

Indian Law Section
Meeting Minutes
June 5, 2020

Julie Kane called the meeting to order at 12:05 p.m. Mountain time. She asked members to review the minutes, then approve them. Jason Brown made a motion to approve the Indian Law Section meeting minutes from May 1, 2020. Regina Hovet seconded. The motion passed.

The next item on the agenda was a request that the Indian Law Section contribute \$500 to the Access to Justice Program with the Idaho Law Foundation. Regina Hovet made a motion to contribute that amount and Dylan Heddon-Nicely seconded the motion. The motion passed.

Kane asked the section members to think about a full-day Indian Law Conference that the Section could sponsor, the soonest date would probably be sometime in the Winter months. Jason Brown suggested that the law school in Boise might be a good central location. Regina Hovet thought this was an excellent idea, to have an Indian Law Conference locally so that practitioners wouldn't have to travel so far to get Indian law CLE's. Heddon-Nicely suggested that it would be really beneficial to have students involved as well. Kane asked folks to be thinking about dates, locations and subject matter for presentations.

Kane then introduced Professor Heddon-Nicely for his CLE presentation on the Coeur d'Alene Basin Water Adjudication.

Dylan Heddon-Nicely had a power point that he shared on the Zoom screen. He first showed a map depicting the Coeur d'Alene Tribe's aboriginal area of about 3.5 million acres, and the reservation boundaries from 1873 and 1891. He described the eastern boundary being the Bitterroot Mtns., and the area encompassing the St. Joe, St. Maries, and the CdA Rivers, which all flow east to west into the Coeur d'Alene Lake. He talked about how historically the Lake was the center for all of the activities of the Tribe historically and today.

He showed a slide of a painting by a Jesuit priest in the 1870's depicting CdA tribal members using boats and other means to funnel deer toward the river, so they could kill the deer in the water. This was useful in showing that the river was even used for hunting.

Because western water adjudication is determined by the principle of "first in time, first in right", there were many objectors to the tribe's aboriginal water claims. In the adjudication before judge Wildman, objectors to the Tribe's claims argued that the court should apply the New Mexico test to the Tribe's claims, which would require that the Tribe demonstrate that only those claims considered "primary" or necessary to fulfill the very purpose of the reservation, should be considered. And, that most of the claims being made by the Tribe were, in fact, "secondary purposes", for which the federal government would have to go to the State for permission to use the water.

The Tribe asked Judge Wildman to apply the “Homeland” theory, which would have broader application to ALL of the Tribe’s uses of the river. If the CdA Tribe had re-acquired property over the years, the objectors also wanted the court to apply the later acquisition date rather than the Executive Order date.

CdA Tribe argued that court should use the broader “homeland purpose test”; should include water rights for gathering, fishing and hunting, and because fishing is a primary purpose, so off-res in stream flow rights should be included.

Idaho Supreme court decision. Reservation was created in 1873, no subsequent cession/abrogation. All water rights vested when reservation was created. Unless CdA ceded the water rights back to the US. “Congress must clearly and plainly express its intent to abrogate tribal water rights and it did not do so after 1873”.

The Court rejected the more narrow “primary purpose test” from New Mexico. Court says the two rights have different origins...Indian reserved water rights exist from time immemorial and are merely recognized by the document. City of Pocatello. This court recognized a distinction between Indian reservations and non-Indian reservations. Facts in this case demonstrate domestic, agricultural, hunting, fishing, plant gathering, cultural. No commercial, industrial. Non-consumptive rights belong to the tribe even if the appurtenant land is sold, therefore they retain their original priority date.

Off-reservation Instream flows. Winters does not preclude. Physical adjacency does not mean appurtenant. Appurtenance is not dependent upon a “physical relationship with the land”.

Justice Burdick (Horton) wrote “an amazing” dissent. “The fishery was the lifeblood of the Tribe”. Supports off-reservation instream flow claims. Homeland should include the water necessary for the fish to spawn, rear, and migrate.”

However, the court rejects off-reservation instream flows, commercial, industrial, hydro.

The CLE presentation ended at almost the hour mark, so it was good timing. Kane reminded attendees to contact Dayna Ferrero at dFerrero@isb.idaho.gov to get credit for the CLE. The group then signed off.