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J. McFaddin's Response to Idaho's Mtn SJ

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DISTRICT COURT - CSRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
NOV 25 2016
By _____ Clerk
_____ Deputy Clerk

IN THE DISTRICT COURT FOR 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	JOHN McFADDIN'S RESPONSE TO THE STATE OF IDAHO'S MOTION FOR SUMMARY JUDGMENT

As a Pro Se objector to claims filed by the United States for the Coeur d'Alene Tribe, I received and read the State's Motion for Summary Judgment and supporting documents. Items 2 and 5 in the Motion fail to raise a question of entitlement. Entitlement is important to the irrigation and domestic well claims, so the court should deny these claims pending the receipt of documentation from the United States that the Tribe is actually entitled to these claims. The State did raise this point in Item 7 of the Motion and in Item 8i of their Memorandum in Support of Motion for Summary Judgment regarding springs, seeps and wetlands, but failed to make the same point regarding irrigation and domestic well claims.

In making their Motion, the State shows little interest in protecting the trust property rights of individual Indians or of verifying that the claims actually involve Tribal properties. This seems to

be based on an ethnic bias or on a questionable extension of an argument that the United States should not get between Indians and their tribes. The first is inappropriate. The second will have no support in situations where the Indians in question are not members of the Tribe in question. On the Coeur d'Alene Reservation, 16 percent of the trust land area (more than one-third of the individual trust land) is held for the benefit of members of other tribes. This figure was provided by the Bureau of Indian Affairs in reply to public records requests. This BIA report is enclosed as Exhibit 1. In making this objection, my point is not that the claims should necessarily be denied, but rather that all claims should be investigated by the United States and certified as to complete Tribal ownership of the trust (beneficiary) interests. The Tribe is not entitled to property rights that belong to others. And the trust obligation of the United States to protect the rights of those individual Indians is as great as its obligation to the Tribe.

SUPPORTING DOCUMENTATION

In addition to the information supplied by the BIA in Exhibit 1, twelve allotments were randomly selected from the 44 irrigation claims for examination of the "ownership" of the trust interests (beneficiaries). Records from the BIA, including Title Status Reports, were obtained and show the following.

Claim No. 93-7487, Allotment 50	Claimed in the name of the Coeur d'Alene Tribe, but held in trust 100 % for four members of the Yakima and Puyallup Tribes.
Claim No. 93-7491, Allotment 19	Most (at least 65%) of the Place of Use acres for this claim are on Allotment 19, which is held 100 percent by two members of the Confederated Salish and Kootenai Tribe.
Claim No. 93-7488, Allotment 43	Claimed in the name of the Coeur d'Alene Tribe, but the majority of the trust interest is held for nonmembers and the Coeur d'Alene Tribe has no interest in this allotment.

Claim No. 93-7492, Allotment 83	Claimed in the name of the Coeur d'Alene Tribe, but 89 percent of the trust interest is held for members of other tribes (Colville and Alaska Region) and the Coeur d'Alene Tribe has no interest. And additional land in this Allotment 83 is claimed in No. 93-7493.
Claim No. 93-7490	Mostly in Allotment 21, claimed for Coeur d'Alene Tribe, but the Tribe has no interest in this allotment. It is in trust for one Coeur d'Alene member and one Colville member.
Claim No. 93-7499 & -7500	These two claims take up approximately 170 acres of Allotments 476 and 413. The Tribal portion of 476 is only 15.83 percent, with no Tribal interest in 413. The other beneficiaries are from four other tribes.
Claim No. 95-16703	Allotments 479 and 480 make up 252.2 acres of this larger claim although the Tribe has no interest in either of these allotments. They are held by members of the Spokane and Yakima Tribes.

These irrigation examples show figures for the Places of Use only. A complete analysis of Tribal entitlement should also include consideration of Points of Diversion and any properties lying between the POD and POU. This information can be provided only by the Bureau of Indian Affairs because that agency maintains the "ownership" records for all of the trust properties.

Specific examples of "ownership" are not available for the domestic well claims because locations are not provided in the claim (95-16672), but the entitlement issue is the same.

WHY THE UNITED STATES MUST PROTECT INDIVIDUAL TRUST INTERESTS

The U.S. Bureau of Indian Affairs has the management responsibility for both individual and Tribal trust properties. Following the $3.4 billion Cobell settlement for past management deficiencies, the Secretary of Interior issued Executive Order 3335 on August 20, 2014. It is enclosed as Exhibit 2. That order seemed appropriately to stress the importance of protecting the interests of the individual Indians. The Order mentioned *individual Indian beneficiaries* 16 times in the 6-page document. It observed that "The trust responsibility is a well-established legal

principle" and provided numerous supporting references including the U.S. Constitution and it quoted the U.S. Supreme Court speaking of "moral obligations of the highest responsibility and trust" and "the national honor". The Court was also quoted with "a fiduciary actually administering trust property may not allow it to fall into ruin on his watch. 'One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets.'" Trust assets are not "maintained" when a specific property right is removed. The claims filed by the United States for the Coeur d'Alene Tribe, if allowed on trust interests held by others, will reduce existing or prospective property rights in those allotments and inappropriately move them to the Tribal entity, and do so without compensation and probably without the knowledge of the true beneficiaries. In the event the Court determines this action is permissible for interests held by members of the Tribe, the Court should deny claims on trust interests held for members of other tribes. Only the United States can demonstrate or certify that no such nonmember properties are involved.

WHY THE TRIBE CANNOT REPRESENT OR PROTECT NONMEMBERS

The responsibility for protecting trust assets appropriately lies with the United States. Tribal governments do not and cannot reasonably be expected to represent the best interests of non-members. In fact, the Coeur d'Alene Tribe has long had a statute (enclosed Exhibit 3) which clearly discriminates against nonmembers and attempts to deny them of their trust properties. Chapter 36, COEUR D'ALENE INDIAN LAND PRESERVATION AND CONSOLIDATION ACT begins "The purpose of this act is to insure that lands on the Coeur d'Alene Reservation are owned by the Coeur d'Alene Tribe and Coeur d'Alene Tribal members". Other quotations from identified sections of the Chapter follow:

36-03.01 "it shall be unlawful for any Indian land owner to sell, grant, gift, deed, or otherwise convey any interest in Indian owned land to anyone other than the Coeur d'Alene Tribe or an enrolled Coeur d'Alene Tribal member."

36-04.01 "It shall be unlawful for any Indian Land owner to will or devise any interest in Indian owned land to anyone other than the Coeur d'Alene Tribe or an enrolled Coeur d'Alene Tribal owner."

36-05.01 "Any violation of this act shall be deemed unlawful and shall be null and void for all purposes. Any Indian owned land or interest therein which would otherwise transfer by testate or intestate succession in violation of this act shall vest in the Coeur d'Alene Tribe."

This statute is intended to prevent nonmember Indians, (those holding one-third of the individual trust land on the reservation) from passing their inherited ancestral land to their own children unless they are members of the Coeur d'Alene Tribe. The statute has been in effect for more than 20 years. Therefore, the Tribal entity has long demonstrated that it does not respect and will not protect the property rights of nonmember Indians. A government entity with this statute and attitude cannot possibly be seen as able to represent the interests of the many members of other tribes rightfully having trust interests on the Reservation.

CONCLUSION

The claims for irrigation water and individual domestic wells cannot proceed to the quantification phase as suggested by the State, without first considering and deciding on the issues of entitlement and fairness. The Bureau of Indian Affairs is the responsible agency for keeping records of trust interests and must provide this information.

11-23-2016
Date

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