

9-6-2017

## Notice of Appeal- USA

Jeffrey H. Wood

*Acting Assistant Attorney General, US Department of Justice*

Vanessa Boyd Willard

*Trial Attorney, Indian Resources Section, Environment & Natural Resources Division, US Department of Justice*

Follow this and additional works at: <https://digitalcommons.law.uidaho.edu/csrba>

---

### Recommended Citation

Wood, Jeffrey H. and Willard, Vanessa Boyd, "Notice of Appeal- USA" (2017). *In re CSRBA (Coeur d'Alene)*. 82.  
<https://digitalcommons.law.uidaho.edu/csrba/82>

This Brief is brought to you for free and open access by the Hedden-Nicely at Digital Commons @ UIdaho Law. It has been accepted for inclusion in In re CSRBA (Coeur d'Alene) by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

DISTRICT COURT - CSRBA  
Fifth Judicial District  
County of Twin Falls - State of Idaho

SEP - 6 2017

By \_\_\_\_\_

Clerk  
Deputy Clerk

**JEFFREY H. WOOD**  
Acting Assistant Attorney General  
**VANESSA BOYD WILLARD**  
Trial Attorney, Indian Resources Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
999 18<sup>th</sup> Street  
South Terrace – Suite 370  
Denver, Colorado 80294  
Phone: (303) 844-1353  
Fax: (303) 844-1350

*Attorneys for the United States of America*

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

<p>In Re CSRBA</p> <p>Case No. 49576</p> <hr/> <p style="text-align: center;">United States of America, Appellant,</p> <hr/>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Consolidated Subcase No. 91-7755</p> <p><b>UNITED STATES' NOTICE OF APPEAL</b></p> <p>Fee Category: <b>I.A.R. 23(a)(1)</b></p> <p>Fee: \$94</p>
--	---	--

TO: THE PARTIES AND THEIR COUNSEL OF RECORD IN THE ABOVE-CAPTIONED ACTION AND THE CLERK OF THE ABOVE ENTITLED DISTRICT COURT

NOTICE IS HEREBY GIVEN THAT:

1. Appellant the United States of America (“United States”) appeals to the Idaho Supreme Court from the *Final Order Disallowing Purposes of Use, Final Order Disallowing Water Right Claims*, and *Order on Motions for Summary Judgment*, entered on May 3, 2017, as well as the *Order on Motion to Set Aside and Modify, Amended Final Order Disallowing Water Right Claims*, and *Order Granting Motion to Reconsider*, entered on July 26, 2017 in the above-captioned action, The Honorable Eric J. Wildman, presiding.
2. Appellant United States has a right to appeal to the Idaho Supreme Court pursuant to Idaho Appellate Rule 4, and the judgments and orders described in paragraph 1 are appealable orders pursuant to Idaho Appellate Rule 11(a)(1) or the permissive appeal process provided in Idaho Appellate Rule 12. Motions filed pursuant to Idaho Appellate Rule 12 are currently pending before the Idaho Supreme Court.
3. Appellant United States intends to assert the following issues on appeal:
  - a. Whether the district court erred in refusing to find that the purpose of the Reservation was, and continues to be, to provide a permanent homeland for the Tribe?
    - i. Whether the district court erred in its application of the *United States v. New Mexico*, 438 U.S. 696 (1978) primary – secondary use distinction to the Coeur d’Alene Reservation?
  - b. Whether the district court erred in disallowing the following purposes of the Reservation:
    - i. plant gathering;
    - ii. commercial and industrial; and
    - iii. instream flows for fish habitat off Reservation?
  - c. 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. The United States requests that the court delay preparation of the record until September 13, 2017 because the parties are currently negotiating a potential stipulation regarding the record. To comply with I.A.R. 28, the United States provides the following list of transcripts and documents. On or before September 13, 2017, the United States will file the joint stipulation or a notice of record request.
6. a. Reporter's Transcripts are requested in hard copy and electronic format.
- b. Appellant United States requests that the Reporter's Transcripts include:
  - i. Transcript of the March 30, 2017 hearing on the Summary Judgment Motions that was held at the Kootenai County Courthouse, Coeur d'Alene, ID; and
  - ii. Transcript of the June 23, 2017 hearing on the State of Idaho's Motion to Reconsider Order and on the United States' and Coeur D'Alene Tribe's Joint Motion to Set Aside and Modify Partial Decree or Final Order Disallowing Water Right Claim.
6. As stated in paragraph 5, on or before September 13, 2017, Appellant United States will clarify its document request for the record, which is likely to include the following:
  - a. United States' transmittal cover letter with attachments I-VIII for Tribal claims. Documents dated January 30, 2014.
  - b. Certain Tribal Claims filed by United States of America, as trustee on behalf of the Coeur D'Alene Tribe, Notice of Claims Federal Reserved Water Right, Subcase Nos. 95-16678, 91-7755, 91-7778, 91-7779, 91-7782, 95-16704, 93-7462, 93-7453, 93-7464, 93-7465, 93-7466, 93-7467, 93-7468, 95-16668, 95-16669, 95-16670, 95-16671, 05-16672, 95-16673, 95-16674, 95-16675, 95-16676, and 95-15577. Documents dated January 30, 2014.
  - c. Notice of Filing Federal Reserved Water Right Claims in the Coeur D'Alene-Spokane River Basin Adjudication, Subcase Nos. 95-16678, 91-7755, 91-7778, 91-7779, 91-7782, 95-16704, 93-7462, 93-7453, 93-7464, 93-7465, 93-7466, 93-7467, 93-7468, 95-16668, 95-16669, 95-16670, 95-16671, 05-16672, 95-16673, 95-16674, 95-16675, 95-16676, and 95-15577. Documents dated March 27, 2014.
  - d. Objections filed by State of Idaho and Objectors to Subcase Nos. 95-16678, 91-7755, 91-7778, 91-7779, 91-7782, 95-16704, 93-7462, 93-7453, 93-7464, 93-7465, 93-7466, 93-7467, 93-7468, 95-16668, 95-16669, 95-16670,

95-16671, 05-16672, 95-16673, 95-16674, 95-16675, 95-16676, and 95-15577. Documents dated from July 21, 2014 through September 29, 2014.

- e. Tribe's letter adopting claims filed by the United States on behalf of the Coeur d'Alene Tribe with attached list. Documents dated May 4, 2015.
- f. State of Idaho's Motion for Summary Judgment and Affidavits of David B. Shaw (without exhibits<sup>1</sup>) and Steven W. Strack with attached exhibits. Documents filed on or about October 21, 2016.
- g. State of Idaho's Memorandum in Support of Motion for Summary Judgment and Errata to State's Memorandum in Support of Motion for Summary Judgment. Documents filed on or about October 21, 2016.
- h. HECLA's Motion for Summary Judgment; Memorandum in Support of HECLA's Motion for Summary Judgment; and Declaration of Paul L. Arrington. Documents filed on or about October 21, 2016.
- i. North Idaho Water Right Group's Motion for Summary Judgment; Memorandum in Support of North Idaho Water Rights Group's Motion for Summary Judgment; and Affidavit of Normal M. Semanko with attached exhibits. Documents filed on or about October 21, 2016.
- j. Coeur D'Alene Tribe's Memorandum in Support of (United States' and Coeur D'Alene Tribe's) Motion for Summary Judgment; and Affidavits of Cajetan Matheson and Richard Hart with attached exhibits. Documents filed on or about October 21, 2016.
- k. United States' and Coeur D'Alene Tribe's Joint Motion for Summary Judgment and Joint Statement of Facts; United States' Memorandum in Support of Motion for Summary Judgment; and Affidavits of Dudley Reiser, Ian Smith, Vanessa Boyd Willard with attached exhibits. Documents filed on or about October 21, 2016.
- l. Objection to Designation of David Shaw as Expert Witness and Motion to Exclude Testimony; Memorandum in Support of Objection to Designation of David Shaw as Expert Witness and Motion to Exclude Testimony; and Affidavit of Counsel in Support of Objection to Designation of David Shaw as Expert Witness and Motion to Exclude Testimony. Documents filed on or about October 21, 2016.
- m. State of Idaho's Response to Objection to Designation of David Shaw as an Expert Witness and Motion to Exclude Testimony; and Second Affidavit of Steven W. Strack with attached exhibits. Documents filed on or about

---

<sup>1</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.

November 14, 2016.

- n. Coeur d'Alene Tribes Reply Brief in Support of Its Motion to Exclude David Shaws Testimony; Second Affidavit of Counsel in Support of Objection to Designation of David Shaw as Expert Witness and Motion to Exclude Testimony. Documents filed on or about November 21, 2016.
- o. John McFaddin's Response to the State of Idaho's Motion for Summary Judgment; and Affidavit of John T. McFaddin with attached exhibits. Documents filed on or about November 25, 2016.
- p. John McFaddin's Response to the United States' and Coeur D'Alene Tribe's Joint Motion for Summary Judgment. Document filed on or about November 25, 2016.
- q. Order Granting Motion to Strike in Part and Denying in Part, and Order Amending Summary Judgment Hearing and Brief Schedule. Document filed on or about November 28, 2016.
- r. HECLA's Memorandum in Opposition to United States' and Coeur D'Alene Tribe's Joint Motion for Summary Judgment. Document filed on or about February 23, 2017.
- s. North Kootenai's Consolidated Response to Motions for Summary Judgment. Document filed on or about February 23, 2017.
- t. Alpine Meadows' Consolidated Response to Motions for Summary Judgment. Document filed on or about February 23, 2017.
- u. Potlatch's Consolidated Response to Motions for Summary Judgment. Document filed on or about February 23, 2017.
- v. North Idaho Water Rights Group's Memorandum in Opposition to United States' and Coeur D'Alene Tribe's Joint Motion for Summary Judgment. Document filed on or about February 23, 2017.
- w. Coeur D'Alene Tribe's Response to the State of Idaho, HECLA, and the North Idaho Water Rights Group; Affidavit of Counsel in Support of Coeur D'Alene Tribe's Responsive Briefing; and Second Affidavit of E. Richard Hart with attached exhibits. Documents filed on or about February 24, 2017.
- x. United States' Response to the State of Idaho's and Objectors' Motions for Summary Judgment. Document filed on or about February 24, 2017.
- y. State of Idaho's Memorandum in Response to United States' and Coeur D'Alene Tribe's Joint Motion for Summary Judgment; State of Idaho's

Statement of Additional Facts; Third Affidavit of Steven W. Strack with attached report; and Affidavit of Steven R. Wee with attached errata exhibit. Documents filed on or about February 24, 2017.

- z. Protective Order. Document filed on or about February 28, 2017.
- aa. Coeur D'Alene Tribe's Reply to the State of Idaho's and Objectors Response to Summary Judgment; Errata to Tribe's Responsive Briefing in Support of Its Motion for Summary Judgment; Affidavit of Counsel in Support of Coeur D'Alene Tribe's Reply Brief on Summary Judgment; and Third Affidavit of E. Richard Hart with attached exhibits. Documents filed on or about March 20, 2017.
- bb. United States Memorandum in Reply to the State of Idaho's and Objectors' Responses to Summary Judgment; and Second Affidavit of Vanessa Boyd Willard with attached exhibits. Documents filed on or about March 20, 2017.
- cc. State of Idaho's Memorandum in Reply to Responses of the United States and Coeur D'Alene Tribe; and Fourth Affidavit of Steven W. Strack with attached exhibits. Documents filed on or about March 20, 2017.
- dd. HECLA's Reply in Support of Motion for Summary Judgment. Document filed on or about March 20, 2017.
- ee. North Idaho Water Rights Group's Reply to Responses of the United States and the Coeur D'Alene Tribe. Document filed on or about March 20, 2017.
- ff. Potlatch's Reply to United States' and Tribe's Responses to the State's Motion for Summary Judgment. Document filed on or about March 20, 2017.
- gg. Alpine Meadows' Reply to United States' and Tribe's Responses to the States' Motion for Summary Judgment. Document filed on or about March 20, 2017.
- hh. North Kootenai's Reply to United States' and Tribes' Responses to the States' Motion for Summary Judgment. Document filed on or about March 20, 2017.
- ii. State of Idaho's Motion to Reconsider Order on Motions for Summary Judgment; and Memorandum in Support of State's Motion to Reconsider Order on Motions for Summary Judgment. Documents filed on or about May 16, 2017.
- jj. Motion to Set Aside and Modify Partial Decree or Final Order Disallowing

Water Right Claim. Document filed on or about May 17, 2017.

- kk. 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; and 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). Documents filed on or about May 17, 2017.
- ll. State of Idaho's Memorandum in Opposition to SF-7 Motion to Alter or Amend to Find Gathering as a Reservation Primary Purpose; and State of Idaho's Memorandum in Opposition to SF-7 Motion for Correction of Clerical Error and/or to Alter or Amend RE: Primary Purpose of Fishing (Habitat). Documents filed on or about June 9, 2017.
- mm. HECLA's Memorandum in Opposition to United States' and Coeur D'Alene Tribe's Joint Motion to Alter or Amend to Find Gathering as a Reservation Primary Purpose; and HECLA's Memorandum in Opposition to United States' and Coeur D'Alene Tribe's Joint SF-7 Motion for Correction of Clerical Error and/or to Alter or Amend RE: Primary Purpose of Fishing (Habitat). Documents filed on or about June 9, 2017.
- nn. United States' and Coeur D'Alene Tribe's Joint Memorandum in Response to the State of Idaho's Motion to Reconsider Order on Motions for Summary Judgment. Document filed on or about June 16, 2017.
- oo. State of Idaho's Reply Memorandum RE: State's Motion to Reconsider Order on Motions for Summary Judgment. Document filed on or about June 20, 2017.
- pp. United States' and Coeur D'Alene Tribe's Joint Memorandum in Reply to the State of Idaho's and HECLA's Memoranda Opposing Motion to Find Gather as Reservation Primary Purpose; and United States' and Coeur D'Alene Tribe's Joint Memorandum in Reply to the State of Idaho's and HECLA's Memorandum Opposing Motion RE: On-Reservation Fish Habitat Claims. Documents filed on or about June 21, 2017.
- qq. Amended Final Order Disallowing Water Right Claims. Document dated July 26, 2017.
- rr. Order Granting Motion to Reconsider. Document dated July 26, 2017.
- ss. Order on Motion to Set Aside and Modify. Document dated July 26, 2017.
- tt. Order Granting Motions for Permissive Appeal. Document dated August 16, 2017.



7. I certify:

- a. That a copy of this *Notice of Appeal* has been served on the CSRBA Court Reporter at the address set out below:

Sabrina Vasquez  
c/o SRBA District Court

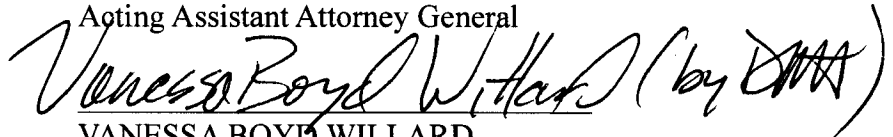

- c. That the estimated fee for preparation of the clerk's record in the amount of \$100.00 (one hundred dollars) is paid by the attached check from David Harder, check number 6386.
- d. That the appellate filing fee in the amount of \$94.00 (ninety-four dollars) is paid by the attached check from David Harder, check number 6387.
- e. That 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 5th day of September, 2017.

Respectfully submitted,

JEFFREY H. WOOD

Acting Assistant Attorney General

 (by )

VANESSA BOYD WILLARD

Trial Attorney

Environment and Natural Resources Division

United States Department of Justice

CERTIFICATE OF SERVICE

I certify that original copies of the UNITED STATES' NOTICE OF APPEAL was sent via FedEx this 5<sup>th</sup> day of September, 2017 to:

Clerk of the District Court  
Coeur d'Alene-Spokane River Basin Adjudication  
253 Third Avenue North  
PO Box 2707  
Twin Falls, ID 83303-2707  
Fax: 208.736.2121

I certify that true and correct copies of the documents listed above were sent via U.S. Mail to the parties below on this 5<sup>th</sup> day of September, 2017.

ALBERT P. BARKER  
BARKER ROSHOLT & SIMPSON LLP  
PO BOX 2139  
BOISE, ID 83701-2139

MARIAH R. DUNHAM  
& NANCY A. WOLFF  
MORRIS & WOLFF, P.A.  
722 MAIN AVE  
ST MARIES, ID 83861

US DEPARTMENT OF JUSTICE  
ENVIRONMENT & NATL' RESOURCES  
550 WEST FORT STREET, MSC O33  
BOISE, ID 83724

CHIEF NATURAL RESOURCES DIV  
OFFICE OF THE ATTORNEY GENERAL  
STATE OF IDAHO  
PO BOX 83720  
BOISE, ID 83720-0010

CHRISTOPHER H. MEYER,  
JEFFREY C. FEREDAY,  
JEFFERY W. BOWER  
& MICHAEL P. LAWRENCE  
GIVENS PURSLEY LLP  
PO BOX 2720  
BOISE, ID 83701-2720

WILLIAM J. SCHROEDER  
KSB LITIGATION PS  
221 N WALL, STE 210  
SPOKANE, WA 99201

CANDICE M MCHUGH  
CHRIS BROMLEY  
MCHUCH BROMLEY PLLC  
380 S 4<sup>TH</sup> STREET STE 103  
BOISE, ID 83702

IDWR DOCUMENT DEPOSITORY  
PO BOX 83720  
BOISE, ID 83720-0098

NORMAN M. SEMANKO  
PARSONS BEHLE & LATIMER  
800 W. MAIN STREET, STE 1300  
BOISE, ID 83702

HOWARD A. FUNKE  
PO BOX 969  
COEUR D ALENE, ID 83816-0969

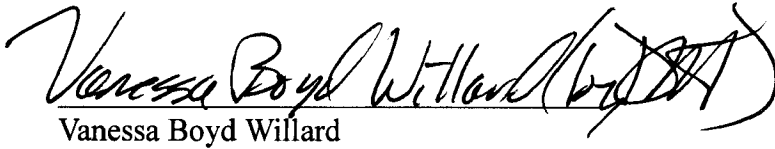
JOHN T. MCFADDIN  
20189 S. EAGLE PEAK RD  
CATALDO, ID 83810

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

RONALD HEYN  
828 WESTFORK EAGLE CREEK  
WALLACE, ID 83873

By email to:

Sabrina Vasquez, SRBA Court Reporter  
[svasquez61@gmail.com](mailto:svasquez61@gmail.com)

  
Vanessa Boyd Willard