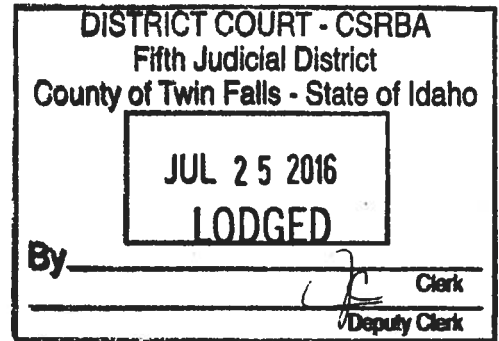


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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In re CSRBA	)	Subcase Nos. 91-7102; 91-07173
	)	
Case No. 49576	)	STATE OF IDAHO'S MEMORANDUM
	)	IN SUPPORT OF MOTION FOR
_____	)	SUMMARY JUDGMENT
	)	
Steve and Deanne Hawks,	)	
	)	
Claimants,	)	
	)	
v.	)	
	)	
Coeur d'Alene Tribe, a federally-recognized	)	
Indian Tribe,	)	
	)	
Objector.	)	
_____	)	

INTRODUCTION

The primary issue to be decided on summary judgment is whether the decree of a
licensed water right is foreclosed when the water users lack permission to maintain diversion and

conveyance structures that allegedly lie over or upon submerged lands. The terms “bed and banks” or “submerged lands” refers to lands beneath the ordinary high water mark of navigable lakes and rivers. *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997). “Under English common law the English Crown held sovereign title to all lands underlying navigable waters [b]ecause title to such land was important to the sovereign's ability to control navigation, fishing, and other commercial activity on rivers and lakes.” *Utah Div. of State Lands v. U.S.*, 482 U.S. 193, 195-96 (1987).

As a general rule, title to submerged lands presumptively vests in states upon their admission as a matter of sovereignty. Acting under such presumption, Idaho managed submerged lands within the Coeur d’Alene Indian Reservation for many years. After adoption of the Lake Protection Act (Idaho Code title 58, chapter 13) in 1974, Idaho issued permits for encroachments on Coeur d’Alene Lake and the slack water portion of the St. Joe River. Two years after Idaho adopted the Lake Protection Act, Congress deferred to state regulation by declaring, in 33 U.S.C. § 59m, that Coeur d’Alene Lake was exempt from 33 U.S.C. § 403, under which the Army Corp of Engineers regulates wharfs, piers, and other structures in navigable waters.

In the late 1990’s however, the United States and the Coeur d’Alene Tribe challenged the State’s ownership of those portions of the beds and banks of Coeur d’Alene Lake and the St Joe River lying within the current boundaries of the Coeur d’Alene Reservation, and the federal district court entered the following judgment:

Title is quieted in favor of the United States, as trustee, and the Coeur d’Alene Tribe, as the beneficially interested party of the trusteeship, to the bed and banks of all of the navigable waters lying within the current boundaries of the Coeur d’Alene Indian Reservation as those boundaries are described by the Act of March 3, 1891, 26 Stat. at 1027 and the Act of August 15, 1894, 28 Stat. at 322, which includes portions of Lake Coeur d’Alene and the St. Joe River, but which exclude

those bed and banks of the navigable waters claimed by Idaho to be within Heyburn State Park.

Judgment and Decree, *United States v. Idaho*, Case No. CIV-94-0327 (D. Idaho 1998). The district court's judgment was affirmed in *Idaho v. United States*, 533 U.S. 262 (2001).

As a result of the decision in *United States v. Idaho*, the "United States, as trustee, and the Coeur d'Alene Tribe of Idaho, as the beneficially interested party of the trusteeship, 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." 95 F. Supp. 2d at 1117. In exercise of the such right, the Tribe has adopted a program requiring land owners along the Lake and River to obtain permits for physical encroachments over or upon submerged lands.¹

The Tribe's objections in these subcases, 91-7102 and 91-7173, assert that the water users' water pumps or water lines extend over submerged lands owned by the Tribe, thus requiring an encroachment permit.² The objections assert that the points of diversion should be located as to not encroach upon tribal submerged lands, and assert that "this water right should not exist" unless authorization for the alleged encroachment is obtained from the Tribe.

The State of Idaho filed responses in these subcases to clarify that the Coeur d'Alene Tribe's ownership of submerged lands underlying the St. Joe River and Coeur d'Alene Lake

¹ See generally Coeur d'Alene Tribe, Encroachment Standards (2016), available online at http://www.cdatribe-nsn.gov/LakeMngmt/encroach_docs/EncrStandAmend_2_11_16.pdf (last visited May 18, 2016).

² The State defines "ordinary high water mark" to mean "the line that water impresses on the soil by covering it for sufficient periods to deprive the soil of its vegetation and destroy its value for agricultural purposes." Idaho Code § 58-1202. The Idaho Supreme Court has held that the because the Post Falls Dam "has maintained the level of Lake Coeur d'Alene at 2128 feet above [mean sea level] throughout the summer and into early fall of every year since 1907," there is a "presumption [that] the State was holding the property [below that level] in trust." In *Idaho Forest Industries, Inc. v. Hayden Lake Watershed Improvement District*, 135 Idaho 316, 319, 17 P.3d 260, 263 (2000). The Court did not address whether such presumption would apply in determining the limits of submerged land ownership within the Reservation, and the State has not adopted any position regarding the location of the diversion structures in these subcases relative to the ordinary high water mark.

within the Coeur d'Alene Indian Reservation does not alter the State's authority to regulate the diversion and use of water from those same water sources.

While the State understands that there is a factual dispute as to whether the points of diversion are located on submerged lands owned by the Tribe pursuant to the judgment in *United States v. Idaho*, it is not necessary for the Court to determine the extent of tribal ownership or whether an encroachment on tribal lands exists. Regardless of whether the Tribe's permission is required for the diversion and conveyance structures at issue here, the State retains authority to determine and decree the right to divert water, independent of any alleged encroachment issues. This is so for several reasons. First, the Ninth Circuit has affirmed the general rule that "because water per se lies within the exterior boundaries of an Indian reservation does not necessarily negate a state's interest in overseeing its usage along with the other in-state water systems." *U.S. v. Anderson*, 736 F.2d 1358, 1366 (9th Cir. 1984). Thus, the State may regulate the use of water "by non-Indians on non-tribal, i.e., fee, land." *Id.* at 1365. This is particularly true where the water source at issue "transcend[s] the exterior boundaries of Indian country." *Id.* at 1366.³ Such test is easily met here. The Court may take judicial notice of the readily ascertainable fact that the majority of both the St. Joe River and Coeur d'Alene Lake lie outside the exterior boundaries of the Reservation.

Second, the State's authority to regulate the distribution of water is not derived from ownership of the underlying submerged lands; rather, it is "a legitimate exercise of the police power of the state." *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 73 F.2d 555, 567 (9th Cir. 1934), *aff'd*, 295 U.S. 142 (1935). Such police powers enable States to regulate the

³ State authority over non-reserved water within federal reservations has been recognized by the Supreme Court, which has held that within national forest reservations the United States must "acquire water in the same manner as any other public or private appropriator" where such water "is only valuable for a secondary use of the reservation." *United States v. New Mexico*, 438 U.S. 696, 702 (1978).

distribution of water in order to “accelerate the development of the state, to promote peace and good order, to minimize the danger of vexatious controversies wherein the shovel was often used as an instrument of warfare, and to provide a convenient way for the adjustment and recording of the rights of the various claimants to the use of the water of a stream or other source of supply at a reasonable expense.” *Pac. Live Stock Co. v. Lewis*, 241 U.S. 440, 448 (1916) (quoting *In re Willow Creek*, 144 P. 505 (Or. 1914)).

In short, the State regulates water rights under its police powers, independent of the ownership of lands over which waters flow. Thus, State regulation of water rights is unaffected by the court decision vesting the Tribe with ownership of the beds and banks of navigable waters within the current boundaries of the Reservation. See *Idaho v. United States*, 533 U.S. 262 (2001).

Further, the Tribe’s objections do not contest the State’s authority to regulate the diversion and use of water from the St. Joe River and Coeur d’Alene Lake by non-members living within the Reservation. Rather the Tribe’s assertion that the water rights “should not exist” appears to be based on the lack of tribal permission for the physical diversion structures (primarily pumps and/or pipes) alleged to encroach over or upon submerged lands owned by the United States for the benefit of the Tribe. The Tribe asserts that a water right claim must be denied if the diversion or conveyance structure is encroaching on land not owned by the claimant without the permission of the land owner. For the reasons set forth herein, the Tribe’s objections, as a matter of law, do not provide a sufficient basis for denial of the claimed water rights. The State asserts that the legal and factual issues regarding the Tribe’s authority to regulate encroachments within the Coeur d’Alene Reservation need not, and cannot, be resolved by this Court, because permission to use property necessary to divert and convey the water to the

place of use is not an element of the water right: thus, the Tribe's grant or denial of permission to maintain a diversion device over or upon submerged lands does not determine whether a water right decree should be issued to the claimants in these subcases.

ARGUMENT

I. THE CSRBA COURT IS A COURT OF LIMITED JURISDICTION, AND CANNOT RESOLVE TRESPASS CLAIMS.

The SRBA District Court is a court of limited subject matter jurisdiction. The SRBA court "is, in effect, a separate division of the district court and exercises the unique jurisdiction given it by the legislature." *Walker v. Big Lost River Irrigation Dist.*, 124 Idaho 78, 81, 856 P.2d 868, 871 (1993). "That jurisdiction requires that the district court undertake 'a comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water'" in the basin being adjudicated. *Idaho Conservation League, Inc. v. State*, 128 Idaho 155, 156, 911 P.2d 748, 749 (1995) (quoting I.C. § 42-1406A (uncodified 1994)). Ancillary issues that are "not an element of a water right used to determine the priority of that right in relation to the competing claims of other water right claimants" cannot be considered by the Court. *Id.* at 157. For example, while "proprietary rights to use water" are properly before the Court, the "state's ownership of water," and the legal obligations implied by such ownership, cannot be determined in an adjudication. *Id.* at 156.

In short, the limited purpose of the CSRBA is to resolve competing claims to the use of water, not disputes between individual water users and the owners of land over which water passes on its way to the place of use. For the reasons stated herein, the State submits that the Tribe's objections regarding the need for encroachment permits are disputes that do not "determine the priority of [the water right] in relation to the competing claims of other water

right claimants,” *id.* at 157, and thus such objections are beyond the jurisdiction of the CSRBA Court.

A By statute, the CSRBA Court may only determine the nature, extent and priority of water rights.

The Snake River Basin Adjudication district court is vested with “special jurisdiction” to determine “the nature, extent and priority of the rights of users of surface and ground water” in North Idaho. Idaho Code § 42-1406B. The meaning of “nature, extent and priority” is explained further in Idaho Code § 42-1412(6), which provides that when water rights claims are the subject of an objection, the district court “shall enter a partial decree determining the nature and extent of the water right which is the subject of the objection or other matters which are the subject of the objection.” The statute then goes on to provide that the “decree shall contain or incorporate a statement of each element of a water right as stated in subsections (2) and (3) of section 42-1411, Idaho Code, as applicable.” The elements that the Court may decree are as follows:

- (a) the name and address of the claimant;
- (b) the source of water;
- (c) the quantity of water used;
- (d) the date of priority;
- (e) the legal description of the point(s) of diversion;
- (f) the purpose of use;
- (g) the period of the year when water is used for such purposes;
- (h) a legal description of the place of use;
- (i) conditions on the exercise of any water right included in any decree, license, or approved transfer application; and
- (j) such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director.

Idaho Code § 42-1411. As stated in subsection (2) of § 42-1411, the above-listed elements are those the Legislature has determined are appropriate to “define and administer the water rights acquired under state law.” Idaho Code § 42-1411(2). In addition, decrees may include references to “general provisions necessary for the definition of the rights or for the efficient

administration of the water rights.” Idaho Code § 42-1412(6). Notably missing from the list of elements the Court may decree is the determination of rights-of-way necessary to divert water and convey it to the place of use. Such omission is not oversight: rather, it recognizes that property rights necessary to divert and convey water to the place of use are a private matter between the water user and the affected property owner, and that resolution of such matter is not necessary to the determination of the priority of the water right in relation to competing claims.

2. Proof of property rights enabling conveyance of the water to the place of use is not an element that can be decreed because such information is not necessary to define or administer the water right.

Notwithstanding the fact that Idaho Code § 42-1411 does not require claimants to prove permission for placement of diversion and conveyance structures, the Tribe asserts the Court should deny water rights where the diversion and conveyance structures are alleged to trespass upon the property of someone other than the water right claimant. The Tribe’s objection appears to be based on the well-established maxim that “a valid water right cannot be initiated by trespass onto another’s property.” *Branson v. Miracle*, 107 Idaho 221, 226, 687 P.2d 1348, 1353 (1984).

The Tribe’s objection, however, fails to recognize the distinction between the facts necessary to initiate a water right, and the facts necessary to define an established water right. As will become evident, while permission to convey water from the point of diversion to the place of use is necessary to the initial establishment of a water right, the absence of such permission, once a water right is permitted, licensed, or otherwise established, is not essential to the existence, definition, or administration of the water right. And, conditioning a water right upon continuous maintenance of permission needed for diversion and conveyance of water to the place of use essentially, and unlawfully, revises Idaho laws regarding forfeiture of water rights.

a. The trespass prohibition is only relevant to the initial establishment of a water right.

It is a well-worn maxim of Idaho law that a water right “initiated by trespass on private property is invalid.” *Lemmon v. Hardy*, 95 Idaho 778, 780, 519 P.2d 1168, 1170 (1974). The maxim arises from the fact that a water right permit must be made “in good faith,” and not for “delay or speculative purposes.” Idaho Code § 42-203A(5). To avoid speculation, water right permits can be issued only upon the condition that “actual construction work and application of the water to full beneficial use shall be complete within a period of five (5) years.” Idaho Code § 42-204. If the water permit applicant lacks any legal right to access and use the land designated in the permit as the point of diversion or place of use, then “no valid water right could be developed on it [and] it can be concluded that the application was filed for speculative purposes, not for development of a water right.” *Lemmon*, 905 Idaho at 780, 519 P.2d at 1170.

Likewise, to avoid speculation, IDWR’s Water Appropriation Rules define the “good faith” requirement of Idaho Code § 42-203A to require a showing that:

- i. The applicant shall have legal access to the property necessary to construct and operate the proposed project, [or] has the authority to exercise eminent domain authority to obtain such access . . . ; and
- ii. The applicant is in the process of obtaining other permits needed to construct and operate the project; and
- iii. There are no obvious impediments that prevent the successful completion of the project.”

IDAPA 37.03.08.045.01.c.

In short, the maxim that a water right cannot be initiated in trespass establishes that the State’s grant of a water right permit does not absolve the applicant from independently obtaining all rights-of-way necessary to put the water right to beneficial use:

The fact that a party has a water right gives him no right to enter the lands of others for the purpose of constructing ditches and canals across them, except over public lands of the United States. He must obtain that easement and right of way either by purchase or condemnation. Ownership of a ditch and the water right for

waters to flow through the ditch may, and often do, exist in different parties. The existence of the one right does not necessarily imply the existence of the other right in the same party.

Swank v. Sweetwater Irrigation & Power Co., 15 Idaho 353, 360, 98 P. 297, 299 (1908). Put another way, the maxim that water rights cannot be initiated in trespass recognizes that the right to put water to beneficial use and the right-of-way necessary to physically convey the water to the place of use are two independent and separate rights: the grant of one right does not imply the grant of the other, and the loss of either right does not imply the loss of the other. *See Simonson v. Moon*, 72 Idaho 39, 47, 237 P.2d 93, 98 (1951) (“in this state a ditch right for the conveyance of water is recognized as a property right apart from and independent of the right to the use of the water conveyed therein. Each may be owned, held and conveyed independently of the other”); *see also Ada Cty. Farmers' Irr. Co. v. Farmers' Canal Co.*, 5 Idaho 793, 799, 51 P. 990, 992 (1898) (“We are of the opinion that possessory rights to ditches and to the use of water may each have an existence independent of the other. A ditch may be conveyed, reserving the water right, or the water right may be conveyed, reserving the ditch. . . . we do not think the loss of the right to divert water under a specific location necessarily forfeits the right to an irrigating canal or right of way for one”).

Because water rights are independent of rights-of-way for diversion and conveyance structures, “the permit issued by the state engineer confers no right to enter upon private land for the purpose of initiating an appropriation of water.” *Marshall v. Niagara Springs Orchard Co.*, 22 Idaho 144, 157, 125 P. 208, 213 (1912). In initiating a water right, it is incumbent upon the applicant to demonstrate independent acquisition of all property rights or permissions necessary to convey the water to the place of use.

A different calculus applies when it is alleged, after issuance of a water right license, that a right-of-way necessary for a point of diversion or conveyance structure has been withdrawn or

otherwise lost. Once a water right is established, loss of a right-of-way necessary to convey water to the place of use does not automatically result in loss of the water right, because the water user may retain the water right pending acquisition of a new-right-of way, or pending transfer to a point of diversion that does not require use of another's property. In either case, loss of a right-of-way necessary for diversion could not result in loss of a water right until beneficial use of the water had ceased, at a minimum, for the five-year statutory period necessary to establish a forfeiture. Idaho Code § 42-222.

For example, in the case of *Branson v. Miracle*, 107 Idaho 221, 687 P.2d 1348 (1984), Miracle possessed the right to use water emanating from a mining tunnel owned by Branson, and did so between 1943 and 1972, with the consent or acquiescence of Branson, by means of a $\frac{3}{4}$ inch pipe laid over Branson's property. *Id.* at 226, 687 P.2d at 1353. The court held that the continuous diversion of water, and its conveyance, with the then-consent of Branson over Branson's property, established a water right "good against the Bransons and all other persons." *Id.* at 227, 687 P.2d at 1354.

But, the Court held that Miracle's possession of the water right did not establish whether Miracle currently had a right of ingress and egress over Branson's property to maintain his flow of water, which had ceased in 1972 when the pipe was filled with silt. *Id.* at 226, 687 P.2d at 1353. Because the trial court had failed to make factual findings regarding the existence of a right of ingress and egress, the Supreme Court remanded the matter to the trial court for additional proceedings, and noted that if necessary, Miracle could obtain a right of entry through eminent domain. *Id.* at 228, 687 P.2d at 1355.

The *Branson* case establishes that the decree of a water right is not dependent on the continued existence of a right-of-way for the diversion and conveyance structures: the court

upheld the decree of the water right even though the existence of the right-of-way necessary to maintain the flow of water was at issue. Other Idaho decisions likewise emphasize that once a water right is established, the existence of the water right is independent of any right-of-way used to convey the water to the place of use. A relevant example is *Morgan v. Udy*, 58 Idaho 670, 79 P.2d 295 (1938), in which the Court enforced a prior decree that established a water right but left unresolved a dispute over the water user's permission to use the ditch that conveyed the water. The Court described the guiding laws as follows:

In this state a ditch right and water right may be independent, separate, and apart. Therefore, while respondent's legal right of conveyance and means of conveyance could have been litigated, it was not so necessary to the determination of the priorities that in the legal sense it *should* have been litigated. Otherwise one with only a permissive or rented use to a right of way for the conveyance of his water could never acquire a priority, which would be contrary to his constitutional rights if he actually diverted and applied it to a beneficial use with intent to appropriate as against other concededly subsequent appropriators In other words, in this state one may have a valid appropriation though only a temporary and revocable way of conveyance for his water; diversion and application to a beneficial use being the two essentials.

Id. at 680, 79 P.2d at 298-99 (citations omitted). In short, the holder of a valid water right does not lose such right merely because the owner of land over which the water is conveyed withdraws permission for such conveyance. If the rule was otherwise, a water user's priority date would be at the mercy of such land owner: the land owner could cause a loss of priority simply by withdrawing permission for the conveyance. Fortunately, the law does not allow water right priorities to be so held hostage.

There is no reason to adopt a different rule in this case. Even if the Tribe were correct in alleging that the diversion and conveyance structures overlay tribal lands without permission, such fact does not require that the water right be disallowed. A license has been issued, it is undisputed that the water user is currently diverting water pursuant to the license and putting it to beneficial use, and all elements necessary to define and administer the water rights are present in

the recommended claim. The issue of whether a valid right-of-way exists for the diversion and conveyance structure is adequately addressed by the standard remark noting that “this right does not grant any right of way or easement across the land of another.” Such remark is already included in License 91-7173. Entry of a decree with such a remark: (1) avoids any implication that the Court’s issuance of a decree resolves any pending encroachment allegations, (2) fully preserves the Tribe’s right to pursue its encroachment allegations in a court empowered to hear such claims, (3) fully preserves the water user’s defenses and preserves the water user’s priority date pending resolution of any disputes regarding the alleged encroachment, and (4) preserves the State’s authority over the determination of water rights and the distribution of water among state water users.

Moreover, the Tribe’s attempt to have this Court condition the water right upon acquisition and continued maintenance of a tribal encroachment permit would essentially, and unlawfully, rewrite Idaho laws regarding the forfeiture of water rights. Even assuming, for purposes of argument, that the Tribe were to succeed in obtaining a court order requiring removal of the diversion structure, this Court could not order forfeiture of the water rights until such time as the water had not been put to beneficial use for a period of five years. Idaho Code § 42-222(2). Given the provisions of § 42-222(2), the Court cannot decree the immediate forfeiture of the water right upon loss of permission for the alleged encroachment.

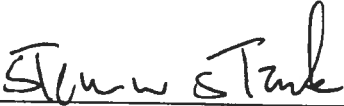
CONCLUSION

For the reasons stated herein, the Court can resolve the Tribe’s objections, and preserve the rights of the State, the Tribe, and the water users, by decreeing the rights as recommended, but with the insertion of a remark noting that the water right “does not grant any right-of-way or easement across the land of another.”

Respectfully submitted this 22d day of July, 2016.

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CERTIFICATE OF SERVICE

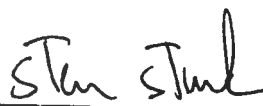
I certify that on the 22d day of July, 2016 I caused to be served a true and correct copy of the foregoing STATE OF IDAHO'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT upon the following parties by the method listed below:

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