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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

Dylon R. Hedden-Nicely

In 2008, the State of Idaho commenced the Coeur d'Alene-Spokane River Basin Adjudication (CSRBA). 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. 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. 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. 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.”

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; 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. 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. The quantity appropriated is the amount actually put to a beneficial use. In contrast, Indian water rights are reserved; actual use is not necessary to
perfect them. Further, unlike state water rights, Indian water rights are not subject to forfeiture for non-use. 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.

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. In contrast, the priority date for Indian water rights is the creation of the reservation or, if the water right is necessary for a traditional use of water, time immemorial.

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 . . .” General stream adjudications are the only way that federal and tribal water rights can be quantified in state court. As sovereigns, both the United States and Indian tribes are generally immune from suit. 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 . . .” 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. The McCarran Amendment did not waive tribal sovereign immunity but tribal water rights can be quantified without their participation. 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.” 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.”

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.

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

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

well per
law and claimed 13,000 gallons per
ty, the United States mirrored Idaho
population. In determining quanti-
cal analysis to estimate future tribal
members. To make this claim, the
United States filed 72 claims
to provide water for future tribal
needs, including planned commer-
cial and industrial projects as well as
future domestic uses. 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 statisti-
cal analysis to estimate future tribal
population. In determining quanti-
ty, the United States mirrored Idaho
law and claimed 13,000 gallons per
well per day.  

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

Consumptive use claims

The first consumptive water right
claims are for irrigation water. The
Tribe is entitled to a water right to ir-
rigate all “practicably irrigable acre-
age” (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 ca-
able 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 prior-
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, Munici-
pal, and Industrial (DCMI) water
uses. Water for DCMI uses are from
both groundwater and surface wa-
ter and are necessary to maintain
the Coeur d'Alene homeland into
perpetuity. Current DCMI needs
include, but are not limited to, wa-
ter for the Tribe's casino, hotel, and
golf course,32 as well as water for cur-
rent domestic use. The United States
also claimed water for future DCMI
needs, including planned commer-
cial 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 statisti-
cal analysis to estimate future tribal
population. In determining quanti-
ty, 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 con-
sumptive water rights. In compari-
son, 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 con-
sumptive water right of 50,000 acre-feet
per year.35

Also consider the total volume
of surface water available in the ba-

Non-consumptive claims

The United States claimed non-
consumptive water rights for a vari-
ety of purposes including cultural
uses and the preservation of reserva-
tion plants, fish, and wildlife. The
claims are for water to maintain
seeps, springs and wetlands, as well
as instream flows and a lake eleva-
tion 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 pri-

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 lo-
cated exclusively on tribal lands.
These claims are necessary to “pro-

dose for Tribally-harvested game and
waterfowl habitat, Tribal plant gath-
ering, and other Tribal traditional,
cultural, spiritual ceremonial, and/or
religious uses.”38 These uses con-
tinue to be critical to the identity of
the Coeur d'Alene People. Despite
the number of claims, the total vol-
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 main-
tain a healthy habitat for on-Reser-
vation 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 con-
tinue to rely on this resource today.
In developing this claim, federal and
tribal experts coordinated to con-
duct extensive hydrological and bio-

tical 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, 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." 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 negotiations 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]." 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. Further, while most negotiations involving Indian Tribes are typically resolved within five to ten years, water rights litigation has been known to commonly last up to fifty years. As the United States Supreme Court has cautioned, "[s]tate courts, as much as federal courts, have a solemn obligation to follow federal law," 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.

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.

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).
5. Id.
6. Id. at 565.
7. Id. (citing Acts of the Fiftieth Congress, first session, Ch. 213. 1888).
8. Id. at 576.
12. Idaho Const Art. XV § 3.
13. Id.; I.C. § 42-106 (1900).
15. Id.
17. Id. at 51.
21. United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. 1983).
29. V. Willard, note 2.
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.
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.
44. Id.
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 Adjudication 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.

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 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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