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Coeur d'Alene Tribe's Enduring Relation to Water -- A Legal History

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"Water is the life of all of us."[1]

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>
> — *United States and Coeur d'Alene Tribe v. Idaho*

The Coeur d'Alene Tribe is inextricably linked to the water flowing through the Coeur d'Alene Indian Reservation. Documented and oral history demonstrate a deep connection between the Tribe and the water in the Coeur d'Alene-Spokane River Basin. Much of that history, in particular the history leading up to and during the Reservation Era, has been recounted by the Idaho Federal District Court[2] as well as the United States Supreme Court in *Idaho v. United States*.[3] The purpose of this article is to briefly highlight relevant history to provide context to the claims made on behalf of the Tribe in the Coeur d'Alene-Spokane River Basin Adjudication.[4]

The Coeur d'Alene Tribe originally inhabited an area of more than 3.5 million acres, which included the entire Coeur d'Alene-Spokane River Basin within Idaho.[5] "[T]he Lake and rivers provided resources that were essential to the Coeur d'Alenes' survival."[6] More specifically, "[t]ribal members traditionally used the lake and its related waterways for food, fiber, transportation, recreation, and cultural activities."[7] Just as important, "[t]he Tribe's spiritual, religious and social life centered around the Lake and rivers."[8] Tribal members "depended on watercourses in their manner of self-identification, language and religious practices."[9] Accordingly, "[a] right to control the lakebed and adjacent waters was traditionally important to the Tribe . . . ."[10]

The Tribe's efforts during the reservation era

The Reservation Era began in Coeur d'Alene Country in 1867 when President Johnson set aside a reservation for the Tribe without its knowledge. The Tribe rejected that reservation because of its "failure to make adequate provision for fishing and other uses of important waterways."[11] The Tribe sent a petition to the U.S. government in which it "insisted" on a different reservation that included key river valleys.[12]

In 1873, the United States and the Tribe agreed on a reservation that included the Hangman Valley, portions of the Coeur d'Alene and St. Joe Rivers, and all but a small sliver of Lake Coeur d'Alene.[13] Article One of the 1873 Agreement guaranteed that "the water running into said reservation shall not be turned from their natural channel where they enter said reservation."[14] One U.S. negotiator noted that "[w]e found that the Indians *demanded* an extension of their reservation so as to include the Catholic Mission and fishing and mill privileges on the Spokane River."[15] In other words, "a purpose of the 1873 agreement was to provide the Tribe with a reservation that granted tribal members exclusive use of the water resource."[16]

The 1873 Agreement was not ratified by Congress. However, President Grant issued an Executive Order, with "[a]n object of the 1873 Executive Order [being], in part, to create a reservation for the Coeur d'Alenes that mirrored the terms of the 1873 agreement."[17]

As of 1885, "Congress had neither ratified the 1873 agreement nor compensated the Tribe" for ceding its aboriginal territory.[18] The Tribe once again petitioned for an agreement, and renewed negotiations commenced in 1887. The parties reached an agreement, which reaffirmed the 1873 reservation boundaries and the cession of territory outside that reservation. Article five of the 1887 Agreement states:

> [i]n consideration of the foregoing cession . . . the Coeur d'Alene Reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians . . . no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation."[19]

Rather than immediately ratify the 1887 Agreement, the Senate directed the Secretary of Interior "to inform the Senate as to the present area and boundaries of the Coeur d'Alene Indian Reservation . . . [and] whether such area includes any portion . . . of the *navigable waters* of

Lake Coeur d'Alene, and of Coeur d'Alene and St. Joseph Rivers . . . ."[20] The Commissioner of Indian Affairs, responding for the Secretary, stated that "the [1873] reservation appears to embrace [almost] all the navigable waters of Lake Coeur d'Alene," and that "[t]he St. Joseph River also flows through the reservation."[21] In response, Congress directed the Secretary of the Interior to negotiate "for the purchase and release . . . of such portions of its reservation . . . as such tribe shall consent to sell."[22]

In 1889, the Tribe and the United States negotiated for the reduction of the 1873 Reservation. While most terms were reached, including the cession of the northern third of the Reservation's uplands, there was never agreement regarding price or the acreage to be sold. Nonetheless, the 1887 Agreement and 1889 Agreement (as drafted by the U.S. negotiators) were ratified together by Congress in 1890.[23]

Allotment comes to the Coeur d'Alene Reservation

Notwithstanding non-Indian encroachment and federal pressure for land, the Tribe flourished during this era. In 1887, U.S. negotiating agents told the Tribe they "did not expect to see [tribal children] ahead of the whites as I see them here" and that the Tribe had "the finest schools, the best community that I have seen among Indians."[24] The agents concluded that "[y]ou will soon need nothing from the government . . . [y]ou will have no use for Government farmers, smiths, doctors, or agents; you can get things without aid."[25] In 1889, U.S. agents observed "[tribal farms] surrounded by better fences than their neighbors, the whites, burdened with golden grain that gave promise of a rich harvest; horses and cattle in large numbers peacefully grazing upon hills covered with bunch-grass, made a picture truly pleasant to contemplate."[26]

Things came to an abrupt change in 1906 when Congress unilaterally allotted the Reservation despite unanimous and vehement objection by the Tribe.[27] Through allotment, the collective ownership of the reservation was dissolved and each tribal member was allotted 160 acres.[28] Of the roughly 345,000 acres within the 1889 Reservation, 104,000 acres were allotted to tribal members. The remaining 241,000 acres were declared "surplus" and made available to non-Indians under the Homestead Act.[29] Despite the promise by the United States that "no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation,"[30] the Tribe lost almost two-thirds of its reservation land by 1909.

The Tribe was devastated by the disruption and poverty caused by allotment.[31] It took many years to reassert its sovereignty, particularly over water within the reservation.[32] In 1907 Washington Water Power Company (now Avista) flooded Lake Coeur d'Alene, the Spokane River, the Coeur d'Alene River, and the St. Joe River with six and a half feet of water without notice to the Tribe.[33] Flooding was increased to eight feet in 1941.[34] During this era the State of Idaho also began issuing water rights in the Basin pursuant to state law, including within the Reservation.

The tribe reasserts its right to control and protect water within the reservation

Despite allotment and its subsequent effects, the Tribe continued to assert its reserved rights. A major milestone in that effort occurred in 1991 when, after overtures for negotiation were rejected, the Tribe filed suit against the State of Idaho in U.S. District Court claiming ownership of the submerged lands of Coeur d'Alene Lake and its tributaries within the original 1873 Reservation boundary.[35] The District Court held that 11th Amendment immunity barred suit and the U.S. Supreme Court affirmed.[36] However, the Supreme Court made clear "[o]ur recitation of the ties between the submerged lands and the State's own sovereignty . . . is not in derogation of the Tribe's own claim. As the Tribe views the case, the lands are just as necessary, perhaps even more so, to its own dignity and ancient right."[37]

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The United States, as trustee for the Tribe, brought its own case against Idaho in 1998 seeking to quiet title to the southern third of Lake Coeur d'Alene and the portion of the St. Joe River within the 1889 Reservation boundary.[38] The Tribe intervened and the Federal District Court quieted title in favor of the United States as trustee for the benefit of the Tribe, "to the beds and banks of the Coeur d'Alene Lake and the St. Joe River lying within the current boundaries of the Coeur d'Alene Indian Reservation."[39] Additionally, the Court found that the U.S. and Tribe are "entitled to the exclusive use, [and] occupancy" of those submerged lands and that "the State of Idaho is permanently enjoined from asserting any right, title or otherwise interest in or to [those] bed and banks . . . ."[40] The United States Supreme Court affirmed, recognizing that "the submerged lands and related water rights had been continuously important to the Tribe . . . ."[41]

Simultaneous to its initial lake case in 1991, the Tribe opened a second front to address contamination flowing into the Lake from the Silver Valley.[42] After requests for negotiations were rejected, the Tribe filed a Natural Resources Damages (NRD) suit against the 10 largest polluters in the Valley.[43] The United States filed its own suit in 1996, which was consolidated with the Tribe's.[44] In 2003, the Federal District Court apportioned liability among the polluters based upon their respective contribution to the hazardous waste stream.[45] The court subsequently determined the Tribe is a trustee "for the purposes of CERCLA over the federal and tribal land as well as the migratory natural resources of: fish, wildlife, birds, biota, water and groundwater based on their involvement in the management and control of such natural resources."[46] The eventual consent decree settlements resulted in approximately $1 billion to restore natural resources and protect human health in the region

In 2005 the Tribe was granted Treatment in the Same Manner as a State (TAS) status by the EPA,[47] which allows the Tribe to "administer the water quality standards for those waters of Coeur d'Alene Lake and the St. Joe River within the Coeur d'Alene Reservation . . . ."[48] The EPA approved the Tribe's water quality standards on June 12, 2014.[49] The Tribe also jointly developed a Lake Management Plan in 2009 with the Idaho Department of Environmental Quality. The purpose of the LMP is to limit nutrients introduced to the Lake in an effort to manage *in situ* metals contamination from the Silver Valley.[50]

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In 2009, as part of its relicensing process for the Spokane River Project, Avista entered into a comprehensive agreement with the Tribe to resolve a range of issues related to Avista's storage of water on Lake Coeur d'Alene. Those issues included Avista's historic trespass by flooding tribal submerged lands without permission from the Tribe, as well as its current and future use of tribal waters, submerged lands, and other lands within the Reservation.[51] Among other things, that agreement provides funding to protect and restore trust resources, including lands, river bank erosion, cultural resources, aquatic weed control, wetland/riparian habitat, and water quality.[52] Avista also applied for a Water Storage/Use Permit from the Tribe, issued pursuant to Tribal Code, to store and use water for hydropower generation and other purposes on the Lake and St. Joe River within the Reservation.[53]

This history demonstrates the Tribe's commitment, from before first contact with non-Indians to present, to the continued management, protection, and enhancement of the water within the Coeur d'Alene Reservation, particularly the Lake and St. Joe River. Now the Tribe must address the issues in the CSRBA: the latest chapter of this long history.

Endnotes

1. Felix Aripa, Coeur d'Alene Tribal Elder.
2. *United States and Coeur d'Alene Tribe v. Idaho, 95* F.Supp.2d 1094, 1101 (D. Idaho 1998) [hereinafter *D. Idaho Opinion*].
3. *Idaho v. United States,* 533 U.S. 262 (2001) [hereinafter *Idaho II*].
4. Those claims, as well as a discussion on the fundamentals of Indian water rights in general, is the subject of a companion piece found in this edition of *The Advocate* entitled "The Coeur d'Alene Tribe's Claims in the Coeur d'Alene-Spokane River Basin Adjudication."
5. *Idaho II,* 533 U.S. at 265.
6. *D. Idaho Opinion,* 95 F.Supp.2d at 1101.
7. *Idaho II* at 265.
8. *D. Idaho Opinion* at 1101.

9. *Id.* at 1102.

10. *Idaho II* at 274.

11. *Id.* at 266.

12. *Id.*

13. *D. Idaho Opinion* at 1095-96.

14. *Id.* at 1105.

15. T.W. Bennett, *Letter to the Editor of the Idaho Signal* (September 18th, 1873) (emphasis in original) (on file with author).

16. *D. Idaho Opinion* at 1109.

17. *Id.*

18. *Idaho II* at 267.

19. *Id.* at 267-68 (quoting the 1887 Agreement).

20. *Id.* at 268; *D. Idaho Opinion* at 1111-12.

21. *Idaho II* at 268.

22. Act of Mar. 2, 1889, ch. 412 § 4, 25. Stat. 1002.

23. *Idaho II* at 270.

24. United States. Congress. House. *Reduction of Indian Reservations.* House Executive Document No. 63. 50th Congress, 1st Session. Washington D.C.: Government Printing Office, 1888.

25. *Id.*

26. Report of the Coeur d'Alene Indian Commission (1889) (on file with the author).

27. 34 Stat. 325, 334 (1906).

28. *Id.*

29. *Id.*

30. *Idaho II* at 267-68 (quoting the 1887 Agreement).

31. For an in-depth account of the effects of the Allotment Policy on Indian tribes throughout the United States, *see* Judith Royster, *The Legacy of Allotment* 27 Ariz. St. L. J. 1, 10-14 (1995).

32. *See e.g.,* Petition to Intervene by Coeur d'Alene Tribe Before the Federal Power Commission 9 (1973) (available with the author), Federal Energy Regulatory Commission, *Order on Remand, Determining Lack of Authority, and Vacating Prior Orders* (1988) (available with the author).

33. *See* Idaho Department of Water Resources, Claim to a Water Right No. 95-9115 (2002).

34. *See id.*

35. *See Coeur d'Alene Tribe v. Idaho,* 798 F.Supp. 1443 (D. Idaho 1992).

36. *U.S. v. Idaho,* 521 U.S. 261 (1997).

37. *Id.* at 287.

38. *D. Idaho Opinion* at 1094. That case did not place the northern two-thirds of the Lake or the submerged lands within Heyburn State Park at issue.

39. *Id.* at 1117.

40. *Id.*

41. *Idaho II* at 275.

42. Dept. of Envtl. Quality and Coeur d'Alene Tribe, Coeur d'Alene Lake Management Plan 5 (2009).

43. *Coeur d'Alene Tribe v. Gulf Resources,* No. 3:1991cv00342 (1991).

44. *Coeur d'Alene Tribe v. Asarco Inc.,* 280 F.Supp.2d 1094 (D. Idaho 2003).

45. *Id.*

46. *United States v. Asarco Inc.,* 471 F.Supp.2d 1063 (D. Idaho 2005).

47. Letter from Ronald A. Kreizenbeck, Acting Regional Administrator for EPA Region 10, to Chief J. Allan, Chairman of the Coeur d'Alene Tribe (August 5, 2005) (on file with author).

48. *Id.*

49. Letter from Daniel D Opalski, Director, EPA Office of Water and Watersheds, to Chief J. Allan, Chairman of the Coeur d'Alene Tribe (June 12, 2014) (on file with author).

50. DEPT. OF ENVTL. QUALITY AND COEUR D'ALENE TRIBE, COEUR D'ALENE LAKE MANAGEMENT PLAN (2009). *See also,* Dylan R. Hedden-Nicely, *Gauging the Success of the Coeur d'Alene Lake Management Plan: an Example of Tribal-State Cooperation,* The Advocate, Vol. 56, No. 8 (August 2013) at 23.

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

52. *Id.* at Appendix D.

53. Coeur d'Alene Tribe, Department of Lake Management, Water Storage/Use Permit No. 2008-01 (2008) (on file with author).

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