to the construction of the dam.

United States, 210 F.3d at 1079, n.18 (emphasis added). The Ninth Circuit made it clear that the area submerged in the Heyburn State Park area could not be included in the submerged lands quieted to the United States because the construction of Post Falls Dam expanded that area to include more submerged lands than those reserved by the United States. *United States*, 210 F.3d at 1079, n.18.

It has been well-established by our own Idaho Supreme Court that additional lands became submerged only after the construction of one or more dams, culminating with the construction of Post Falls Dam in 1907. *In re Sanders Beach*, 143 Idaho 443, 147 P.3d 75 (2006); *Erickson v. State*, 132 Idaho 208, 970 P.2d 1 (1998); *Deffenbaugh v. Wash. Water Power Co.*, 24 Idaho 514, 135 P. 247 (1913); *Petajaniemi v. Wash. Water Power Co.*, 22 Idaho 20, 124 P. 783 (1912); *Wash. Water Power Co. v. Waters*, 19 Idaho 595, 115 P. 682 (1911).

While the presumed ordinary high water mark ("OHWM") is currently 2128 feet and has been at that level since 1907 (*Erickson*, 132 Idaho at 211, 970 P.2d at 4), this higher level is the result of "the dam [that] raised the water level . . . in both the lake and in the Coeur d'Alene and St. Joe rivers that feed into the lake." The dam has been recognized as "raising the

elevation of the water . . . approximately 6 1/2 feet . . . . This increased height in the dam naturally resulted in submerging the lands adjacent to Coeur d'Alene Lake and the streams flowing into the lake to an elevation of at least 2,126.5 feet." *In re Sanders Beach*, 143 Idaho 443, 147 P.3d 75 (emphasis added); *see also*, *Deffenbaugh*, 24 Idaho at 520-21, 135 P.2d at 253-54 ("the elevation is raised six or eight feet above the ordinary elevation of the water in the summer and fall").

These additional submerged lands are well beyond those recognized in *Idaho v. United States*. The United States only reserved those submerged lands that existed prior to Statehood. They did not—could not—reserve lands that would not become submerged until after the dams were built.

2. Additional lands submerged by private entities after the Reservation was set aside are not reserved federal submerged lands.

The North Idaho Water Rights Group also challenges the Tribe's expansive interpretation and application of *Idaho v. United States* to privately owned lands in and around Lake Coeur d'Alene and its tributaries within the current Reservation boundary. Lake Coeur d'Alene and the St. Joe River are expansive and the portions not within the current boundaries of the Reservation, or that came into existence only after the Reservation was set aside, are not owned by the United States in benefit for the Tribe. *See* Semanko Aff. ¶ 6, Ex. E and ¶9, Ex. H. These lands are either owned by the State or private owners.

In *Jefferis v. East Omaha Land Co.*, 134 U.S. 178 (1890), the Supreme Court made clear that privately owned land that later becomes submerged does not change ownership simply because it becomes submerged. In *Jefferis*, the Court stated, "the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold by the same boundary." *Jefferis*, 134 U.S. at 188. In the same way, the Tribe cannot

expand the lands lawfully quieted to the United States in trust for it by claiming all submerged lands, including patented and privately deeded and owned lands. The United States does not become the owner of land because it becomes submerged at any time. This idea would cut against Idaho's fundamental policy of protecting private property. *Roark v. Caldwell*, 87 Idaho 557, 561, 394 P.2d 641, 642-43 (1964) ("It is fundamental that [Idaho Constitution Art. 1, Secs. 13 and 14] prohibit the taking of private property for a public use without just compensation.").

It seems clear that the United States has no legitimate claim to water rights for off-Reservation lands. However, in addition, there are on-Reservation lands that the United States and the Tribe are also not entitled to because the land was transferred to private owners. In 1906, the land office of Idaho opened lands within the Reservation that the State purchased from the Tribe to patent for private ownership. *See* Semanko Aff. ¶ 7, Ex. F, OBJ 2088. Certain members of the North Idaho Water Rights Group still own lands on the beds and banks of Coeur d'Alene Lake and the St. Joe River within the Reservation that were opened up in 1906. The fact that many private lands became partially submerged due to the activities of these owners does not mean that the ownership automatically transferred to the United States on behalf of the Tribe. Yet, this is exactly the position the Tribe has advocated.[2]

For example, NIWRA members Steve and Deanne Hawks ("Claimants") claim a point of diversion in CSRBA Subcase No. 91-7102, which is on deeded, privately owned land that later became submerged with the construction of a private moorage lagoon. *See* Semanko Aff. ¶ 8, Ex. G. The location of the lots where Claimants divert and use their licensed water are part of a subdivision called "Sylvia's Haven." *Id.* Sylvia's Haven was part of a larger area

[2] Again, the United States has not joined the Tribe in these arguments in the Encroachment Test Subcases.

originally called "Castillo's Tracts," which was first subdivided in 1914. *Id.* A private owner purchased Lots 6-9 of Castillo's Tracts and developed the land into Sylvia's Haven, which included the construction of a moorage lagoon for private boat access for residents of Sylvia's Haven. *Id.*

For water right claim no. 91-7102, the lands that are licensed and claimed for the point of diversion and place of use were and are within the private land purchased and developed by the private developer. *Id.* Before the moorage lagoon was built over Block 2, the location for the point of diversion was on dry land and clearly within the land described by the deeds transferred to the private owner of the land. *Id.* Just because the moorage lagoon was built and water filled the area does not mean that the Tribe suddenly owned the land. Both the point of diversion and place of use are still part of the private land that is now known as Sylvia's Haven and specifically part of the sections owned by Claimants. *Id.*

In scenarios like these, it is even more clear that the United States could only have reserved those submerged lands for the Tribe that were submerged at the time the Reservation was set aside. Therefore, the extent of the submerged federal lands now is limited to those lands that were submerged at the time the Reservation was set aside.

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CONCLUSION

For the reasons stated above, the North Idaho Water Rights Group is entitled to judgment as a matter of law on the issue of federally reserved water rights and North Idaho Water Rights Group's Motion for Summary Judgment should be granted in full.

DATED this 20th day of October, 2016.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Norman M. Semanko – Of the Firm
Attorneys for Members of the North Idaho Water Rights Group

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of October, 2016, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF NORTH IDAHO WATER RIGHT GROUP'S MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

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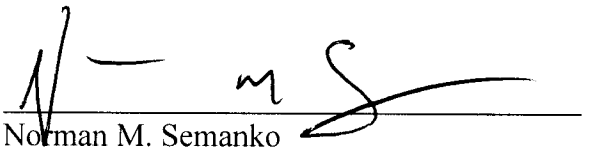

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