

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF TWIN FALLS

RECEIVED

JUN 25 2015

DEPARTMENT OF
WATER RESOURCES

A. Subcase 91-7386

In Re CSRBA)
)
Case No. 49576)
)
)
)
)
_____)

STANDARD FORM 1 OBJECTION

B. NAME AND ADDRESS OF PERSON OBJECTING

COEUR D'ALENE TRIBE of the COEUR D'ALENE INDIAN RESERVATION, 850 A Street, P.O.
Box 408, Plummer, ID 83851

Name & Address of Attorney:

Howard Funke
Howard Funke & Associates, P.C.
424 Sherman Ave.
P.O. Box 969
Coeur d'Alene, ID 83816-0969
Telephone: (208) 667-5486
Email: hfunke@indian-law.org

C. CLAIMANT OF WATER RIGHT AS LISTED IN DIRECTOR'S REPORT

Dennis Powell, 2020 Center Ave, St. Maries, ID 83861

Name & Address of Attorney:

D. The United States objects to the following elements or general provision as recommended in the
Director's Report.

1. ☐ **Name and Address**

Should be: _____

2. ☒ **Source**

Should be: A water source that is not overlying tribal submerged lands within the Coeur d'Alene
Reservation.

3. ☐ **Quantity**

Should be: _____

4. ☒ **Priority Date**

Should be: The date that reflects when water was actually diverted and put to a beneficial use.

5. ☒ **Point of Diversion**

Should be: Located so as to not encroach upon tribal submerged lands within the Coeur d'Alene Reservation.

6. ☐ **Instream Flow Beginning and Ending Point**

Should be: _____

7. ☐ **Purpose(s) of Use**

Should be: _____

8. ☐ **Period of Year**

Should be: _____

9. ☐ **Place of Use**

Should be: _____

10. ☐ **General Provision** ☐ Individual Water Right ☐ All Water Rights

☐ Should not be recommended.

☐ This general provision was not recommended but should be recommended as described below.

Should be: _____

☐ General provision was recommended but should be modified as described below.

Should be: _____

11. ☐ I object because the recommendation contains an accomplished transfer under Idaho Code § 421425 resulting in injury to my water right(s) and/or enlargement of the original right.

12. ☒ I object because:

☒ This water right should not exist.

☐ This water right was not recommended, but should be recommended with the elements described above.

E. REASONS SUPPORTING OBJECTIONS:

Box 2 and 5:

The United States has filed a number of claims for waters from groundwater and surface water sources within the North Idaho Adjudication in the State of Idaho to fulfill the permanent homeland purpose of the Coeur d'Alene Indian Reservation pursuant to *Winters v. United States*, 207 U.S. 564 (1908) and its progeny, as well as the operative documents and circumstances surrounding the creation of the Coeur d'Alene Reservation, including but not limited to, the Agreement dated July 28, 1873 between the United States and the Coeur d'Alene Tribe, the Executive Order signed by President Grant on November 8, 1873, 1 C. Kapler, Indian Affairs: Laws and Treaties 837 (1904), and the Agreement dated March 26, 1887 between the United States and the Coeur d'Alene Tribe, ratified by Act of Congress dated March 3, 1891, 26 Stat. 1027.

In 2001, the United States Supreme Court ruled that the lands underlying Lake Coeur d'Alene and its tributaries within the current boundaries of the Coeur d'Alene Indian Reservation ("Reservation") are owned by the United States as Trustee for the benefit of the Coeur d'Alene Tribe ("Tribe"). *Idaho v. United States, et al.*, 533 U.S. 262 (2001). In so doing, the Supreme Court affirmed the order of the district court that the United States and the Tribe are "entitled to the exclusive use, occupancy and right to the quiet enjoyment of the bed 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" *United States and Coeur d'Alene Tribe v. Idaho*, 95 F.Supp.2d 1094, 1117 (D. Idaho 1998). Therefore, the claimant must have authorization from the Tribe to encroach upon tribal submerged lands for the purpose of using the navigable waters within the Reservation. To date, no such authorization has been obtained by the claimant and therefore, this water right should not exist.

Box 4:

Idaho law requires the director of the Idaho Department of Water Resources (IDWR) to determine the relative priority of each claimed water right in the adjudication. I.C. § 42-1411(2)(d). The Idaho Supreme Court has found that a user's claimed priority date "must be based upon evidence, not speculation. If a water right is based upon the constitutional method, 'one of the essential requisites to establish his claim is the application of water to a beneficial use, and, where there is a total lack of evidence upon this point, a decree awarding water to the claimant cannot be sustained.'" *City of Pocatello v. Idaho*, 152 Idaho 830, 841 (2012) (quoting *Reno* 32 Idaho at 8). The claimant in this case has provided only a land patent as proof of his/her priority date. However, the Idaho Supreme Court has found that where a claimant in an adjudication has offered a land patent as their only evidence of priority, decreeing that date would "give them a date of priority in advance of the actual application of the water to a beneficial use of which there is any *definite evidence*" *Reno*, 32 Idaho at 8.

Exhibit A, attached, contains a list of claim numbers that the Tribe has also objected to that implicate the same issues raised in this objection.

F. CERTIFICATE OF MAILING

I certify that on June 23rd, 2015, I mailed the original and copies of this objection, including all attachments, to the following persons:

1. Original to: Clerk of the District Court
Coeur d'Alene-Spokane River Basin Adjudication
253 Third Avenue North, PO Box 2707
Twin Falls, ID 83303-2707
2. One copy to the claimant or the attorney for the claimant of the water right at the following address:

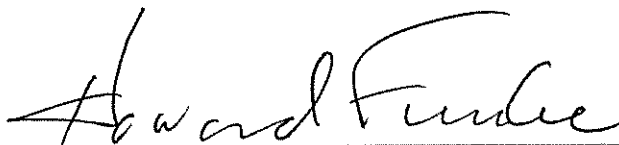
Dennis Powell
2020 Center Street
St. Maries, ID 83861

3. Copies to:

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

Chief, Natural Resources Division
Office of Attorney General
PO Box 83720
Boise, ID 83720-0010

United States Department of Justice
Environmental & Nat'l Resources Div.
550 W. Fort Street, MSC 033
Boise, ID 83724

A handwritten signature in dark ink, appearing to read "Howard Funder", written over a horizontal line.

Signature of Objector or attorney
mailing on Objector's behalf

EXHIBIT A
LIST OF SUBCASE NOS.

Box 2, 5: Source and Point of Diversion

91-4015
91-4113
91-7003
91-7026
91-7048
91-7102
91-7104
91-7113
91-7120
91-7121
91-7125
91-7131
91-7136
91-7137
91-7140
91-7173
91-7339
91-7471
91-7519
91-7568

Box 4: Priority date

91-4109
91-7218
91-7228
91-7472
91-7474
91-7476
91-7537
91-7584
91-7706
91-7823
91-7824