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DEPT. OF WATER RESOURCES

Counsel for the Coeur d'Alene Tribe

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 No.: 91-7102
	)	
Case No. 49576	)	
	)	
_____	)	
Steve and Deanne Hawks,	)	
	)	
Claimant(s),	)	OBJECTOR'S MEMORANDUM IN
	)	SUPPORT OF ITS MOTION FOR
	)	SUMMARY JUDGMENT
v.	)	
	)	
Coeur d'Alene Tribe, a federally-recognized	)	
Indian Tribe,	)	
	)	
Objector.	)	
_____	)	

COMES NOW, Objector, the Coeur d'Alene Tribe (hereinafter referred to as "Tribe" and/or "Objector"), and hereby offers the Court this memorandum of law in support of its motion for summary judgment. As noted in the motion, this memorandum and accompanying affidavit of counsel are expressly incorporated therein.

MEMORANDUM IN SUPPORT
 OF MOTION FOR SUMMARY
 JUDGMENT - 1

FACTUAL BACKGROUND

On November 19, 1912, the United States of America issued a patent for government lot 7, Sec. 7, Township. 46 north, Range 2 west, Boise Meridian. Aff. of Counsel, Ex. 10. Prior to the issuance of the patent, it is undisputed that the United States of America owned the property in question. It is undisputed that the ordinary high water mark (OHWM) in 1912 was 2128 feet. *Id.*, Ex. 1, p. 5 (RFA 6) (“...Claimants admit that in *City of Coeur d’Alene v. Mackin (In re Ownership of Sanders Beach)*, the court stated the following: “[t]he current OHWM of the Lake is 2128 feet” and “the OHWM of Lake Coeur d’Alene has been 2128 feet since 1907.” 143 Idaho 443, 447, 147 P.3d 75, 79 (2006) (citing *Erickson v. State*, 132 Idaho 208, 211, 970 P.2d 1, 4 (1998))”). Because the St. Joe River feeds into Coeur d’Alene Lake, the OHWM of the St. Joe River, likewise, could not have been lower than 2128 feet since 1907.¹

Claimants base water right claim No. 91-7102 upon a permit issued on October 6, 1988. Aff. of Counsel, Ex. 6 (Ex. 7 to Deposition of S. Hawks, dated May 2, 2016). The permit stated, *inter alia*, “[t]he issuance of this permit in no way grants any right-of-way or easement across the land of another.” *Id.*

On November 30, 1988, the Idaho Department of Lands sent Mr. Hawks a letter notifying him that an encroachment permit would be required for the “pump and waterline” for claim No. 91-7102 due to the fact that the “St. Joe River is a navigable river.” *Id.* Ex. 9. Neither the State nor Claimants have been able to produce a copy of any alleged encroachment permit issued by the State of Idaho for Claimants’ “pump and waterline” for claim No. 91-7102.

¹ Pursuant to I.R.E. 201, the Tribe would ask the Court to take judicial notice of this fact. *See also In re Ownership of Sanders Beach*, 143 Idaho 443, 447 (2006) (“The courts will take judicial notice of the fact that water seeks its level; and if a witness should testify that it stood up in hillocks or piles, like stone or earth, a court would not be expected to believe it.”).

A water right license was issued by the Idaho Department of Water Resources (“IDWR”) on July 20, 1990. *Id.*, Ex. 5 (Ex. 10 to Deposition of S. Hawks, dated May 2, 2016). The source of water for both the permit and license is listed as the St. Joe River. *Id.* Likewise, it is undisputed and admitted that the St. Joe River is a *natural* water source. *Id.*, Ex. 2, p. 8 (RFA 34). The location of the point of diversion (“POD”) is noted on the permit as [Government] Lot 7, Sec. 7, Township 46N, Range 2W, Benewah County. *Id.*, Ex. 5 (Ex. 10 to Deposition of S. Hawks). It is undisputed the Director’s Report places the POD on Benewah Co. tax parcel No. RP00530020061A. *Id.*; *see also* Aff. Counsel, Ex. 2, pp. 11-12 (Interrog. No. 15). Claimants never objected to the license for claim No. 91-7102. *Id.*, Ex. 4, p. 3 (RFA 37).

In 1998, title to the bed and banks of all of the navigable waters lying within the current boundaries of the Coeur d’Alene Indian Reservation was conclusively quieted in favor of the United States, as trustee, and the Tribe as beneficiary of the trusteeship. *United States and Coeur d’Alene Tribe v. Idaho*, 95 F.Supp.2d 1094 (D.Idaho 1998), *aff’d* *United States v. Idaho*, 210 F.3d 1067 (9th Cir. 2000), *aff’d* *Idaho v. United States*, 533 U.S. 262 (2001) (“*Idaho II*”); *see also* Aff. of Counsel, Ex. 7 (*Judgment & Decree* from *United States v. Idaho* 95 F.Supp.2d 1094 (D.Idaho 1998)).² The ruling quieting title was affirmed by the Supreme Court of the United States. *Id.* The only exception is the bed and banks of navigable waters within Heyburn State Park. *Id.* The property at Claimants’ POD is not excepted out of the *Judgment & Decree*. *Id.*

The same case which determined title also granted the United States and Tribe the exclusive use, occupancy and right to the quiet enjoyment of those same beds and banks. *Id.*; *see*

² Pursuant to I.R.E. 201(d), the Tribe asks the Court to take judicial notice of the fact, content, and substance of the *Judgment & Decree* in the federal case CIV-94-0328-N-EJL, entered in the United States District Court for the District of Idaho, signed by Hon. Edward J. Lodge on August 14, 1998. A true, accurate, and correct copy of the *Judgment & Decree* is attached to the supporting affidavit of Counsel as Exhibit 7 thereto.

also Aff of Counsel, Ex. 8 (RFA 22 and RFA 23) In addition, the state of Idaho is permanently enjoined from asserting any right, title, or otherwise interest in or to the bed and banks of all the navigable waters lying within the current boundaries of the Tribe's reservation. *Id.*

Claimants allege either they, or the State, own the property at their POD. Aff. Counsel, Ex. 1, p. 13 (Interrog. 8). Despite their bare allegation of ownership, Claimants admit the source of water for water right claim No. 91-7102 is the St. Joe River (*Id.*, Ex. 2, p. 3 (RFA 20)); that the waters at the POD for claim No. 91-7102 are navigable (*Id.*, Ex. 1, p. 6 (RFA 8)); and that the POD is located within the current boundaries of the Tribe's reservation. *Id.*, Ex. 1, pp. 4-5 (RFA 5). Claimants admit they never acquired permission from the United States or the Tribe to install the diversionary works at claim No. 91-7102's POD. *Id.*, Ex. 3, pp. 2-3 (RFAs 10, 11). Claimants admit that they "did not have a permit from either the United States or the Coeur d'Alene Tribe to encroach upon the submerged lands of the St. Joe River at the time the diversion works were constructed." *Id.*, Ex. 3, p. 2 (RFA 10) (emphasis added). Further, Idaho has admitted that it is "enjoined from asserting ownership of the submerged lands of the St. Joe River lying below the natural ordinary high water mark within the exterior boundaries of the Coeur d'Alene Indian Reservation" *Id.*, Ex. 8, pp. 4-5 (RFA 22 and RFA 23).

On June 16, 2016, Mr. Scott Rasor, PLS, completed a survey of Lot 6, Sylvia's Haven subdivision, in or near St. Maries, Idaho, in relation to the POD for water right claim No. 91-7102. Aff. S. Rasor, Ex. 1. As noted above, Mr. Rasor's investigation confirms that the POD is not within Claimants' deeded property boundaries. *Id.*, ¶ 6.

On July 15, 2016, a *Judgment* was entered in the Coeur d'Alene Tribal Court along with *Findings of Fact and Conclusions of Law* in Tribal Court action CV-DE-2016-0074.³ Aff. of Counsel, Ex. 11. The *Findings of Fact and Conclusions of Law* set forth that, *inter alia*,

FINDINGS OF FACT

...

7. [t]he Tribe's Exhibit Nos. 2 and 3 depict the Defendants' boat garage is located within a side channel lagoon of the St. Joe River and that the boat garage is moored by way of a piling driven into the bed of the river lagoon.

8. The pilings, waterline and boat garage constitute an encroachment as defined by the Coeur d'Alene Tribal Code.

...

15. The Tribe has further sought a finding that the Defendants are trespassing upon Tribally controlled lands and that the Tribe is entitled to remove the encroachments due to a lack of a permit for the encroachments.

CONCLUSIONS OF LAW

...

7. The Court concludes that the Defendants are trespassing upon Tribally-controlled lands and that the Tribe is entitled to an Order of Eviction to remove the encroachments.

...

Id.

³ Such Tribal Court judgment is entitled to full faith and credit under Idaho law. *Sheppard v. Sheppard*, 104 Idaho 1, 7 (1982). To be clear, Mr. and Mrs. Hawks own multiple properties adjacent to the navigable waterways in the same area. The Judgment and Findings of Fact and Conclusions of Law in case No. CV-DE-2016-0074 relate to encroachments for Lot 13. Lot 13 is the place of use for water right claim No. 91-7173. However, the findings and conclusions above address encroachments within the "side channel lagoon" of the St. Joe River. Water right claim No. 91-7102, at issue in this subcase, is adjacent to Lot 6 – on the opposite end of the very same side channel lagoon. The Tribe asserts that Claimants' diversion works at the POD in the lagoon are an encroachment on the Tribe's submerged lands without a permit and therefore in trespass.

Thus, there is no dispute as to material fact, the disposition of this water right should be determined as a matter of law on summary judgment, and Claimants' water right claim No. 91-7102 should be disallowed by this Court.

STANDARD OF REVIEW

Under Idaho Rule of Civil Procedure 56, summary judgment may properly be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c).

In determining whether any issue of material fact exists, this Court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.*, 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996).

However, in any case which will be tried to the court, rather than to a jury, the trial judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment, but instead, can arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 518-20, 650 P.2d 657, 661-62 (1982). Accordingly, this Court can reach the most probable inferences from the undisputed material facts before it in ruling on the Tribe's motion for summary judgment.

ARGUMENT

I. Under Idaho law a water right may not be initiated via trespass.

It is well established that under Idaho law a water right initiated by trespass is void.

Lemmon v. Hardy, 95 Idaho 778 (1974).

In *Lemmon*, the Supreme Court of Idaho cited to the prior Idaho precedent of *Bassett v. Swenson* to note that:

It is quite generally held that a water right initiated by trespass is void. That is to say, one who diverts water and puts it to a beneficial use by aid of a trespass does not, pursuant to such trespass, acquire a water right. Any claim of right thus initiated is void.

Id. at 780 (citing *Bassett v. Swenson*, 51 Idaho 256, 259 (1931)).

a. Federal law controls the disposition under the OHWM of riparian lands within the boundaries of an Indian reservation.

Usually, state law controls disposition of lands underlying the OHWM, however, it is well established that federal law controls the determination of ownership of submerged lands underlying navigable waters within an Indian reservation. *Idaho II*, supra; accord *Montana Power Co. v. Rochester*, 127 F.2d 189 (9th Cir. 1942); *Montana Power Co. v. FPC*, 459 F.2d 863, 865 (D.C. Cir. 1972); *United States v. Pollman*, 364 F.Supp. 995 (D. Mont. 1973); *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982). The Supremacy Clause of the United States Constitution would supplant any Idaho law on the subject. U.S. Const., Art. VI, Cl. 2.

In this case, it is undisputed the property at the POD's location is within the boundaries of the Tribe's reservation. Aff. of Counsel, Ex. 1, pp. 4-5 (RFA 5). Thus, because the property at issue is within the Tribe's reservation, federal law controls.

b. Government lots transferred via patents do not extend below the OHWM.

When a patentee takes title to property riparian to navigable waters, under federal law, the patentee takes title down to the OHWM *at the time the patent was issued*. *Jefferis v. East Omaha Land Co.*, 134 U.S. 178 (1890).

In *Jefferis*, Justice Blatchford wrote for a unanimous Court affirming the decision of the circuit court when he observed that,

[t]he grounds upon which the circuit court proceeded in overruling the demurrer to the bill are stated by in its opinion to be these: ... Where a water line is the boundary of a given lot, no matter how it shifts, remains the boundary, and a deed describing the lot by number or name conveys the land up to such shifting water-line, exactly as it does up to the fixed side lines, as long as the doctrine of accretion applies, the water-line, no matter how much it may shift, if named as the boundary, continues to be the boundary, and a deed of the lot carries all the land up to the water line.

Jefferis, 134 U.S. at 188. At issue in *Jefferis* was whether approximately 40 acres of additional lands which had become upland since the original government survey had inured to the benefit of a patentee.

The original patent had purported to convey 37.24 acres, which was determined as of a survey in 1851. *Id.* at 180. The land was entered by Mr. Edmund Jefferis in 1853. *Id.* The land was described as having its boundary as the meander line of the river. *Id.* Between 1853 and 1888, an additional 40 acres had formed along the boundary of the Missouri River. *Id.* at 181. The Court ruled that the patentee, as opposed to the United States, owned the new property:

The rule is applicable to government lands bounded by the Missouri river as the same are surveyed and platted under the acts of congress; and the patent passed the title of the United States to lot 4, not only as it was at the time of the survey in 1851, *but as it was at the date of the patent in 1855*, so that the United States did not retain any interest in any accretion formed between the survey in 1851 and the date of the patent.

Id. at 195 (emphasis added).

c. Federal law has quieted title in favor of the United States and Tribe to the property at Claimants' point of diversion.

In this case, no one is quibbling about ownership at the place of use. What is at issue is the ownership of property at the POD.

In 1998, through the case of *Idaho II*, title to *all* submerged lands underlying navigable waters lying within the Tribe's reservation, excepting out the submerged lands underlying navigable waters within Heyburn State Park, were definitively quieted in favor of the United States in trust for the Coeur d'Alene Tribe. The case was a quiet title action.⁴

The *Judgment & Decree of Idaho II* very clearly spells out,

[t]itle 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... 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, which waters and submerged lands are not at issue in this litigation;

Aff. Counsel, Ex. 7, p. 2 (emphasis added). It also set forth that,

[t]he United States, as trustee, and the Coeur d'Alene Tribe, as the beneficially interested party of the trusteeship, are entitled to the exclusive use, occupancy and right of quiet enjoyment of the bed and banks of all of the navigable waters lying within the current boundaries of the Coeur d'Alene Indian Reservation... 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, which waters and submerged lands were not at issue in this litigation.

Id. (emphasis added).

The rationale behind the *Judgment & Decree* was that the Executive actions in the late 1800's reflected a clear intent to include submerged lands within the Coeur d'Alene Indian

⁴ Under the law, the doctrine of *res judicata* has special force in regard to quiet title actions. *Aldape v. Akins*, 105 Idaho 254 (Ct. App. 1983); *Farrell v. Brown*, 111 Idaho 1027 (Ct. App. 1986).

Reservation. 95 F.Supp.2d at 1099. Thus, the reservation includes within its borders land under navigable waters. *Id.* The Executive actions reflected an acknowledgement that the Tribe depended on the reservation's waterways for a significant portion of its needs. *Id.* at 1099-1102. Those actions evidenced a plain awareness of the vital importance that the submerged lands and the water resource had to the Tribe. *Id.* at 1102-1106. Congress was on notice of those Executive actions, and thus ratified the retention of the submerged lands demonstrating a "clear" intent to defeat the state of Idaho's title under the equal footing doctrine. *Id.* at 1109-1110. During negotiations of the 1889 agreement, in response to Chief Seltice's statement, "you know we do not understand papers; in taking it that way we will not know the boundaries," General Benjamin Simpson, one of the federal negotiators stated, "You all know where the St. Joseph River is. We do not want any of that." *Id.* at 1113. General Simpson explained, "if we buy this land [the northern end of the 1873 reservation] you still have the St. Joseph River and lower part of the lake and all the meadow and agricultural land along the St. Joseph River." *Id.*

The State of Idaho appeared in *Idaho II* in its sovereign capacity. *See Idaho II*, 533 U.S. 262 (2001); *see also Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997) ("*Idaho I*").

Under the *parens patriae* doctrine, when a state appears in a lawsuit involving a matter of sovereign interest, it must be deemed to represent the interests of all of its citizens. *New Jersey v. New York*, 345 U.S. 369, 372-73 (1953).

The rationale for the doctrine is a necessary recognition of sovereign dignity, as well as a good working rule for good judicial administration. *Id.* Otherwise a state may be judicially impeached on matters of sovereign policy by its own subjects and there would be no practical limitation on the number of citizens, as such, who would be entitled to challenge the state, or any

other sovereign, on matters which implicate sovereign interests. *See Id.* The United States Supreme Court has acknowledged, “the wisdom of the rule.” *Id.*

In these subcases, private parties, e.g., Claimants, apparently seek to collaterally attack a *Judgment & Decree* which was entered as between three separate sovereigns. There are numerous other private individuals who seek to do the same thing in other subcases, each eager to argue minute factual distinctions which they would allege bring their situations outside of the *Judgment & Decree* of *Idaho II*.

Judicial administration and resources of the CSRBA are not served by giving every recalcitrant holdout an opportunity to collaterally attack a quiet title decree entered by the federal court, fully appealed, and affirmed by the Supreme Court of the United States of America.

The relief sought by Claimants; an acknowledgement of their water rights in light of encroachments on Tribal lands, without a permit, would bar the Tribe from exercising core governmental powers, e.g., the right to control encroachments over property deemed by the Tribe to be an integral part of its territory. To pass this off as a matter that would cause little or no offense to the Tribe’s sovereign authority and its place in our system of government would simply be to ignore the realities of the relief Claimants seek. *Cf. Idaho v. Coeur d’Alene Tribe*, 521 U.S. at 282.

Claimants admit the waters of the St. Joe River at the POD are navigable and that such waters are within the Tribe’s reservation. Based on the holding of *Idaho II*, Claimants do not own the property at the POD, the United States and Tribe do. Ownership at the POD is *res judicata*. Claimants admit the United States and the Tribe have never given permission for diversion works to encroach at the POD for claim No. 91-7102, and thus Claimants’ diversionary works are in trespass.

As Claimants admit, the OHWM was 2128 at the time their patent was issued (1912), and has remained no lower than that level since 1907. Thus, Government Lot 7, Sec. 7, Township 46 North, Range 2 West, of the Boise Meridian, could not have contained any lands below 2128. As noted in the Rasor survey, Claimants' POD lays at an elevation of 2123.75. Aff. S. Rasor, Ex. 1.

To the extent the POD is claimed as being [Government] Lot 7, Sec. 7. Township 46N, Range 2W, Benewah County, such a notation is in error because that property cannot extend below the admitted OHWM of 2128 (since 1907) pursuant to federal law.

Based on the foregoing, summary judgment should be granted in favor of the Tribe.

d. The Coeur d'Alene Tribal Court has found Claimants to be in trespass in the side channel lagoon of the St. Joe River.

Claimants are *collaterally estopped* from arguing the issue of trespass as the issue was conclusively established in Tribal court. The Tribal court found that "Defendants are trespassing on Tribally-controlled lands and that the Tribe is entitled to an Order of Eviction to remove the encroachments." Aff. of Counsel, Ex. 11.

Claimants may correctly point out that the *Judgment and Findings of Fact and Conclusions of Law* relate to their encroachments for Lot 13 of Sylvia's Haven Subdivision, however, the water line encroachment for Lot 6 is located in the same "side channel lagoon of the St. Joe River" as the boat house and piling for Lot 13. *Id.* Thus, there is a distinction without a difference.

This Court should not inquire into matters which have been conclusively determined by another court of competent jurisdiction. The evidence before this Court is that Claimants are in trespass, and therefore their water right claim should be disallowed.

II. Claimants are bound by facts set forth in their water right licenses.

Claimants are estopped from disputing aspects of, and bound by facts contained in, their water rights licenses under established water court precedent. *See In re SRBA*, Case No. 39576, Subcase Nos. 36-02708, et. al, *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, entered Dec. 29, 1999, Hon. Barry Wood presiding.

Judge Wood wrote in his order:

Having determined that I.C. § 42-220 binds the state to licensed rights, those same licenses are also binding on the license holder. If a party is aggrieved by any aspect of the 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 (1997). 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. [footnote 5 cited]. *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). In this case, Claimant did not appeal the remarks addressing facility volume for [their] water rights... Therefore, Claimant is bound by the licenses for these rights.

Id. (emphasis added).

Claimants admit that, "...IDWR water right license no. 91-7102 states that the location of the point of diversion is the St. Joe River..." They also admit that the St. Joe River is a natural water source. *Id.*, Ex. 3, p. 3 (RFA 11), Ex. 2, p. 8 (RFA 34) ("Claimants admit that the IDWR water right license no. 91-7102 states that the point of diversion is the St. Joe River, which is a natural water source...") (emphasis added)). In 1988, both Claimants in their permit application, and the Idaho Department of Lands in its letter to Claimants, treated the POD as the St. Joe River. Aff. Counsel, Exs. 6 and 9. Claimants never challenged either their permit or license from IDWR and hence they are bound by it and cannot use these proceedings to collaterally attack it.

Claimants may attempt to allege the POD for Claimants' water right claim No. 91-7102, is not from the St. Joe River, a natural water source, but rather from a point at which the water is diverted from "a man-made, artificially built lagoon" – off of the St. Joe River. Again, such allegation would constitute an impermissible collateral attack upon the license and merely be a red-herring and distraction from the undisputed and admitted *material* facts of this case in an attempt to survive summary judgment.

Established water court precedent forecloses such an attempt to collaterally attack the license upon which claim No. 91-7102 rests, not to mention an attempt to lure this Court into collaterally attacking a federal court judgment, reviewed and upheld by the Supreme Court of the United States of America.

Claimants should not be allowed to use these proceedings to collaterally attack aspects of their license they should have used established procedure to rectify if they disagreed with their license. Likewise, this Court should not authorize any collateral attack challenge to *Idaho II*.

III. Regardless of ownership, Claimants fail to proffer *any* evidence they had permission to establish their point of diversion on lands they do not own.

The Tribe's objection sets forth that it owns the property at Claimants' POD. In light of the undisputed facts, the Tribe's objection is wholly consistent with the *Judgement & Decree* from the federal district court in *Idaho II*: the waters are navigable and the property is within the Tribe's reservation. The State of Idaho has admitted that it is "enjoined from asserting ownership of the submerged lands of the St. Joe River lying below the natural ordinary high water mark within the exterior boundaries of the Coeur d'Alene Indian Reservation" *Id.*, Ex. 8, pp. 4 - 5 (RFA 22 and RFA 23), and thus cannot own the property at Claimants' POD.

Claimants allege either they, or the State of Idaho, own the property at the POD for claim no. 91-7102. Aff. Counsel, Ex. 1, p. 13 (Interrog. 8). Mr. Rasor's survey establishes Claimants do not own the property. Aff. S. Rasor, Ex. 1. The ownership of the property at the POD is *immaterial*. Regardless of who owns the property at the POD, it is beyond dispute that Claimants' do not own it. Accordingly, under Idaho law, e.g., I.C. § 42-1411(5), Claimants' must establish they had permission from the owner of the property in order for their water right to be valid, e.g., not initiated in trespass.

Claimants' have not provided any evidence that would suggest they asked for or received permission from *anyone* to build their diversion works on the property at issue. This failure, especially in light of being notified by the State of Idaho that they needed an encroachment permit for their "pump and waterline," or obtaining an encroachment permit pursuant to Tribal code, is fatal to their claim of a water right.

Idaho law *requires* permission to enter the lands of another *before* a water right may be initiated. Any water right initiated without the permission of the landowner is void. *Lemmon*, 95 Idaho at 780.

The evidence in the record before this Court demonstrates Claimants do not own the property at the POD. They never received permission to initiate their water right from *anyone*. Therefore, the water right is void and summary judgment should be entered.

CONCLUSION

As shown above there are no disputes as to *material* facts.

Based upon the undisputed and admitted material facts, the United States and Tribe own the bed and banks underlying navigable waters within the Tribe's reservation: the waters overlying Claimants' points of diversion are navigable and are within the Tribe's reservation.

During times relevant hereto, Claimants never sought nor received permission for their water diversionary works to be placed at the POD for claim 91-7102 from either the United States or the Tribe. Hence, claim No. 91-7102 was initiated via trespass and is void.

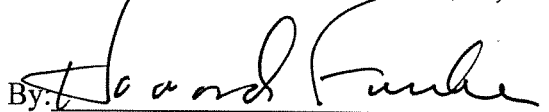
Any attempt to dispute that the bed and banks at Claimants' point of diversion for claim No. 91-7102 is anything other than the St. Joe River, a natural watercourse, is foreclosed by the undisputed and admitted aspects of Claimants' license and established water court precedent.

Finally, a formal survey of Claimants' property reveals the POD is outside Claimants' property boundaries. In light of the foregoing, it is Claimants' burden to prove their water right was not initiated via trespass. I.C. § 42-1411(5). Regardless of who owns the property at the POD, Claimants fail to establish that they received permission from *anyone* prior to establishing their water right.

For the foregoing reasons, this Court should disallow claim No. 91-7102 and refuse to enter a partial decree therefor.

Respectfully submitted this 26th day of July, 2016.

HOWARD FUNKE & ASSOCIATES, P.C.

By: 

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Attorneys for the Coeur d'Alene Tribe

Certificate of Service

I hereby certify that on the 26th day of July, 2016, a copy of the foregoing document was served on the following counsel of record and other entities via the method indicated below:

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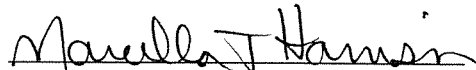
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