

## *The Network Note* **February 2021**

### *Focus on Idaho*

#### **ID Supreme Court: Coeur d'Alene Tribe Has "Homeland"**

After a comprehensive review of tribal water rights law, the Idaho Supreme Court held, in *US v. Idaho*, that the 1873 agreement between the Coeur d'Alene Tribe (Tribe) and the Federal Government set aside a "homeland" for the Tribe on Lake Coeur d'Alene in northern Idaho.

Before Americans arrived, the Tribe had inhabited more than 3.5 M acres in northern ID and WA. An 1867 presidential order set aside a "reservation of comparatively modest size." When the Tribe learned of the order, it negotiated to cede some of its lands to the US in 1873, in exchange for a larger reservation "set apart and secure[d]" from settlement. After Congress failed to ratify that agreement, the Tribe negotiated other agreements, which Congress ultimately ratified in 1891.

Judge Eric Wildman, the district court judge presiding over the Coeur d'Alene adjudication, reviewed the US claims filed on the Tribe's behalf. In orders on summary judgment, the judge rejected the US theory that the reservation created a "homeland" that justified a wide range of water uses, including plant and animal habitat. He concluded that the theory exceeds the limits of the reserved rights doctrine and "effectively eliminates the primary-secondary purpose distinction" in the 1978 SCOTUS *US v NM* decision.

While largely affirming the trial court holdings, the Idaho Supreme Court reversed on the homeland theory, rejecting the primary-secondary distinction as applied to the Tribe. It emphasized that the reservation was established by agreement with the Tribe, which ceded lands to the US. Such agreements are interpreted as the Tribe would have understood the terms, and in the Tribe's favor. It recognized that the terms of those agreements provided the Tribe with a homeland, but that concept only added water rights for plant gathering and cultural purposes, not industrial, commercial or aesthetic uses.

#### **Snake River Basin Adjudication Court = Water Court**

The Snake River Basin Adjudication (SRBA) court has become the ID water court. With DTW Convener Eric Wildman now presiding, the SRBA court has responsibility for all ID water right adjudications and administrative appeals from IDWR. Its origins date to a controversial 1982 ID Supreme Court decision that subordinated water rights upstream of Swan Falls Dam to Idaho Power. Subsequent conflict led to a settlement that provided for an adjudication.

#### **Race, Federal Indian Policy, and Access to Water Parts II – The Upper Klamath River March 30 – 11 am PST**

*Dividing the Waters* will convene its second webinar on racial justice and water to discuss the Upper Klamath River conflict among the Klamath Tribes, environmentalists, farmers, and fisherman. In 2001, the Bureau of Reclamation cut water deliveries to farmers during a drought, to protect Klamath River fisheries, following – and leading to more – years of water conflict and litigation. Speakers will include:

- Holly Doremus, UC Berkeley School of Law
- Don Gentry, Chairman of the Klamath Tribes
- Joe Tenorio, Native American Rights Fund
- Dan Tarlock, Chicago-Kent Law School

To register, please visit the [NJC-DTW registration page](#).

#### **ID Department of Water Resources (IDWR): Central Role**

Before water disputes reach the SRBA court, IDWR plays the central role in administering the SRBA decree. It accepts, investigates and makes decisions on applications for new water rights, water transfers, and delivery calls to enforce priorities. IDWR studies dam raises and other water projects.

#### **Other ID Water Agencies Have Water Responsibilities**

Both state and federal agencies affect ID water:

- *ID Water Resources Board*: Develops long-range water use plans and holds instream water rights for the State.
- *ID Department of Environmental Quality*: Manages water quality under the federal Clean Water Act.
- *US Bureau of Reclamation*: Delivers water to irrigation districts/contractors. Operates dams for flood control.
- *US Army Corps of Engineers*: Operates dams for power production and flood control.

#### **Other Adjudications Proceeding in SRBA Court**

The ID Legislature assigned all water right adjudication proceedings to the SRBA Court, including:

- Coeur d'Alene/Spokane River
- Clark Fork/Pend Oreille
- Palouse River Basin
- Bear River Basin

*This Idaho edition owes its creation to assistance from Idaho District Court Judge Eric Wildman.*

**Can YOU Help on the Focus Edition for Your State? Contact [ALFIII@sbcglobal.net](mailto:ALFIII@sbcglobal.net)**