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DEPARTMENT OF
WATER RESOURCES

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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

Case No. 49576

Subcase Nos. 91-7102; 91-7173

**MEMORANDUM IN SUPPORT OF
CLAIMANTS STEVE AND DEANNE
HAWKS' MOTION FOR SUMMARY
JUDGMENT**

Steve and Deanne Hawks,

Claimants,

vs.

Coeur d'Alene Tribe, a federally-recognized
Indian tribe,

Objector.

Claimants Steve and Deanne Hawks, through undersigned counsel of record, hereby file this Memorandum in Support of Claimants Steve and Deanne Hawks' Motion for Summary Judgment pursuant to Idaho Rule of Procedure 56(c) and Rule 7(f)(4) of this Court's Administrative Order 1. The Motion and this Memorandum are supported by the Affidavit of Norman M. Semanko filed contemporaneously herewith (the "Semanko Affidavit").

INTRODUCTION AND BACKGROUND

On February 24, 2015, the Idaho Department of Water Resources ("IDWR" or the "Department") issued its Coeur d'Alene Spokane River Basin Adjudication ("CSRBA") Director's Report in Basin 91. Included in this Director's Report are many recommendations for water rights claimed by members of the North Idaho Water Rights Alliance ("NIWRA") on the St. Joe River ("submerged lands claims"), including Claimants Steve and Deanne Hawks' ("Claimants") water right claim nos. 91-7102 and 91-7173.

On June 24, 2015, the Coeur d'Alene Tribe ("Objector" or the "Tribe") objected to various submerged lands claims, including water right claim nos. 91-7102 and 91-7173. Objector's objections to the submerged lands claims are very similar in nature, each one objecting to source, point of diversion, and asserting that the water right should not exist. In support, the objections collectively rely on *Idaho v. United States, et al.*, 533 U.S. 262 (2001), to assert that: (1) the lands underlying Lake Coeur d'Alene and its tributaries are within the current boundaries of the Coeur d'Alene Reservation ("Reservation") and are owned by the United States for the benefit of the Tribe; (2) the Tribe is "entitled to exclusive use, occupancy and right to the quiet enjoyment of the bed and banks of the Coeur d'Alene Lake and St. Joe River lying within the current boundaries" of the Reservation; and (3) Claimants must have authorization to encroach upon tribal submerged lands and no such authorization has been obtained.

Both the State of Idaho and the members of NIWRA filed responses to Objector's objections to the submerged lands claims. Since Objector raised several fundamental, overarching issues of law, the parties and the Court identified Claimants' water right claim nos. 91-7102 and 91-7173 as the two test cases for the submerged lands claims. Now, Claimants seek summary judgment on Objector's objections and ask that these water right claims be decreed according to the Director's Report.

LEGAL STANDARD

The present Motion for Summary Judgment is brought pursuant to Rule 56, Idaho Rules of Civil Procedure. The rule provides that summary judgment is appropriate where the pleadings, depositions, admissions, and affidavits on file show there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.

In addition, summary judgment is appropriate to dismiss a claim when a party fails to submit evidence to establish an essential element of their claim. *Ambrose ex rel. Ambrose v. Buhl Joint Sch. Dist. No. 412*, 126 Idaho 581, 584, 887 P.2d 1088, 1091 (Ct. App. 1994); *Nelson ex rel. Nelson v. City of Rupert*, 128 Idaho 199, 202, 911 P.2d 1111, 1113 (1996). Facts in dispute cease to be material facts when a claimant fails to establish a prima facie case; in such a situation, there can be no genuine issue of material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Garzee v. Barkley*, 121 Idaho 771, 774, 828 P.2d 334, 337 (Ct. App. 1992); *Ambrose ex rel. Ambrose, supra*.

In addition, in the CSRBA Adjudication proceedings, cases are tried without a jury. In such circumstances:

When an action is to be tried without a jury, however, the court is not compelled to draw inferences in favor of the party opposing the motion; rather, the court is “free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts.” [Citations omitted].

Land O’ Lakes, Inc. v. Bray, 138 Idaho 817, 819, 69 P.3d 1078, 1080 (Ct. App. 2003).

Many of the issues raised in Objector’s objections may be resolved as a matter of law and may be properly decided on summary judgment. As is supported by the facts and legal arguments set forth herein, Objector’s objections ignore critical aspects of Idaho law, which demonstrates that the Director’s Report is *prima facie* evidence of water right claims, collateral attack of a license is barred, and a party must establish ownership to initiate a trespass claim.

ARGUMENT

A. The Director’s Report is Prima Facie Evidence of a Water Right and the Burden is On Objector to Show the Director’s Report is Not Accurate.

By themselves, the Department’s recommendations constitute *prima facie* evidence of the nature and extent of the water rights acquired under state law and the unobjected-to portions will be decreed as reported. IDAHO CODE § 42-1411(4). This is because the Department is a legislatively appointed expert to this Court. IDAHO CODE § 42-1401B(1). “Any party filing an objection to any portion of the director’s report shall have the burden of going forward with the evidence to rebut the director’s report as to all issues raised by the objection.” *State v. Hagerman Water Right Owners (in Re SRBA Case No. 39576)*, 130 Idaho 736, 742, 947 P.2d 409, 415 (1997) (quoting IDAHO CODE § 42-1411(5)).

Idaho statute makes it clear that the Director’s Report for water right claim nos. 91-7102 and 91-7173 constitute *prima facie* evidence of the nature and extent of those water rights. If no objection was made, those two claims would be decreed exactly as reported in the

Director's Report. Therefore, the burden is firmly on Objector to adduce evidence as to why the source, point of diversion, and existence of the water right are not accurate. Objector does not dispute that the source and diversion exist as claimed and reported. Objector just wants the source and diversion moved somewhere else. Since Objectors have provided no evidence that rebuts the presumption afforded to the Director's Report, Claimants should be granted summary judgment on Objector's objections and Claimants' water rights should be decreed as reported.

B. Objector Cannot Collaterally Attack a License.

According to well-established precedent, this Court has held:

If a party is aggrieved by any aspect of a license, that party's remedy is to seek an administrative review and then, if necessary, a judicial review of the license. I.C. §§ 42-1701(A) and 67-5270; *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946. If the license is not appealed when issued, any attempt to appeal the license in a subsequent judicial proceeding, like the SRBA, would constitute a collateral attack on the license. *See e.g., Mosman v. Mathison*, 90 Idaho 76, 408 P.2d 450 (1965); *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984).

Supplemental Findings of Fact and Conclusions of Law (Facility Volume) (Subcases 36-02048 *et al.*) (July 31, 1998) at 11-12 (Special Master held that Claimant was bound by the licenses for the rights at issue because Claimant did not appeal the remarks during the licensing process).

A license issued by IDWR shall be prima facie evidence as to such right and "any attempt to redefine a license would be 'tantamount' to altering a real property right." *Id.* at 11; IDAHO CODE § 42-220. Therefore, if a licensee failed to appeal the condition of a license when the license was issued, then the licensee has no judicial remedy. Order Granting Motion to Alter or Amend; Amended Findings of Fact and Conclusions of Law and Recommendation (Subcase 36-08099) (August 20, 1999) at 3.

Objector's objection to water right claim nos. 91-7102 and 91-7173 is untimely because it is a collateral challenge to the Director's decision to issue License Nos. 91-7102 and 91-7173. Objector had the opportunity to protest License No. 91-7102 at the time the application for permit was filed and published, leading to the issuance of the license in 1990. *See Semanko Aff.* ¶ 2, Ex. A. In addition, Objector also had the opportunity to protest License No. 91-7173 prior to its issuance in 2008. *See Semanko Aff.* ¶ 3, Ex. B. However, Objector failed to do so and therefore waived any challenge to the issuance of the licenses. The CSRBA does not provide a venue to revive lost challenges to licensing decisions. Therefore, Claimants should be granted summary judgment on Objector's objections as collateral attacks on Claimants' licenses.

C. Objector Cannot Prove Ownership of the Submerged Lands It Claims and, Therefore, Cannot Claim Trespass by Claimants.

The basis of Objector's objection to the submerged lands claims in this case is that Claimants are trespassing on Objector's land with the diversion and use of their licensed water. However, Objector cannot prove ownership of the submerged lands it claims and, therefore, cannot claim trespass by Claimants.

Trespass may be established under Idaho Code Section 6-202 by proving that Claimants, by using the water lawfully allotted to them, encroach on Objector's land. Trespass may be established under the common law by proving "(1) an invasion; (2) which interferes with the right of exclusive possession of the land, and (3) which is a direct result of some act committed by [Claimants]." *Mock v. Potlatch Corp.*, 786 F. Supp. 1545, 1548 (D. Idaho 1992).

The element of ownership to prove trespass has not been met in this case because Objector cannot prove that they own the submerged lands they claim Claimants are allegedly encroaching upon. The location of the lots where Claimants divert and use their licensed water

are part of a subdivision called “Sylvia’s Haven.” Sylvia’s Haven was part of a larger area originally called “Castillo’s Tracts,” which was first subdivided in 1914. *See Semanko Aff.* ¶ 4, Ex. C-D. Cy Chase purchased Lots 6-9 of Castillo’s Tracts through two transactions in 1964 and one other transaction in 1967. *See Semanko Aff.* ¶ 5-6, Ex. E-G. The deeds that transferred the Lots 6-9 to Cy Chase include all of the land now known as Sylvia’s Haven. Cy Chase was the developer for Sylvia’s Haven, which included 13 Blocks and plans for a moorage lagoon over Block 2. *See Semanko Aff.* ¶ 7, Ex. H. The moorage lagoon was built in the 1960s and provided a private access point for owners of land in Sylvia’s Haven.

For water right claim no. 91-7102, the lands that are licensed and claimed for point of diversion and place of use were and are within the private land purchased and developed by Cy Chase, designated by Block 6 and the original Block 2. *See Semanko Aff.* ¶ 8, Ex. I. Before the moorage lagoon was built over Block 2, the location for the point of diversion was on dry land and clearly within the land described by the deed transferred to Cy Chase. *See Semanko Aff.* ¶ 5-6, Ex. E-G. Just because the moorage lagoon was built and water filled the area does not mean that Objector suddenly owned the land. Both the point of diversion and place of use are still part of the private land that is now known as Sylvia’s Haven and specifically part of the sections owned by Claimants.

For water right claim no. 91-7173, the lands that are licensed and claimed for place of use are clearly within the private land purchased and developed by Cy Chase, designated as Block 13. *See Semanko Aff.* ¶ 8, Ex. I. Furthermore, although the lands that are licensed and claimed for point of diversion are in the St. Joe River, they are above the submerged lands validly claimed by Objector under *Idaho v. United States, et al.*, 533 U.S. 262 (2001). The U.S. Supreme Court and the Ninth Circuit Court of Appeals specifically recognized that the United

States reserved, or set aside, the submerged lands that existed prior to Statehood in 1890. *See generally Idaho v. United States*, 533 U.S. 262 (2001), and *United States v. Idaho*, 210 F.3d 1067 (9th Cir. 2000) (upholding the finding that the United States reserved 1873 submerged lands for the Tribe). It is these submerged lands within the reservation—and only these submerged lands—that are owned by the United States. The Ninth Circuit specifically stated as follows:

In construing the parties' pleadings, we bear in mind that the current physical situation in and around [Heyburn State] Park differs from the situation that existed in 1873, at the time of the executive reservation, and in 1908 and 1911, the years, respectively, that the Park was authorized and conveyed to the State. Due to the construction of [Post Falls] dam, three small lakes have combined with the [Coeur d'Alene] Lake into one large body of water. We read the United States' complaint in light of the physical situation as it existed prior to the construction of the dam.

United States, 210 F.3d at 1079, n. 18.

It is well known that additional lands within the reservation boundary became submerged only after the construction of one or more dams, culminating with the construction of Post Falls Dam in 1907. *In re Sanders Beach*, 143 Idaho 443, 147 P.3d 75 (2006); *Erickson v. State*, 132 Idaho 208, 970 P.2d 1 (1998); *Deffenbaugh v. Wash. Water Power Co.*, 24 Idaho 514, 135 P. 247 (1913); *Petajaniemi v. Wash. Water Power Co.*, 22 Idaho 20, 124 P. 783 (1912); *Wash. Water Power Co. v. Waters*, 19 Idaho 595, 115 P. 682 (1911). These additional submerged lands are beyond those recognized in *Idaho v. United States*. The United States only reserved those submerged lands that existed prior to Statehood. They did not—could not—reserve lands that would not become submerged until after the dams were built. Therefore, both the point of diversion and place of use are still part of the private land that is now known as Sylvia's Haven and specifically part of the sections owned by Claimants.

Moreover, the Idaho Supreme Court has consistently held “that a water right cannot be initiated in trespass upon private lands.” *Jones v. McIntire*, 60 Idaho 338, 91 P.2d 373 at 376 (1939). It is telling that the issue of trespass was not an issue in the licensing of these rights or during the drafting of the Director’s Report. In addition, the license for no. 91-7173 even states on its face that “[t]his right does not grant any right-of-way or easement across the land of another.” *See Semanko Aff.* ¶ 3, Ex. B. Since the licenses for both rights have already been issued, the alleged loss of ownership or right-of-way over the land described as the point of diversion cannot result in the loss of the water right. Therefore, Claimants should be granted summary judgement on Objector’s objections because there is no valid claim of trespass.

D. Even If Objector Could Prove Ownership of Submerged Lands, Objector is Precluded from Bringing a Trespass Claim Based on the Doctrines of Estoppel, Waiver, and Laches.

Even if Objector could prove ownership of the submerged lands, Objector is precluded from bringing a trespass claim based on the doctrines of estoppel, waiver, and laches. Estoppel is a “bar that prevents one from asserting a claim or right that contradicts what one has said or done before.” *BLACK’S LAW DICTIONARY* 629 (9th ed. 2009).

Quasi-estoppel is essentially a last-gasp theory under which a defendant who can point to no specific detrimental reliance due to plaintiffs’ conduct may still assert that plaintiffs are estopped from asserting allegedly contrary positions where it would be unconscionable for them to do so...The doctrine applies where it would be unconscionable to allow a party to maintain a position inconsistent with one in which he acquiesced or of which he accepted a benefit.

Schoonover v. Bonner Cnty., 113 Idaho 916, 919, 750 P.2d 95, 98 (1988). Waiver is the “voluntary intentional relinquishment of a known right or advantage” and the doctrine of laches

denies equitable relief to one who has reasonably delayed pursuing an action to the prejudice or detriment of an adverse party. *Id.* at 919-920, 98-99.

Objectors failed to bring any trespass claims against any Claimants until the commencement of the CSRBA, even though Claimants have been obtaining and using licenses for water since the 1990s and earlier. To allow Objectors to benefit from the current position they are just now, years after the licensing of these water right claims, asserting in the CSRBA for the first time is inequitable. Objectors voluntarily and intentionally acquiesced to Claimants' use of water for years and delayed pursuing an action until Claimants were forced to participate in the CSRBA. This prejudices Claimants and puts Objector in an unfair advantage. Thus, the doctrines of estoppel, waiver, and laches bar Objector's claim of trespass and Claimants should be granted summary judgment on Objector's objections.

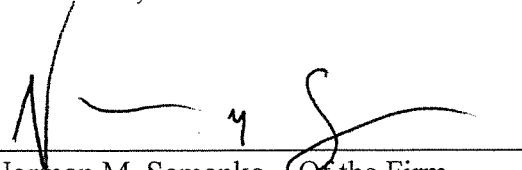
CONCLUSION

For the reasons stated above, Claimants Steve and Deanne Hawks are entitled to judgment as a matter of law on Objector's objections and Claimants' motion for summary judgment should be granted in full.

DATED this 26th day of July, 2016.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By



Norman M. Semanko - Of the Firm
Attorneys for Claimants
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of July, 2016, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF CLAIMANTS STEVE AND DEANNE HAWKS' MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

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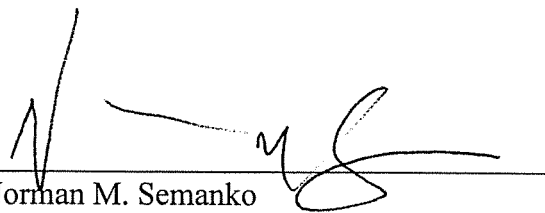
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