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COMMENTARY

## The Continuing Saga of Indian Land Claims

### *The Coeur D'Alene Tribe's Claim to Lake Coeur D'Alene*<sup>1</sup>

**E. RICHARD HART**

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#### COEUR D'ALENE DEPENDENCE ON ITS WATER RESOURCES

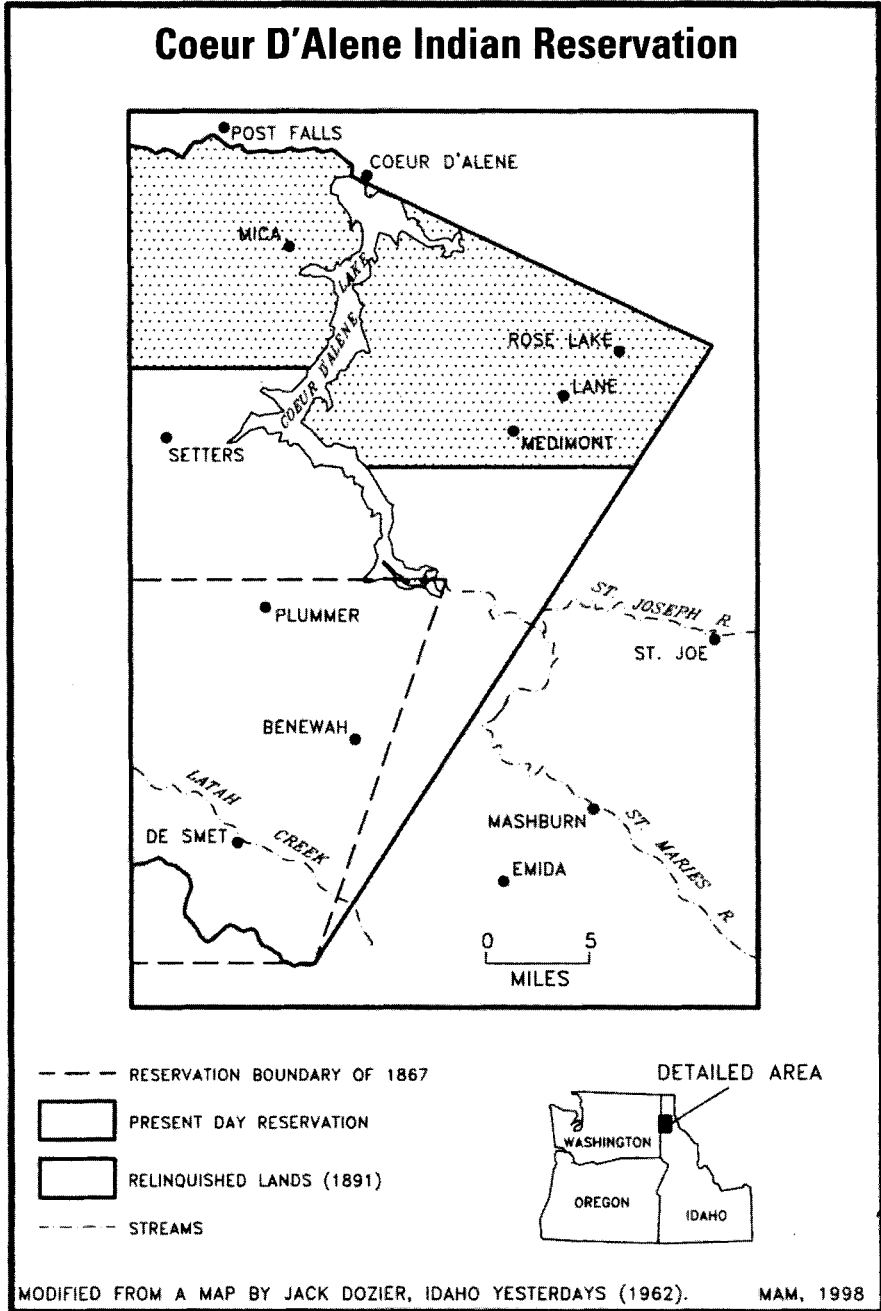
The Coeur d'Alene Tribe, known as Schee-chu-umsh in their own Interior Salish language, had an aboriginal territory of about 4-million acres, which included the centrally located Lake Coeur d'Alene, the Coeur d'Alene River, and the St. Joe River<sup>2</sup> (Figure 4).<sup>3</sup> The lakes and rivers within tribal territory were integral to the tribe's cultural survival. Throughout their history, tribal members depended on their lakes and rivers for physical and spiritual well-being. Lake Coeur d'Alene, the Coeur d'Alene River, and the St. Joe River not only formed the heart of the tribe's territory, but also acted as the crux of their cultural life. In other words, the tribe had a fundamental dependence on these water resources.

The Coeur d'Alene Tribe depended on the water resources of the Coeur d'Alene River, St. Joe River, and Lake Coeur d'Alene in the location, establishment, and occupation of their villages. The three divisions of the tribe occupied at least thirty-three villages on the banks of or near these bodies of water upon which the tribe depended for survival. Eyewitness observers have provided detailed descriptions of Coeur d'Alene villages on the banks of the rivers and lake for over 150 years.<sup>4</sup>

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E. Richard Hart was an expert witness in *United States v. State of Idaho*.

Figure 4



The lower half of Lake Coeur d'Alene was a part of the reservation until 1891 (map prepared by Michelle A. Mestrovich).

Coeur d'Alene villages were situated near the lakes and rivers not only because of the ready and abundant supply of fish, but also because travel through the dense undergrowth and thick forest was difficult while travel by canoe on the lakes and rivers was much easier. The Coeur d'Alene depended on these water resources for purposes of transportation, subsistence, and maintenance of village life.

Fishing was crucial to the survival of the Coeur d'Alene. Using an extensive and complex system involving weirs, basket traps, various types of nets, lines, spears, and hooks, the tribe harvested large numbers of fish through all seasons of the year for purposes of subsistence, especially relying on the fisheries of the Coeur d'Alene River, St. Joe River and its tributaries, and Lake Coeur d'Alene. Fishing provided essential food resources to the tribe. The fisheries of these rivers and the lake were indispensable to the tribe, which was dependent on these resources for their material survival.

Tribal reliance on the lakes and waterways extended to hunting practices. Tribal hunting techniques were integrally tied to the rivers and lakes. The tribe depended on these waterways for strategic hunting practices, as well as for more general transportation uses during hunting expeditions. The dependence of the tribes on the rivers and lake for hunting is another indication of the central importance of these waters to the survival and identity of the Coeur d'Alene.

Other traditional Coeur d'Alene activities associated with waterways provide additional evidence of tribal dependence on their lakes and rivers. These Indians traditionally traveled over Lake Coeur d'Alene and the St. Joe and Coeur d'Alene rivers by canoe for purposes of trade, communication, hunting, and reaching gathering sites. Many other traditional activities, including gathering, tool-making, and especially the harvest of "water potatoes" also took place utilizing Lake Coeur d'Alene resources. Burial practices were closely associated with the lake and rivers, as were other religious and cultural activities. In their use of Lake Coeur d'Alene and the Coeur d'Alene and St. Joe rivers for transportation, communication, food-gathering, utilitarian necessities, burial-ground location, and religious and secular cultural activities, the tribe fully demonstrated its integral connection to and dependence on these water resources.

Study, analysis, and synthesis of the Coeur d'Alene language and traditional narrative provide further indication of the extent to which the Coeur d'Alene relied upon their water resources both for material needs and cultural and spiritual support. Language, stories, myths, and other traditional narratives all provide evidence of the Coeur d'Alene's integral relationship with the lake and rivers and tributaries. Traditional narratives provide details of lifestyle as it related and still relates to waterways within tribal territory. Studies of these materials also indicate societal and religious beliefs regarding the waterways. The tribe's dependence on these aquatic resources has been not only for physical well-being, but also for the maintenance of their cultural and spiritual identity.

Voluminous materials documenting Coeur d'Alene culture, including materials relating to traditional villages, fishing, hunting, gathering, religion,

traditional narrative, and cultural identity demonstrate the fundamental dependence the tribe has had on its waterways, especially the Coeur d'Alene and St. Joe rivers and Lake Coeur d'Alene.<sup>4</sup>

#### ESTABLISHMENT OF THE COEUR D'ALENE RESERVATION

In 1873 an executive order conveyed a reservation to the Coeur d'Alene Tribe that included within its borders Lake Coeur d'Alene and a portion of the watersheds of the Coeur d'Alene and St. Joseph rivers.<sup>5</sup> The governor of the Idaho Territory was a member of the commission that negotiated the boundaries of that reservation with the tribe. He reported that the boundaries of the reservation were established in a manner designed to protect tribal fishing rights and a future mill site on the Spokane River bed. In 1887 the tribe reached an agreement with the United States to cede that portion of its aboriginal territory found outside the 1873 reservation in exchange for \$150,000 and a guarantee that their reservation would not be taken from them without their consent. In 1889 the tribe reached an agreement to cede the northern portion of the reservation, including roughly the northern two-thirds of Lake Coeur d'Alene in exchange for \$500,000. An act ratifying both the 1887 and the 1889 agreements was passed by Congress in 1891.<sup>6</sup> In 1894 the tribe ceded another strip of their reservation to the United States in exchange for a smaller amount of money.<sup>7</sup>

The act establishing the Territory of Idaho in 1863 specifically excluded any Indian lands for which aboriginal title had not been extinguished. The state of Idaho was established by an act on 3 July 1890 that also disclaimed any ownership of Indian land which had not had its aboriginal title extinguished.

#### LITIGATION TO DETERMINE OWNERSHIP OF LAKE COEUR D'ALENE SUBMERGED LANDS

In 1973 the Coeur d'Alene Tribe successfully petitioned to intervene in Washington Water Power Company's licensing hearing before the Federal Energy Regulatory Commission (FERC). The Department of the Interior also intervened and supported a position that the tribe owned the southern one-third of the beds of Lake Coeur d'Alene. The state of Idaho claimed it owned all of the lakebed under the Equal Footing Doctrine.

Under this doctrine, submerged lands of navigable bodies of water are presumed to go to the state unless the United States reserved them for some other purpose prior to statehood. In addition, the Supreme Court has set a number of tests, including a demand of historical dependence on the resource, that tribes must satisfy in order to defeat the Equal Footing Doctrine.<sup>8</sup>

Although FERC originally ruled in favor of the tribe, in 1988 it vacated its order, citing a lack of jurisdiction. In 1991 the tribe fielded a lawsuit against eight mining companies and one railroad company for heavy metal contamination of the Coeur d'Alene watershed. The extent of damages from this action, should it prove successful, could be greatly enhanced if the tribe proves ownership of the beds and banks of Lake Coeur d'Alene and the

Coeur d'Alene River. The tribe also filed an action against the state of Idaho, claiming title to the lakebed.<sup>9</sup>

In 1994, on an appeal from the ninth circuit court of appeals, the tribe's lawsuit was dismissed by the Supreme Court, which found the state of Idaho immune from the tribe's lawsuit. In the meantime, the United States, acting on behalf of the Coeur d'Alene, filed its own action against the state of Idaho, asserting tribal ownership of the southern one-third of Lake Coeur d'Alene.<sup>10</sup> After the dismissal of its case in 1995 the tribe was allowed to intervene in the United States' case.

The trial of *United States v. Idaho* was held in federal district court in Coeur d'Alene during the first two weeks of December 1997 with Judge Edward J. Lodge presiding. At the trial the state claimed it owned title to Lake Coeur d'Alene submerged lands as a result of the Equal Footing Doctrine. The United States, however, claimed that it had made an express conveyance of the beds and banks to the tribe prior to statehood, making the Equal Footing Doctrine tests moot. In addition, the United States argued that the General Allotment Act of 1887 provided congressional ratification of the conveyance.

On 28 July 1998 US District Judge Lodge ruled in favor of the Coeur d'Alene in *United States v. Idaho*.<sup>11</sup> He ruled that (1) the United States, as trustee for the tribe, held beneficial interest in the bed and banks of Coeur d'Alene Lake and the St. Joe River within current reservation boundaries; (2) that the tribe was entitled to exclusive use and occupancy and right to quiet enjoyment of the bed and banks; and (3) that the state of Idaho was permanently enjoined from asserting any right, title, or otherwise interest in said bed and banks. At the time of this writing, the state of Idaho has appealed and the case is pending.

## NOTES

1. Portions of this essay have been drawn from expert testimony; see E. Richard Hart, "A History of the Coeur d'Alene Tribe's Claim to Lake Coeur d'Alene," expert testimony submitted to federal district court, Coeur d'Alene, in *United States v Idaho* (Civ. 92-35703), 1997; Hart also prepared an earlier study, "The Tribal Claim to Lake Coeur d'Alene," paper presented at the Biannual Meeting of the American Society for Environmental History, Las Vegas, 11 March 1995.

2. Indian Claims Commission, "Findings of Fact," Docket 81, *Coeur d'Alene Tribe of Indians v the United States*, 4 Ind. Claims Comm., 1ff, 38 (1955); 6 Ind. Cl. Comm. 1, 38 (1957).

3. Figure 4 is based upon a map in Jack Dozier, "Coeur d'Alene Country: the Creation of the Coeur d'Alene Indian Reservation in North Idaho," *Idaho Yesterdays* 6:3 (1962): 2-7.

4. For ethnographic and historic accounts, see Stuart A. Chalfant, "Historical Material Relative to Coeur d'Alene Indian Aboriginal Distribution," in *Interior Salish and the Eastern Washington Indians I: The Coeur d'Alenes* (New York: Garland Publishing Company, 1974); Verne F. Ray, "Native Villages and Groupings of the Columbia Basin," *Pacific Northwest Quarterly* 27:2 (1936): 99-152. Robert H. Ruby and John A. Brown, *A Guide to the Indian Tribes of the Pacific Northwest* (Norman: University of Oklahoma Press, 1986), 32-34 (Coeur d'Alene).

5. *Executive Orders Relating to Indian Reservations from May 14, 1855 to July 1, 1912* (Washington, DC: Government Printing Office), 72.

6. US Congress, House, "Ratification of Coeur d'Alene Indian Treaties in Idaho," *Report 1109*, 51st Cong., 1st Sess. (Washington, DC: Government Printing Office, 1890).

7. Charles J. Kappler, comp., *Indian Affairs, Laws and Treaties*, vol. 1 (Washington, DC: Government Printing Office, 1904), 835; C. C. Royce, comp., *Indian Land Cessions in the United States, 18th Annual Report, 1896-97*, pt. 2 (Washington, DC: Bureau of American Ethnography, 1899), Plate CXXIII, 866-869.

8. On the equal-footing doctrine, see Matthew Berry, "A Treasure Not Worth Salvaging," *Yale Law Journal* 106 (1996): 240-246; Frank W. DeCatri, "Are All States Really Equal? The 'Equal Footing' Doctrine and Indian Claims to Submerged Lands," *Wisconsin Law Review* 1 (1997): 179-206; Kathleen Smith, "Land Rights: Quiet Title Action Against the State," *American Indian Law Review* 22:2 (1997): 249-253; Eric B. Wolff, "Coeur d'Alene and Existential Categories for Sovereign Immunity Cases," *California Law Review* 86:4 (1998): 879ff.

9. *Coeur d'Alene Tribe v State of Idaho* (CV 91-437-HLR), 798 F. Supp. 1443 (D. Idaho, 1992); 42 F.3d 1244 (9th Cir.) cert. granted, 116 S. Ct. 1415(1994). See also *Idaho v Coeur d'Alene Tribe of Idaho*, No. 94-1474, 1997 WL 338603 (US 23 June 1997).

10. *United States v State of Idaho*, Civil No. 94-328-N-ELJ.

11. Civil No. 94-328-N-ELJ.