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Dylan R. Hedden-Nicely

University of Idaho, College of Law, dhedden@uidaho.edu

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The Coeur d'Alene Tribe's Claims in the Coeur d'Alene-Spokane River Basin Adjudication

Dylan R. Hedden-Nicely

In 2008, the State of Idaho commenced the Coeur d'Alene-Spokane River Basin Adjudication (CSRBA).¹ The Coeur d'Alene-Spokane River basin lies within the historic homeland of the Coeur d'Alene Tribe and includes the current Coeur d'Alene Indian Reservation. As trustee for the Tribe, the United States entered the CSRBA and made claims on the Tribe's behalf, which were submitted to Idaho Department of Water Resources on January 30, 2014.² IDWR's Director's Report of federal claims was published in March, 2014. The publishing of the Director's Report triggered the objection period for federal claims, which ran until September 29, 2014.³ The purpose of this article is three-fold. First, it will describe the fundamentals of Indian reserved water rights and how reserved water rights differ from state-based water rights. Second, it will describe the Tribe's claims in the CSRBA. It will close with a discussion on negotiation of tribal claims.

The fundamentals of Indian water rights

In most cases, the right to use water is acquired pursuant to state law. Indian reserved water rights are an important exception to this general principle as they are vested pursuant to federal law. Specifically, the legal basis for Indian reserved water rights is derived from the treaties, executive orders, and/or congressionally ratified agreements (operative documents) between each Tribe and the United States.⁴ Most of these operative documents are silent regarding water rights. That silence was first

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addressed in *U.S. v. Winters*,⁵ when non-Indian irrigators began damming and diverting water from the Milk River, a water source for the Fort Belknap Reservation in Montana.⁶

The basis of the case was a congressionally ratified agreement between the Tribes and the United States, which made no mention of water rights.⁷ Nonetheless, the Supreme Court found the agreement implied a water right sufficient to make the reservation "valuable or adequate."⁸ The Court reaffirmed that a "treaty is not a grant of rights to the Indians, but a grant of rights from them — a reservation of those not granted[.]"⁹

[t]he Indians had command of the lands and waters, - command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate? Neither view is possible."¹⁰

Since *Winters* the Supreme Court has repeatedly reaffirmed that "when the Federal Government reserves land, by implication it reserves water rights sufficient to accomplish the purposes of the reservation."¹¹

State water rights vs. Indian reserved water rights

Decreed state and federal water rights are administered together in Idaho, making the distinctions between the two important for Idaho water users and managers. Idaho is a prior appropriation state;¹² the older the water right, the more "senior" the water right. During times of shortage, water is administered according to priority with the most senior water rights being serviced first.¹³ When purely applied, prior appropriation is a harsh system; junior water right holders receive *no* water until all more senior holders receive their full allocation.

In order to acquire a state-issued water right, users must divert water and put it to a beneficial use.¹⁴ The quantity appropriated is the amount actually put to a beneficial use.¹⁵ In contrast, Indian water rights are reserved; actual use is not necessary to

perfect them.¹⁶ Further, unlike state water rights, Indian water rights are not subject to forfeiture for non-use.¹⁷ Finally, the quantity reserved is the amount necessary to fulfill the purpose of the reservation rather than the amount necessary for a particular beneficial use.¹⁸

Though administered together in order of priority, the means for determining the priority date of state versus federal reserved water rights are different. The priority date of a state-issued right is the date application for a permit was made, or for water rights that predate Idaho's mandatory permitting and licensing system, the date the water was first put to beneficial use.¹⁹ In contrast, the priority date for Indian water rights is the creation of the reservation²⁰ or, if the water right is necessary for a traditional use of water, time immemorial.²¹

The McCarran Amendment and state court general stream adjudications

Because Indian water rights are implied they typically must be quantified by a court or through settlement precipitated from litigation. Of late, this is usually done via a general stream adjudication, which is a "comprehensive determination of the nature, extent and priority of the rights of [all] users of surface and ground water . . ."²² General stream adjudications are the only way that federal and tribal water rights can be quantified in state court. As sovereigns, both the United States²³ and Indian tribes are generally immune from suit.²⁴ In 1952 Congress passed the McCarran Amendment, which gave consent for the United States to be joined "as a defendant in any suit (1) for the adjudication of rights

to the use of water of a river system or other source . . . where it appears the United States is the owner of . . . water rights by appropriation under State law, by purchase, by exchange, or otherwise . . ."²⁵

The Supreme Court held that the McCarran Amendment granted state court jurisdiction over Indian water rights because "viewing the governments' trusteeship of Indian rights as ownership," the United States is "otherwise" the owner of Indian water rights.²⁶ The McCarran Amendment did not waive tribal sovereign immunity but tribal water rights can be quantified without their participation.²⁷ The Coeur d'Alene Tribe has not entered the CSRBA. Instead, the United States, as the Tribe's trustee, has filed claims on the Tribe's behalf.

Important for interstate hydrologic basins such as the Coeur d'Alene-Spokane Basin, Congress expressly disclaimed any waiver of the sovereign immunity of the United States "in any suit or controversy in the Supreme Court of the United States involving the right of states to the use of the water of any interstate stream."²⁸ The Supreme Court has yet to address how it would treat a federal reserved water right that had previously been decreed in a general

stream adjudication by one of the states involved in an interstate water rights adjudication.

The claims filed by the United States on behalf of the Coeur d'Alene Tribe

A companion piece in this edition of *The Advocate* entitled "The Coeur d'Alene Tribe's Enduring Relation to Water - A Legal History" details the Coeur d'Alene Tribe's longstanding connection to the water within its territory and the steps the Tribe has taken to protect and manage water and other natural resources within the Basin. That history informed the Tribe as it worked with the United States to develop its claims in the CSRBA. Table 1 shows the 353 claims that have been filed to reserve sufficient water to fulfill the "overall purpose of establishing the [Coeur d'Alene] Reservation as a permanent homeland for the Coeur d'Alene people."²⁹

The Tribe's claims may be categorized as either consumptive (61 claims) or non-consumptive (the remaining 292 claims). As applied here, a consumptive water right is the right to remove water from a source and use it such that it is not returned whereas a non-consumptive water right is the right to ensure water remains in its natural place.

Type of Claim	Number of Claim Forms	Total Water Claimed
Domestic, Commercial, Municipal, Industrial (DCMI)	17	7,453 acre-feet per year (AFY) plus 979 wells with use up to 13,000 gallons per day
Instream Flows	72	Monthly cubic feet per second
Irrigation	44	17,815 AFY
Coeur d'Alene Lake	1	Natural Lake Elevation
Springs	24	21.6 AFY
Wetlands	195	7,102 AFY

Table 1: Summary of the claims filed by the United States on behalf of the Coeur d'Alene Tribe.

Consumptive use claims

The first consumptive water right claims are for irrigation water. The Tribe is entitled to a water right to irrigate all “practicably irrigable acreage” (PIA).³⁰ PIA acres consist of all lands currently irrigated, as well as those lands not currently irrigated if they are (1) arable - the soil is capable of growing a crop; (2) irrigable - water can reach the land; and (3) economically viable - the economic benefit of irrigating the land is greater than the cost.³¹ This is a complex and exacting criteria; the analysis is done on an acre-by-acre basis by a team of technical and economic experts. A water duty is applied to each PIA acre to arrive at the final water right claim. The claimed priority date for these water rights is November 8, 1873 - the creation of the Reservation.

The United States also made claims for current and future tribal Domestic, Commercial, Municipal, and Industrial (DCMI) water uses. Water for DCMI uses are from both groundwater and surface water and are necessary to maintain the Coeur d’Alene homeland into perpetuity. Current DCMI needs include, but are not limited to, water for the Tribe’s casino, hotel, and golf course,³² as well as water for current domestic use. The United States also claimed water for future DCMI needs, including planned commercial and industrial projects as well as 979 future domestic wells necessary to provide water for future tribal members. To make this claim, the United States did extensive statistical analysis to estimate future tribal population. In determining quantity, the United States mirrored Idaho law and claimed 13,000 gallons per well per day.³³

The Tribe claimed a total of 25,268 acre feet per year for consumptive water rights. In comparison, the Shoshone-Bannock Tribes of the Fort Hall Reservation agreed to a water right to “divert up to 581,031 [acre-feet per year] . . . for present and future irrigation, DCMI, instream flow, hydropower, and stockwater . . .”³⁴ The Nez Perce Tribe agreed to a total consumptive water right of 50,000 acre-feet per year.³⁵

Also consider the total volume of *surface* water available in the basin. According to tribal hydrological

The tribal consumptive claim is for approximately 7.7% of the surface water originating on the reservation.



analysis, the total volume of surface water originating on the Reservation is approximately 300,000 acre-feet per year while the volume originating in the St. Joe and Coeur d’Alene River Basins is approximately 4.5 million acre-feet per year.³⁶ The tribal consumptive claim is for approximately 7.7% of the surface water originating on the reservation and 0.6% of the water available from the St. Joe and Coeur d’Alene Rivers.³⁷

Non-consumptive claims

The United States claimed non-consumptive water rights for a vari-

ety of purposes including cultural uses and the preservation of reservation plants, fish, and wildlife. The claims are for water to maintain seeps, springs and wetlands, as well as instream flows and a lake elevation claim for Lake Coeur d’Alene. Because these water right claims are necessary to fulfill uses that predate the creation of the Coeur d’Alene Reservation, each has a claimed priority date of time immemorial.³⁸

The United States filed 219 claims on behalf of the Coeur d’Alene Tribe for water rights to protect seeps, springs, and wetlands distributed throughout the reservation and located exclusively on tribal lands. These claims are necessary to “provide for Tribally-harvested game and waterfowl habitat, Tribal plant gathering, and other Tribal traditional, cultural, spiritual ceremonial, and/or religious uses.”³⁹ These uses continue to be critical to the identity of the Coeur d’Alene People. Despite the number of claims, the total volume claimed is for 7,123.6 acre-feet of water per year, which averages to 32.5 acre-feet per year per claim.

The United States filed 72 claims for instream flows necessary to maintain a healthy habitat for on-Reservation adfluvial trout that live in the Lake but spawn in tributary streams.⁴⁰ The “resident fishery was a main staple of the Tribe’s diet” at the time the Coeur d’Alene Reservation was created⁴¹ and tribal members continue to rely on this resource today. In developing this claim, federal and tribal experts coordinated to conduct extensive hydrological and biological analysis to estimate monthly minimum flows for each of the 72 claim reaches. A majority of these claims are for stream reaches located in rural portions of the Basin where

little water use is currently taking place. However, because fish from the Lake must travel on the larger rivers in order to reach the headwater spawning grounds, claims were also made for flows in the mainstem reaches of the Coeur d'Alene and St. Joe Rivers.

Finally, the United States claimed a sufficient flow into Lake Coeur d'Alene to maintain the Lake's natural monthly elevation and outflow. The term "natural elevation" is used to represent the elevation that would occur but for control by the Post Falls Dam. However, this claim does not seek to alter present licensed management of the Lake's elevation. The water right would take effect only if the Lake's elevation were to fall *below* the elevation claimed. Any water above that minimum elevation would be available for other uses. As Figure 1 shows, the claim ranges between five and eight feet below the average summertime elevation when water demand is highest. The volume available between 2120 and 2128 feet is estimated to be approximately 275,000 acre-feet,⁴² which would be available for other uses.

Why negotiate tribal claims?

The 2014 Idaho Legislature unanimously passed House Concurrent Resolution 62 (HCR 62) directing "the Governor and the Attorney General, to attempt to negotiate. . . a resolution of the nature and extent of the reserved water rights claims of the Coeur d'Alene Tribe."⁴³ With the passage of HCR 62 all three sovereigns have signaled their willingness to engage in negotiations. Local municipalities, businesses, utilities, and other stakeholders have indicated support as well. However, for nego-

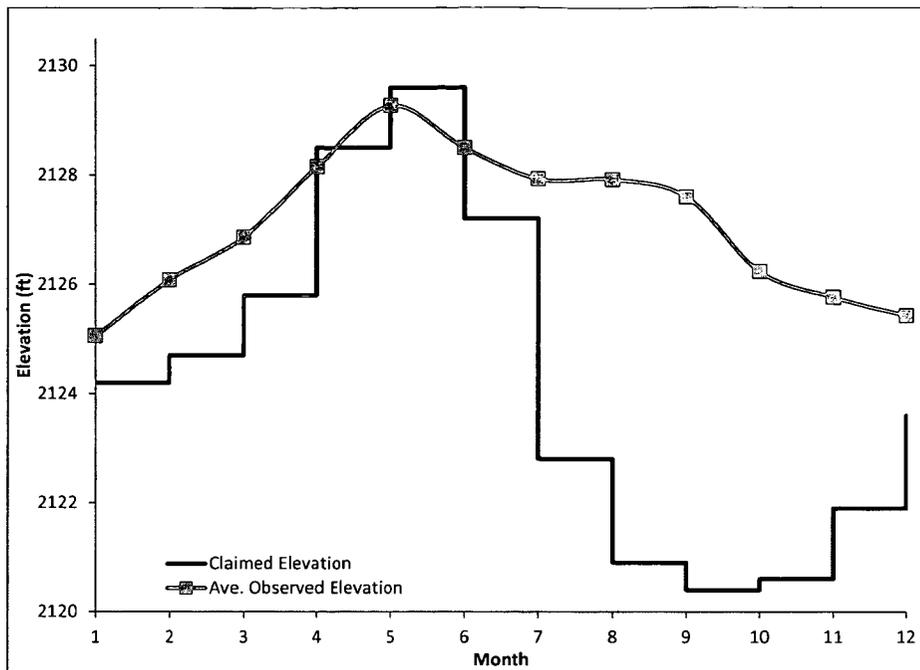


Figure 1: Claimed vs. observed elevation, Lake Coeur d'Alene, ID.

tiations to be successful, *all* interested CSRBA claimants must buy into the process. HCR 62 directed "the Governor [and the AG to] develop a process . . . for equal and open participation in the negotiations by claimants [in the CSRBA]."⁴⁴ This opens the door for any claimant to attempt to derail the settlement process.

Conflict is inevitable in a case as large and complex as a water rights adjudication. Every user is making claim to a unitary and finite resource. However, these realities underscore why negotiation is the preferred approach. The cost for water rights litigation has been estimated to average three times as much as negotiation *per year*.⁴⁵ Further, while most negotiations involving Indian Tribes are typically resolved within five to ten years,⁴⁶ water rights litigation has been known to commonly last up to fifty years.⁴⁷ As the United States Supreme Court has cautioned, "[s]tate courts, as much as federal courts, have a solemn obligation to follow federal law,"⁴⁸ making it very difficult

to be flexible in the outcome. Litigation poses significant risk to all parties. There is no "sensitivity" to junior water users in litigation.⁴⁹

In contrast, settlement is less time consuming and less expensive. At a recent conference to celebrate the end of the Snake River Basin Adjudication (SRBA), speakers credited successful tribal settlements for the relatively quick and inexpensive conclusion of that case. Many believed that but for those settlements, the SRBA would still be in its infancy today.⁵⁰

Further, settlements can be flexible enough to account for the unique characteristics of the region. Both the United States and the Tribe have sovereign immunity from any future interstate adjudication. Settlement in this case has the potential to forge a partnership capable of keeping water in Idaho. Additionally, negotiated agreements provide procedural safeguards since they must be ratified by the Tribal Council, the Idaho Legislature, and the U.S. Congress,

as well as be approved by the Court before going into effect. A negotiated settlement provides the opportunity to forge a lasting relationship amongst all basin stakeholders and allow for effective and cooperative water management into the future.

Conclusion

The Coeur d'Alene Tribe's history is one of water. The CSRBA represents the latest episode in the Tribe's continuing effort to protect its rights and natural resources and is the Tribe's one opportunity to make claims for all current and future water needs for the Coeur d'Alene People. Accordingly, the Tribe has coordinated closely with the United States to make water rights claims for a sufficient quantity of water to fulfill the homeland purpose of the Coeur d'Alene Reservation. We now approach a crossroads where the scope of the Tribe's claims can be litigated or negotiated. The Tribe has demonstrated success in litigating these issues of great importance but maintains its policy of seeking negotiation first. Litigation is a risky and inflexible zero-sum game that is time consuming and extremely costly to all involved. In contrast, negotiated agreements provide an opportunity to structure a stable, cooperative solution that attempts to minimize impacts, maximize benefits, and coordinate outcomes and implementation.

Endnotes

1. *In Re: The General Adjudication of Rights to the Use of Water From the Coeur d'Alene-Spokane River Basin Water System*, No. 49576 (Nov. 12, 2008).
2. Letter from Vanessa Villard, Department of Justice, to Gary Spackman, Director of the Idaho Department of Water Resources re The United States' Claims on Behalf of the Coeur d'Alene Indian

- Tribe (January 30, 2014).
3. *Notice of Filing Federal Reserved Water Right Claims in the Coeur d'Alene-Spokane River Basin Adjudication*, No. 49576 (Mar. 27, 2014).
4. *Winters v. United States*, 207 U.S. 564 (1908).
5. *Id.*
6. *Id.* at 565.
7. *Id.* (citing Acts of the Fiftieth Congress, first session, Ch. 213. 1888).
8. *Id.* at 576.
9. *U.S. v. Winans*, 198 U.S. 371, 381 (1905).
10. *Winters*, 207 U.S. at 576.
11. *Cappaert v. U.S.*, 426 U.S. 128, 139 (1976).
12. Idaho Const Art. XV § 3.
13. *Id.*; I.C. § 42-106 (1900).
14. I.C. § 42-101 (1900).
15. *Id.*
16. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51 (9th Cir. 1981).
17. *Id.* at 51.
18. *Cappaert*, 426 U.S. at 138.
19. I.C. § 42-219 (1903).
20. *Cappaert*, 426 U.S. at 138. *See also*, *United States v. Idaho*, 131 Idaho 468, 472 (1998).
21. *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983).
22. I.C. § 42-1406B (2006).
23. *United States v. Mitchell*, 445 U.S. 535, 538 (1980).
24. *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (2013).
25. 43 U.S.C. § 666 (1952).
26. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 810 (1976).

27. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 566 n. 17 (1983).
28. 43 U.S.C. § 666 (1952).
29. V. Willard, note 2.
30. *Arizona v. California*, 373 U.S. 546 (1963).
31. *Id.* at 155-56.
32. Combined, the Coeur d'Alene Hotel and Casino, along with Circling Raven Golf Course are one of the largest employers in North Idaho.
33. I.C. § 42-111 (1899).
34. The 1990 Fort Hall Indian Water Rights Agreement By and Between The Shoshone-Bannock Tribes of the Fort Hall Indian Reservation, the State of Idaho, the United States, and Certain Idaho Water Users 17 (1990). While the water right contemplated includes non-consumptive uses such as instream flow and hydropower, the Agreement makes clear that the consumptive right is for 581,031 acre-feet per year but the Tribe may elect to forego diverting some of that water in favor of instream purposes, if it so chooses. *See id.* at 46-55.
35. Mediation between the Nez Perce Tribe, the State of Idaho, the United States, and Other Water Users Mediator's Term Sheet at § 1(A). Available at: <http://www.srba.state.id.us/FORMS/Mediator%20term%20sheet.pdf>. This term sheet was ultimately incorporated into the final decree of the Snake River Basin Adjudication.
36. Stetson Engineers, General Natural Flow Study for the Coeur d'Alene Tribe, Idaho (2010).
37. These figures do not include groundwater or water available in Kootenai County outside the Reservation, St. Joe, and/or the Coeur d'Alene Rivers.
38. *Adair*, 723 F.2d at 1414.

We now approach a crossroads where the scope of the Tribe's claims can be litigated or negotiated.



39. *Id.*

40. A table showing the monthly flow claimed for each stream reach is on file with the author. The claims may also be obtained from the SRBA Court.

41. *United States and Coeur d'Alene Tribe v. Idaho*, 95 F. Supp.2d 1094, 1100 (D. Idaho 1998).

42. *Order Issuing New License and Approving Annual Charges for Use of Reservation Lands*, 127 FERC ¶ 61,265 (2009).

43. H.C.R. 62, 67th Leg., 2d Reg. Sess. (Idaho 2014).

44. *Id.*

45. See e.g., <https://docs.google.com/viewer?url=http://www.cskt.org/tr/docs/negotiation-vs-litigate-printable.pdf?time=0>

46. For example, the negotiations leading to the Fort Hall Agreement took approximately five years while a final resolution to the Nez Perce claims, which involved both litigation and negotiation, lasted fourteen years.

47. See e.g. *Arizona v. California*, 373 U.S. 546 (1963) (litigation began in 1952 and is ongoing); *In re the General Adjudica-*

tion of All Rights to Use Water in the Big Horn River System, 753 P.2d 76 (1988) (adjudication began in 1977 and is ongoing); *U.S. v. Adair*, 723 F.2d 1394 (9th Cir. 1984) (litigation began in 1975; the most recent settlement was reached in early 2014 but is subject to ratification); *Washington v. Acquavella*, 100 Wash.2d 651 (1983) (adjudication began in 1977).

48. *San Carlos Apache*, 463 U.S. at 571.

49. *Cappaert*, 426 U.S. at 139.

50. Understanding the SRBA Resolution - A Foundation for Idaho & National Water Policy. A Celebration of the Conclusion of the Snake River Basin Adjudication, Boise, ID (August 25, 2014).

About the Author

Dylan R. Hedden-Nicely is an attorney with Howard Funke & Associates, P.C. He practices in the areas of Native American natural resources and water law. He is admitted to practice in Idaho and in the United States District Court, District of Idaho. He received his J.D., magna cum laude, from the

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University of Idaho with Emphases in Native American Law and Environmental and Natural Resources Law in November 2011. He also received an M.S. from the University of Idaho in Water Resources - Science and Engineering in November 2012.



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Boise, ID 83701-1743

gtb@idahojustice.com

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