

Howard A. Funke, ISB No. 2720
Kinzo H. Mihara, ISB No. 7940
Dylan Hedden-Nicely, ISB No. 8856
HOWARD FUNKE & ASSOCIATES, P.C.
Attorneys at Law
424 Sherman Avenue, Suite 308
P. O. Box 969
Coeur d'Alene, Idaho 83816-0969
P (208) 667-5486
F (208) 667-4695

RECEIVED

JUL 29 2016

DEPARTMENT 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 Nos.: 91-7173
	)	
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 affidavits are expressly incorporated therein.

INTRODUCTION

This is not a typical trespass action. The lands at issue in this case are submerged lands of the St. Joe River, a navigable waterbody. Title to these lands has been quieted by the United States Supreme Court in favor of the United States in trust for the Coeur d'Alene Tribe. *Idaho v. United States*, 533 U.S. 262, 266-67 (2001) (“*Idaho II*”). “[O]wnership of the land underlying such waters is ‘strongly identified with the sovereign power of government.’” *Id.* at 272 (quoting *Montana v. United States*, 450 U.S. 544, 552 (1981); *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 284 (1997) (“*Idaho I*”); *Alaska*, 521 U.S. 1, 5 (1997)).

Concomitant to the ownership of submerged lands underlying navigable waterbodies is the “accompanying power to control navigation, fishing, and other public uses of water” *Tarrant Regional Water Dist. V. Herrman*, 133 S. Ct. 2120, 2132 (2013). These powers are “an essential attribute of sovereignty.” *Alaska*, 521 U.S. at 5.

Because of the strong sovereign interests involved, “[a] court deciding a question of title to the bed of navigable water must . . . begin with a strong presumption’ against defeat of a State’s title.” *Idaho II*, 533 U.S. at 272. After a hundred-year struggle, culminating in two trips to the United States Supreme Court, the Coeur d’Alene Tribe overcame this strong presumption and quieted title to “the bed and banks of *all of the navigable waters* lying within the current boundaries of the Coeur d’Alene Indian Reservation” Aff. of Counsel, Ex. 8 (Judgment &

Decree from *United States and Coeur d'Alene Tribe v. Idaho*, 95 F.Supp.2d 1094 (D. Idaho 1998).¹

Now, after that long struggle, Claimants Steve and Deanne Hawks (“Claimants”) ask this Court to affirm their water right claim that was initiated in trespass upon those same submerged lands the Tribe has fought so hard to reclaim. Since at least 2003, Claimants have consistently flouted tribal demands to either come into compliance with the tribal encroachment code or remove their encroachments. Aff. of Counsel, Ex. 12, p. 2 (Findings of Fact and Conclusions of Law). Since 2003, the Tribe has offered to Claimants an encroachment permit upon the same terms offered to all other riparian owners within the Reservation. Instead of coming into compliance, Claimants have actually added *more* out-of-compliance encroachments in that time, including the diversion works at issue in this case.

The ownership and control of the submerged lands of the St. Joe River is critical to the “dignity and ancient right” of the Coeur d’Alene Tribe. *Idaho I*, 521 U.S. at 287. The purpose of this objection is to continue to defend these crucial sovereign rights and interests. The Tribe respectfully requests this court keep these strong principles of sovereignty in mind as it determines the outcome of this case.

¹ 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 that *Judgment & Decree* is attached to the supporting affidavit of Counsel as Exhibit 8 thereto.

FACTUAL BACKGROUND

From time immemorial, the Tribe has occupied, controlled, and “used the lake and its related waterways for food, fiber, transportation, recreation and cultural activities.” *Idaho II*, 533 U.S. at 265. “[T]he Lake and rivers provided resources that were essential to the Coeur d’Alenes’ survival[, and] [t]he Tribe’s spiritual, religious and social life centered around the Lake and rivers.” *United States and Coeur d’Alene Tribe v. Idaho*, 95 F.Supp.2d at 1101. Tribal members also “depended on watercourses in their manner of self-identification, language and religious practices.” *Id.* at 1102.

Although long ignored, the Tribe never gave up ownership of the submerged lands underlying the Lake and its related waterways, including the St. Joe River. That battle culminated in 2001 when the Supreme Court of the United States affirmed the decree of the United States District Court for the District of Idaho that

1. [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 of all of the navigable waters lying within the current boundaries of the Coeur d’Alene Indian Reservation . . . ;²
2. The United States, as the trustee, and the Coeur d’Alene Tribe, as the beneficially interested party of the trusteeship, are entitled to the exclusive use, occupancy and right to quiet enjoyment of the bed and banks of all the navigable waters lying within the current boundaries of the Coeur d’Alene Indian Reservation . . . ;
3. The State of Idaho is permanently enjoined from asserting any right, title, or otherwise interest in or to the bed and banks of

² The only exception in the decree were the submerged lands under navigable waters within Heyburn State Park, which were not at issue in *Idaho II*. Aff. of Counsel, Ex. 8 (Judgment & Decree from *United States and Coeur d’Alene Tribe v. Idaho*, 95 F.Supp.2d at 1094).

all the navigable waters lying within the current boundaries of the Coeur d'Alene Indian Reservation Aff. of Counsel, Ex. 8 (Judgment & Decree from *United States and Coeur d'Alene Tribe v. Idaho*, 95 F.Supp.2d at 1094).

In affirming the District Court, the Supreme Court found that the “right to control the lakebed and adjacent waters was traditionally important to the Tribe” *Idaho II*, 533 U.S. at 274. It also cited positively the District Court’s finding that “the submerged lands and related water rights had been continuously important to the Tribe throughout the period prior to congressional action confirming the reservation” *Id.* at 275. The Court has also recognized that the inextricable intertwinement of the Coeur d’Alene People and the navigable waterways within the Coeur d’Alene Reservation continues to this day. *Idaho I*, 521 U.S. at 287.

On June 20, 2008, almost ten years after the district court decision and a full seven years after the affirming decision of the Supreme Court in *Idaho II*, claimants Steve and Deanne Hawks (“Claimants”) filed an application for a permit to appropriate water. Aff. of Counsel, Attachment 1, Ex. 2 (Bates CDAT OBJ-7173 0008-09). The application listed the source of the water as “St. Joe River.” *Id.* Claimants asserted in that application that they owned the property at their point of diversion and, as a result, did not have to “describe the arrangement enabling the applicant to make this filing.” *Id.* Maps and other documents filed with the permit application depicted the point of diversion (“POD”) as being from the St. Joe River. *Id.* On those documents, Claimants drew the exterior boundaries of their property with their POD extending beyond those boundaries. Claimants admitted in this litigation that their “diversionary works extend past the legal description of Claimants’ property.” *Id.*, Ex. 2, p. 4 (RFA 23). Nonetheless,

Claimants stated in their application for permit they are the owners of the land at their POD. *Id.*, Attachment 1, Ex. 2 (CDAT OBJ-7173 0008-09).

IDWR subsequently granted the Claimants both a permit and a license. *Id.*, Ex. 6 (Ex. 17 to Dep. of S. Hawks, dated May 2, 2016); Ex. 7 (Ex. 22 to Dep. of S. Hawks, dated May 2, 2016). Once again the source of water in the license was listed as “St. Joe River.” *Id.* The POD listed mirrored Claimants’ application for permit. *Id.* Furthermore, the field examiner conducting the beneficial use field report once again denoted Claimants’ boundaries and that the POD extended beyond those boundaries into the St. Joe River. *Id.*, Attachment 1, Ex. 2 (Bates CDAT-OBJ 7173 0013-17). A condition of approval listed on the permit was that “[t]his right does not grant any right-of-way or easement across the lands of another.” *Id.*, Ex. 6 (Ex. 17 to Dep. of S. Hawks, dated May 2, 2016). The license contained the same condition. *Id.*, Ex. 7 (Ex. 22 to Dep. of S. Hawks, dated May 2, 2016). The Hawks did not challenge the elements of either their permit or license, as issued by IDWR. Aff. of Counsel, Ex. 4, p. 3 (RFA 37).

Claimants admit that their POD is located within the “current boundary of the Coeur d’Alene Indian Reservation.” *Id.*, Ex. 1, p. 4-5 (RFA 5). Claimants also admit that the waters at their POD are navigable “according to Claimants’ understanding of the definition in Idaho Code Section 36-1601 and the definition in 33 U.S.C. § 1362.” *Id.*, Ex. 1, p. 6 (RFA 8). Likewise, they admit that the water at their POD is capable of floating boats and/or canoes. *Id.*, Ex. 2, p. 7-8 (RFA 33).

Claimants admit that the source of their water right claim is the St. Joe River. *Id.*, Ex. 2, p. 3 (RFA 20). Also, they admit their POD is at a point where “water is diverted from the St. Joe River.” *Id.*, Ex. 2, p. 3 (RFA 21).

Claimants assert that “either Claimants or the State of Idaho own the submerged lands underlying the Claimants’ point of diversion.” *Id.*, Ex. 1, p. 13 (Interrog. No. 8). However, they simultaneously admit their “diversionary works extend past the legal description of Claimants’ property” *Id.*, Ex. 2, p. 4 (RFA 23). *See also*, *Id.*, Ex. 4, p. 6 (RFA 45) (Claimants admit their Point of diversion for water right claim No. 91-7173 “is not physically located within the exterior boundaries of Parcel No. RP005300200130A”). 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. 9, p. 4 (RFA 22).

Claimants admit that “prior to the issuance of the patent [Aff. of Counsel, Ex. 10] any land conveyed in that patent was owned by the United States.” *Id.*, Ex. 4, p. 4 (RFA 41).

Claimants admit they “cannot enter any lands, including submerged lands, owned by the Coeur d’Alene Tribe or by the United States in trust for the benefit of the Coeur d’Alene Tribe without permission from either the Tribe or the United States” , *Id.*, Ex. 2, p. 6 (RFA 29). Claimants admit that they “did not have permission 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). They also admit they have never received permission from either the United States or the Tribe since the diversion works

were installed. *Id.*, Ex. 3, p. 2-3 (RFA 11). *See also, Id.*, Ex. 1, p. 10-11 (Interrog. No. 4) (“Claimants did not request permission of either the United States or the Coeur d’Alene Tribe to encroach upon the submerged lands of the St. Joe River for the installation of their diversionary works”).

Claimants admit that “neither IDWR water permit no. 91-7173 nor IDWR water right license no. 91-7173 could have been initiated in trespass” *Id.*, Ex. 2, p. 5 (RFA 26). They further admit IDWR is not empowered to authorize a trespass upon the lands of another through the issuance of a permit or license to use water, *Id.*, Ex. 2, p. 5 (RFA 27), and that “neither IDWR water permit no. 91-7173 nor IDWR water right license no. 91-7173 authorize access to or across land not owned by the Claimants.” *Id.*, Ex. 2, p. 5-6 (RFA 28).

Claimants have admitted the “ordinary high water mark (OHWM)” is currently 2128 feet and has been at that level since 1907” *Id.*, Ex. 2, p. 8-10 (Interrog. No. 10). Claimants assert the “natural” or “historic” ordinary high water mark is 2120 feet. *Id.*, Ex. 2, p. 13-14 (Interrog. No. 20). However, Claimants also acknowledge there “is water at Claimants’ point of diversion at all times of the year.” *Id.*, Ex. 2, p. 4 (RFA 24).

On June 16, 2016, Mr. Scott Rasor, PLS, completed a survey of Lot 13, Sylvia’s Haven subdivision, in or near St. Maries, Idaho, in relation to the point of diversion for water right claim No. 91-7173. Aff. S. Rasor. Mr. Rasor’s investigation confirms that (1) the elevation of the submerged lands at Claimants’ point of diversion is 2112.94 feet; (2) the elevation of the “foot valve” is 2116.07 feet; and (3) the point of diversion is not within Claimants’ deeded property boundaries. *Id.*, Ex. 2.

The Tribe initiated a trespass action in tribal court against Steve and Deanne Hawks on May 13, 2016. Aff. of Counsel, Ex. 11 (Judgment *Coeur d'Alene Tribe v. Steve and Deanne Hawks*, Case No. CV-DE-2016-0074 (2016)). Claimants were properly served on May 14, 2016 but failed to appear, answer the complaint, or otherwise participate in the proceedings. *Id.* As a result, the Court of the Coeur d'Alene Tribe entered a default Judgment against the Claimants on July 18, 2016. *Id.* As part of that decision, the court found “the defendants have a waterline lying on the river bed out to pilings that are at an approximate water depth of 2,113 feet and that the waterline lies on the river bottom. The line is attached to a piling.” *Id.*, Ex. 12, p. 2 (Findings of Fact and Conclusions of Law). The court expressly found that “[t]he pilings, [and] waterline, . . . constitute an encroachment as defined by the Coeur d'Alene Tribal Code.” *Id.* The Court also found that the Tribe had been sending letters and compliance orders to Claimants regarding their various encroachments since 2003 and that Claimants never responded to this correspondence. *Id.* Ultimately, the court found “[i]t is the judgement of this court that the Defendant[s] have trespassed against Plaintiff by maintaining encroachments without proper permits; and . . . [t]he Tribe is entitled to remove the encroachments.” *Id.*, Ex. 11, p. 2 (Judgement).

Thus, there is no dispute as to a material fact, the disposition of this water right claim should be determined as a matter of law on summary judgment, and Claimants' water right claim for claim No. 91-7173 should be denied by this Court.

STANDARD OF REVIEW

Under Idaho Rule of Civil Procedure 56, summary judgment may properly be granted 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

1. CLAIMANTS MAY NOT INITIATE OR MAINTAIN THEIR WATER RIGHT IN TRESPASS AGAINST THE COEUR D'ALENE TRIBE

A. Pursuant to Federal Law the Coeur d'Alene Tribe has the Inherent Right to Exclude Non-members from Lands Owned by the Coeur d'Alene Tribe

The Supreme Court has long recognized that "In the absence of treaty provisions or congressional pronouncements to the contrary, the tribe has the *inherent* power to exclude non-members from the reservation." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 410 (1983) (emphasis added) (citing *Williams v. Lee*, 358 U.S. 217, 219 (1959); *Worcester v.*

Georgia, 31 U.S. 515, 561 (1832)).³ The Supreme Court’s recognition of the tribal right to exclude dates back to at least 1832 where the Court found that “[t]he Cherokee nation, then, is a distinct community, occupying its own territory . . . which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.” *Id.*

The right to exclude is an inherent sovereign right that all tribes have retained; “[o]nly the Federal Government may limit a tribe’s exercise of its sovereign authority.” *Merrion v. Jicarila Apache Tribe*, 455 U.S. 130, 147 (1982) (internal citations omitted). “Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that [] sovereign power[s] . . . remain[] intact.” *Id.* at n. 14. Additionally, “Indian sovereignty is not conditioned on the assent of a nonmember; to the contrary, the nonmember’s presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose.” *Id.* at 147 (internal citations omitted).

Ninth Circuit precedent also recognizes “the long-standing rule that Indian tribes possess inherent sovereign powers, including the authority to exclude” *Water Wheel Camp Recreational Area, Inc. v. Larance*, 642 F.3d 802, 808 (9th Cir. 2011) (citing *Mescalero Apache Tribe*, 462 U.S. at 333). There, the Court acknowledged that “through its sovereign authority over tribal land, the [Tribe] had power to exclude Water Wheel and Johnson, who were trespassers on the tribe’s land and had violated the conditions of their entry.” *Water Wheel*, 642 F.3d at 811.

³ Notwithstanding the broad sweep of this statement, the Coeur d’Alene Tribe simply maintains that it has the inherent right and authority to exclude non-members from lands owned by the Tribe.

The right to exclude can be invoked at any time, even after a non-Indian has been allowed onto tribal lands, if the non-Indian violates the conditions of his entry. Also, tribal conditions are subject to change; the Supreme Court has said that “a nonmember who enters the jurisdiction of the tribe remains subject to the risk that the tribe will later exercise its sovereign power. The fact that the tribe chooses not to exercise its power . . . does not permanently divest the tribe of its authority” *Merrion*, 455 U.S. at 145. Indeed, “[t]o presume that a sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power . . . turns the concept of sovereignty on its head, and we do not adopt this analysis.” *Id.* at 148.

B. Idaho Law Prohibits a Water Right from Being Initiated in Trespass

Claimants’ water right claim cannot be decreed because their point of diversion is not located on their property and they have never requested or received permission to locate their diversion works thereon. Accordingly, they initiated their water right in trespass and the Idaho Supreme Court has long held that “[i]t 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.” *Lemmon v. Hardy*, 95 Idaho 778, 780 (1974) (quoting *Bassett v. Swenson*, 51 Idaho 256, 259 (1931)).⁴ Although the right to appropriate unappropriated water is a right under

⁴ It is important to point out that there are two separate but related lines of cases in Idaho related to water rights and trespass. The **first line** relates to cases where a landowner initially grants permission for an appropriator to enter his land and divert water therefrom only to subsequently revoke that permission at a later time. *See e.g., Branson v. Miracle*, 107 Idaho 221 (1984); *Swank v. Sweetwater Irr. & Power Co.*, 15 Idaho 353, 98 P. 297, 299 (1908); *Jones v. McIntire*, 60 Idaho 338, 91 P.2d 373 (1939). The Court has consistently found that where the water right was not initiated in trespass a legally valid appropriation was made. Accordingly, the issue in these cases is whether the validly granted water right includes a right of ingress and egress onto the

the Idaho Constitution, “such provisions of the Constitution and statute do not authorize a person to go upon private property of another for the purpose of making an appropriation.” *Marshall v. Niagara Springs Orchard Co.*, 22 Idaho 144, 125 P. 208, 211 (1912). Simply put, it is a “generally recognized principle that a valid water right cannot be initiated by using another’s ditch against his will, or by any other trespass.” *Rabido v. Furey*, 33 Idaho 56, 190 P. 73, 75 (1920) (citing WIEL, WATER RIGHTS IN WESTERN STATES § 221, 391 (3d. Ed.); *McRae v. Small*, 48 Or. 139 (1906); *Niagra*, 22 Idaho at 144, 125 P. at 208).

Claimants’ water right is void regardless of whether the Tribe protested Claimants’ illegal appropriation at the time it was initiated. *Niagara*, 125 P. at 211. The respondent in *Niagara*, Frank Marshall, had applied for and received a permit from the state engineer to appropriate water on the appellant’s land for power purposes. *Id.* at 209. That permit was issued without protest “in accordance with the application of the plaintiff and the laws of the state of Idaho relating thereto.” *Id.* He subsequently initiated a lawsuit to condemn the same land. *Id.* The issue in the case was whether “an appropriation of water upon private land [can] be initiated by trespass upon private property, and is the attempted appropriation void as against the landowner whose land has been trespassed upon[.]” *Id.* at 210. The Court found that

property of the landowner for the purpose of maintaining the water right. *Miracle*, 107 Idaho at 227. The **second line** of cases address the situation where the appropriator did not have the permission of the landowner to enter upon the landowner’s land at the time at the time of the appropriation. See e.g., *Lemmon*, 95 Idaho at 778; *Niagara*, 22 Idaho at 144, 125 P. at 208; *Toby v. Bridgewater*, 22 Idaho 566 (1912). The Court has found under those facts that any water right so initiated is “void.” *Niagara*, 125 P. at 212. It is important to not conflate these two lines of cases as they address different issues and lead to strikingly different results. The second line of cases addresses the validity of the existence of the water right *per se* while the first line of cases addresses only what rights are appurtenant to a validly acquired water right already in existence. The Tribe’s objection is that Claimants’ water right was *initiated* in trespass. Therefore the second line of cases is applicable to the case at bar.

in order for the respondent to make an appropriation of the water at a point upon the land owned by the appellant, it was necessary for the respondent to enter upon the lands of the appellant in the first instance The right to enter the land of the appellant, therefore, should have been secured from the appellant . . . and, without such remedy being pursued, the respondent in making such entry would be a trespasser.” *Id.* at 211.

The Court clarified that the duty lies with the appropriator to secure permission from the landowner, not on the landowner to seek out, preclude access, or protest an appropriator’s permit because “it is the [land owner’s] right by reason of his ownership of the land to have exclusive possession of said land, and said owner is protected against any right that is attempted to be acquired by trespass thereon in the way of an attempt to appropriate the water running across said land.” *Id.* As a result, the Court found “where an attempt is made to initiate the right to appropriate the public water of the state by trespass upon private property, such initiation of such right is *void*” *Id.* at 212 (emphasis added).

Likewise, Claimants’ license does not conclusively prove their water right is legally valid. At the outset, the Idaho Supreme Court has never distinguished between different types of water rights initiated in trespass or indicated it would allow *any type* of water right initiated in trespass to be sustained. The use of the general term “water right,” which applies generally to constitutional method rights, permitted rights, licensed rights, and decreed water rights indicates that the Court views its rule against trespass to apply to *all water rights*.

Admittedly, Claimants’ license is “binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right.” I.C. § 42-220. However, in no way does the code indicate that a license conclusively establishes the existence of a water right or whether it was legally appropriated. Nor could it, as that determination is within the exclusive jurisdiction of this Court. *In re SRBA No. 39576*, 128

Idaho 246, 259 (1995). Instead, the license is afforded the exact weight as the director's report. Accordingly, should there be sufficient evidence to rebut the findings of the director's report, any presumption of correctness afforded Claimants' license is likewise rebutted.

Claimants' license, like the director's report, is afforded a rebuttable evidentiary presumption, which is governed by IRE 301. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 745-46 (1997). This presumption only shifts the burden of production and, once the presumption is rebutted, "the presumption disappears and the party with the benefit of the presumption retains the burden of persuasion on the issue." *Id.* (citing *Bongiovi v. Jamison*, 110 Idaho 734, 738-39 (1986)). *Prima-facie* weight allows the water right to be presumed valid until there is "substantial evidence of the nonexistence," of the water right. *Id.* Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept to support a conclusion; it is more than a scintilla, but less than a preponderance." *Clear Springs Foods, Inc. v. Clear Lakes Trout Co.*, 136 Idaho 761, 764 (2002). Although the Idaho Supreme Court has never directly addressed whether the term "*prima facie*" found in I.C. § 42-1411 is the same as in I.C. § 42-220, it is inconceivable that the Legislature intended for the same word, located in the same title of the Idaho Code, to be interpreted differently. Accordingly, the term "*prima-facie*" found in I.C. § 42-220 should likewise constitute a rebuttable evidentiary presumption under IRE 301 and be rebutted with substantial evidence. In the present case, the evidence overwhelmingly supports the Tribe's position that Claimants' water right was initiated in trespass. As such, there is substantial evidence of the nonexistence of this right, which should "burst the bubble" that protects both the director's report and the license.

Claimants have admitted that a water license cannot be legally initiated in trespass. Aff. of Counsel, Ex. 2, p. 5 (RFA 26). They go onto admit IDWR is not empowered to authorize a trespass upon the lands of another through the issuance of a permit or license to use water. Aff. of Counsel, Ex. 2, p. 5 (RFA 27). Specifically applied to the submerged lands of the St. Joe River, the State of Idaho is “permanently enjoined from asserting any right, . . ., or otherwise interest in or to the bed and banks,” of the St. Joe River at Claimants’ point of diversion. Judgment & Decree from *United States and Coeur d’Alene Tribe v. Idaho*, 95 F.Supp.2d at 1094. This would include asserting the right to issue water right licenses without the applicant first acquiring permission from the Tribe to encroach upon those lands.

In order to have legally valid license the Claimants must first have a legally valid permit to appropriate water, which they did not acquire. I.C. § 42-202. The Idaho Supreme Court has specifically invalidated the issuance of a permit initiated in trespass. *Niagara*, 125 P. at 212. There, the Court found that “the mere fact that the state engineer granted the permit in no way conferred any right upon the respondent to enter upon private land for the purpose of making an appropriation.” *Id.* The Court concluded “the permit [is] of no force or effect by reason of the fact that it was based upon a trespass.” *Id.*⁵ The Idaho Supreme Court’s strong precedent against trespass strongly indicates it would find a license based upon a permit initiated in trespass is also void. *See Hall v. Taylor*, 57 Idaho 662, 67 P.2d 901, 903 (1937) (acknowledging that a license or certificate of a water right issued by the State commissioner of reclamation could not legally

⁵ *See also, Short v. Praisewater*, 35 Idaho 691, 208 P. 844, 847 (1922) (“[w]ithout respondent’s consent, appellant could not have entered upon his premises and *initiated* a valid appropriation to this spring.”); *Lemmon*, 95 Idaho at 780 (“In the case at bar the land designated as the point of diversion . . . in appellants’ original application was private property not owned by the appellants and therefore no valid water right could be developed on it.”).

originate in trespass).⁶ The issuance of a license from IDWR does not negate the fact that the water right was nonetheless initiated in trespass. Any other interpretation would allow scofflaws to legally acquire a water right so long as they are able to conceal their trespass long enough to trick IDWR into issuing a license. The Tribe argues that such an interpretation is against the spirit of the policy the Idaho Supreme Court seeks to preserve by precluding water rights initiated by trespass. Accordingly, Claimants' water permit is void and, in turn, their water license is likewise void.

Furthermore, Claimants' permit was applied for under false pretenses. The water appropriation rules require that an "applicant shall have legal access to the property necessary to construct and operate the proposed project" IDAPA 37.03.08.045.01.c. Claimants asserted they were the owners of the submerged lands at their point of diversion. Aff. of Counsel, Attachment 1, Ex. 2 (Bates CDAT OBJ-7173 0008-09). However, Claimants have admitted in this litigation that their "diversionary works extend past the legal description of Claimants' property," *Id.*, Ex. 2, p. 4 (RFA 23), and that it "is not physically located within the exterior boundaries of Parcel No. RP005300200130A." Aff. of Counsel, Ex. 4, p. 6 (RFA 45). This alone

⁶ The respondent's predecessor in interest in *Hall v. Taylor* had acquired a water license to use water located upon the lands of the appellant. 67 P.2d at 903. The appellant argued that "a lawful location or appropriation of such waters could not originate in trespass," and the Idaho Supreme Court found "[t]hat proposition, too, may be conceded." *Id.* (citing *Niagara*, 22 Idaho 144, 125 P. at 208; *Bassett*, 51 Idaho at 256). However, the Court went on to affirm the respondent's water right based upon adverse possession. As such, the Court found "we may eliminate *from this case* all contention that the water was lawfully appropriated and diverted as public waters and may well *ignore the license and certificate of water right* issue by the commissioner of reclamation to respondent's predecessor in interest . . . in so far as it may apply to the spring here in question." *Id.* (emphasis added). Although the case was determined on other grounds, the Idaho Supreme Court strongly indicated that it would treat water licenses initiated in trespass as void, just like a water permit or other water right.

should be sufficient evidence to overcome any *prima-facie* presumption of validity afforded the license that was subsequently issued based upon this misinformation.

There is a line of cases that suggest that one caveat to the rule against initiating a water right in trespass is that a person may appropriate water from the *public domain* without the express permission of the United States. *See e.g., Mahoney v. Neiswanger*, 6 Idaho 750 (1899); *Sarret v. Hunter*, 32 Idaho 536 (1919); *First Security Bank v. Idaho*, 49 Idaho 740 (1930). The historical basis for this is that the “general policy [of prior appropriation] was approved by the silent acquiescence of the federal government, until it received formal confirmation at the hands of Congress by the Act of 1866.” *Joyce Livestock Co. v. United States*, 144 Idaho 1, 19 (2007) (quoting *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 154 (1935) (citing 30 U.S.C. § 51 (1866))). As such, under Idaho law the United States is presumed to have consented to the appropriation of water rights on the public domain.

It is important to note that these cases are “limited to their facts to appropriations that were made on unsurveyed federally owned lands . . . The cases clearly do not support the broad proposition that all trespassers may establish valid water rights.” *Lemmon*, 95 Idaho at 780 (discussing *Mahoney*, 6 Idaho at 750; *Sarret*, 32 Idaho at 536; *First Security Bank*, 49 Idaho at 740).

The Coeur d’Alene Reservation is *not* unsurveyed federally owned land upon the public domain. In fact, federal reservations are by definition lands that have been removed from the public domain and set aside for a specific federal purpose. *Cappaert v. United States*, 426 U.S. 128, 138 (1976). The Coeur d’Alene Reservation was “withdrawn from sale [in 1873] and set

apart as a reservation for the Coeur d'Alene Indians.” *Coeur d'Alene Tribe of Idaho v. State of Idaho*, 95 F. Supp.2d at 1096. The Reservation has been surveyed several times, beginning in 1883. *Id.*; *Idaho II*, 533 U.S. at 266-67.

Furthermore, the Federal Acts cited by the Idaho Supreme Court in *Joyce Livestock* apply only to public domain lands and are inapplicable to federal reservations. *Federal Power Comm'n v. Oregon*, 349 U.S. 435, 839-40 (1955). The issue in that case was whether a private electric company needed to acquire a water right from the State of Oregon—in addition to the license it had received from the Federal Power Commission—to install a dam within the Warm Springs Indian Reservation. The State of Oregon argued that “the Acts of July 26, 1866, July 9, 1870, and the Desert Land Act of 1877 constitute an express congressional delegation or conveyance to the State of the power to regulate the use of these waters.” *Id.* (internal citations omitted). The Court found

[i]t is not necessary for us, in the instant case, to pass upon the question of whether the legislation constitutes the express delegation or conveyance of power that is claimed by the State, because these Acts are not applicable to the reserved lands and waters here involved. The Desert Land Act covers ‘sources of water supply upon the public lands. . . .’ The lands before us in this case are not ‘public lands’ but ‘reservations.’ Even without that express restriction of the Desert Land Act to sources of water supply on public lands, these Acts would not apply to reserved lands. ‘It is a familiar principle of public land law that statutes providing generally for disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition because they have been appropriated to some other purpose.’ *United States v. O'Donnell*, 303 U.S. 501, 510, 58 S.Ct. 708, 714, 82 L.Ed. 980. *See also, United States v. State of Minnesota*, 270 U.S. 181, 206, 46 S.Ct. 298, 305, 70 L.Ed. 539. The instant lands certainly ‘are not unqualifiedly subject to sale and disposition’ Accordingly, it is enough, for the instant case, to recognize that these Acts do not apply to this [FPC]

license, which relates only to the use of waters on reservations of the United States.

Id. at 840. Accordingly, the Coeur d'Alene Reservation cannot be treated as public domain lands where a water right may be initiated without permission from either the United States or the Tribe.

Finally, this line of cases further highlight that a water right may not be legally initiated on non-public domain federal land without *first* securing the permission of the landowner. That permission is presumed on federal public domain land but not on private property. "The rule as to trespass and water rights in Idaho appears to be that a water right initiated on the unsurveyed public domain is valid, but a water right initiated by trespass on private property is invalid." It is not that Idaho law allows for users to trespass on federal land. Just the opposite, the Idaho Supreme Court has recognized that "Idaho law could not authorize anyone to trespass upon federal land." *Joyce Livestock*, 144 Idaho at 19. Instead the focus lies with whether a water right may be legally initiated without express permission from the landowner. Where the land is in the public domain then an appropriator can legally acquire a water right without express permission, contingent upon continued acquiescence by the United States. *Id.* However, where the land is not on the public domain an appropriator cannot initiate their water right without express permission from the landowner; any attempt to do so is "void." *Niagara*, 125 P. at 212.

2. THE COEUR D'ALENE TRIBAL COURT HAS ALREADY DETERMINED CLAIMANTS' DIVERSION WORKS ARE IN TRESPASS

The Coeur d'Alene Tribal Court has previously determined that Claimants' diversion works and other encroachments are in trespass. Further, the Tribal Court found that since 2003, starting with Claimants' pilings, the Tribe has never given its permission for Claimants to have

encroachments of any kind upon tribal submerged lands. Idaho Supreme Court precedent confirms that the findings of the Tribal Court are “entitled to full faith and credit.” *Sheppard v. Sheppard*, 104 Idaho 1, 7 (1982).

In fact, the District Court of the First Judicial District of the State of Idaho, in and for the County of Benewah has recently recognized a similar tribal court trespass judgement pursuant to I.C. § 10-1301 and *Sheppard*. Aff. of Counsel, Ex. 13 (Memorandum Opinion, *Coeur d’Alene Tribe v. Kenneth and Donna Johnson*, Case No. CV-2016-25 (July 15, 2016)). Like the Hawks, the Johnsons had encroachments in the St. Joe River but had failed, despite repeated requests from the Tribe, to come into compliance with tribal code. *Id.* at 2. The Tribe initiated a trespass action against the Johnsons but they failed to answer the complaint or make an appearance in the proceedings. *Id.* at 3. The Tribal Court entered a default judgement against them and the Tribe then petitioned the state court to recognize the judgment. *Id.* Despite vehement opposition by the Johnsons, the state court ultimately determined that “the judgment of the Coeur d’Alene Tribal Court . . . is RECOGNIZED AS VALID AND FULLY ENFORCEABLE under the laws of the State of Idaho. *Id.* at 19 (emphasis in original).

Accordingly, the Tribal Court’s decision in the Hawks’ trespass case should be afforded full faith and credit and Claimants are collaterally estopped from litigating the trespass issue in this case. *D.A.R., Inc. v. Sheffer*, 134 Idaho 141 (2000).⁷

⁷ “In order for collateral estoppel to bar the relitigation of an issue determined in a prior proceeding, five factors must be evidence: 1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; 2) the issue decided in the prior litigation was identical to the issue presented in the present action; 3) the issue sought to be precluded was actually decided in the prior litigation; 4) there was a final judgment on the merits in the prior litigation; and 5) the party against whom the issue is asserted was a party or in privity with a party to the litigation.” *D.A.R., Inc.*, 134 Idaho at 144. All five factors are present in this case. First, Claimants had a full and fair opportunity to participate in

3. DETERMINATION OF THE ORDINARY HIGH WATER MARK OF THE ST. JOE RIVER IS NOT MATERIAL TO THE DISPOSITION OF THIS CASE

Claimants argue

[t]he 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. . . . It is these submerged lands within the reservation—and only these submerged lands—that are owned by the United States. Aff. of Counsel, Ex. 2, p. 8-10 (Interrog. No. 10)

Claimants proceed to assert that their point of diversion is not located on these lands because

[i]t 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. These additional submerged lands are beyond those recognized in *Idaho v. United States*. *Id.*

Id. (citing *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)). Claimants conclude that

The United States only reserved those submerged lands that existed prior to Statehood. They did not—could not—reserve lands

the tribal court proceedings. Aff. of Counsel, Ex. 12, p. 2 (“service of process was on May 24, 2016); *id.* at p. 3 (“[d]efendants and their attorney did receive notice of the Motion for Default and default judgment hearing as evidenced by the Certificate of Mailing . . .”). Second, the tribal litigation dealt with the issue of whether claimants diversion works were an illegal encroachment that is in trespass, which is identical to the issue to be decided in this case. Third, the tribal court did actually determine that Claimants’ diversion works are in trespass. *Id.* at p. 2, 4; *id.*, Ex. 11, p. 2. Fourth, the judgment was final and on the merits of the case. *Id.* Ex. 11. *See also, Lewiston Lime Co. v Barney* 87 Idaho 462, 470 (1964) (“[a] judgment in an action bars subsequent litigation between the same parties . . . on all matters which were litigated and decided in the action This is so, even though the judgment . . . was entered by default.”). Finally, the parties are the same in this case as in the tribal court case.

that would not become submerged until after the dams were built.”
Aff. of Counsel, Ex. 2, p. 8-10 (Interrog. No. 10)

Claimants’ argument is immaterial to the disposition of this case for several reasons. First, Claimants have admitted that their “diversionary works extend past the legal description of Claimants’ property. Aff. of Counsel, Ex. 2, p. 4 (RFA 23). They further admit that the point of diversion is “not physically located within the exterior boundaries of Parcel No. RP005300200130A.” Aff. of Counsel, Ex. 4, p. 6 (RFA 45). Regardless of who owns it, it is beyond dispute that Claimants *do not own the property at issue*. Accordingly, Claimants must establish they had permission from the owner, whoever it may be, in order for their water right to have not been initiated in trespass. Claimants have provided no evidence that would suggest they asked for or received permission from *anyone* to build their diversion works on the property at issue.⁸ The Idaho Supreme Court clearly requires permission to enter the lands of another *before* a water right may be initiated. *See* section 1(B), *supra*. Any water right initiated without the permission of the landowner is *void*. *Lemmon*, 95 Idaho at 780. The evidence clearly demonstrates that Claimants did not receive permission to initiate their water right and therefore, their water right is void.

Second, Claimants’ assertions reflect a misunderstanding of the applicable law. The boundary between submerged lands owned by an Indian Tribe and the adjacent uplands owned

⁸ Claimants also assert that “either Claimants or the State of Idaho own the submerged lands underlying the Claimants’ point of diversion.” Aff. of Counsel, Ex. 1, p. 13 (Interrog. No. 8). However, Idaho has admitted 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. 9, p. 4 (RFA 22). Even if the State did own the lands in question, Claimants have failed to establish that they received the State’s permission to have their diversion works on the submerged lands of the St. Joe River. Accordingly, even if the State did own these lands, which it does not, Claimants’ water right would still have been initiated in trespass.

by a fee owner is determined under federal law. *Montana Power Co. v. Rochester*, 127 F.2d 189, 191 (9th Cir. 1942).⁹ Federal law dictates that the boundary is the ordinary high water mark. *Id.*

⁹ Even if state law were applicable, Claimants' arguments still fail. Claimants argue that the boundary between the submerged lands owned by the Tribe and the adjacent uplands is the ordinary high water mark as of 1890. Aff. of Counsel, Ex. 2, p. 8-10 (Interrog. No. 10). Claimants go on to cite *Erickson* and *Sanders Beach* for the proposition that the "ordinary high water mark (OHWM)" is currently 2128 feet and has been at that level since 1907 . . ." *Id.* (citing *Sanders Beach*, 143 Idaho at 446; *Erickson*, 132 Idaho at 210.). From this, as well as some vague language from some early cases dealing with Washington Water Power Company, Claimants make the leap to the assertion that the ordinary high water mark was actually 2120 feet in 1890. *Id.*, Ex. 2, p. 13-14 (Interrog. No. 20). However, *Erickson* and *Sanders Beach* actually held that the natural or ordinary high water mark of Coeur d'Alene Lake *at the time of statehood in 1890* is presumed to be 2128 feet above sea level. *Sanders Beach*, 143 Idaho at 446; *Erickson*, 132 Idaho at 210. Accordingly, if Claimants want to assert it should be some other level then they shoulder the burden of doing so by "clear and convincing evidence." *Erickson*, 132 Idaho at 211. Admittedly, the holdings of *Sanders Beach* and *Erickson* were not applied directly to the St. Joe River. However, the presumption in those cases is based upon

the current OHWM of Lake Coeur d'Alene. Using dams located at Post Falls, the Washington Water Power Company has maintained the level of Lake Coeur d'Alene at 2128 feet above msl throughout the summer and early fall of every year since 1907. The consistent maintenance of a single water level for over ninety years established a certain current OHWM, justifying the presumption . . . *Sanders Beach*, 143 Idaho at 448.

This presumption should accordingly apply to the St. Joe River because, as found by the Idaho Supreme Court, the dam affected the level "in both the lake and in the Coeur d'Alene and St. Joe Rivers that feed into the lake." *Id.* The State has acknowledged that the elevation of the St. Joe River is affected by operation of the Post Falls dam up to "the highway bridge $\frac{3}{4}$ mile east of St. Joe City, Idaho," which is upstream from Claimants' point of diversion. Aff. of Counsel, Ex. 9, p. 7 (Interrog. No. 9). Claimants have likewise admitted that the dam at Post Falls regulates the water level at their point of diversion. Aff. of Counsel, Ex. 5, p. 21, l. 14-20 (Deposition of S. Hawks). The Court in *Sanders Beach* expressly found that the elevation of the lake did not vary from place to place around the shore, going so far as to take judicial notice "of the fact that water seeks its level; and if a witness should testify that it stood up on hillocks or piles, like stone or earth, a court would not be expected to believe it." *Sanders Beach*, 143 Idaho at 447. Since the St. Joe flows into the Lake (and not the other way around) it is physically impossible for the water level in the St. Joe to be lower than the elevation in the Lake. As the district court for Benewah County recently pointed out in *Coeur d'Alene Tribe v. Johnson*, "[a] river, by definition, would have a higher elevation at its source than at its mouth." Aff. of Counsel, Ex. 13.

See also, *Bonelli Cattle Co v. Arizona*, 414 U.S. 313, 318 (1973).¹⁰ Furthermore, under federal law, the sovereign holds to the “present highwater mark,” rather than the “natural” or “historic” high water mark. *Id.* at 322.¹¹ Claimants have admitted that the “ordinary high water mark (OHWM)” is currently 2128 feet and has been at that level since 1907.” Aff. of Counsel, Ex. 2, p. 9 (Interrog. No. 10). If Claimants’ diversion works extend below this elevation, they are trespassing upon tribal submerged lands. Mr. Rasor, PLS, establishes that the elevation of the submerged lands of the St. Joe River at Claimants’ point of diversion is 2112.94 feet. Aff. S. Rasor, Ex. 2. Accordingly, Claimants’ diversion works are clearly trespassing upon submerged lands owned by the Tribe.

Even if the boundary were fixed at some date, that date would be the date that the land was patented by the United States to Claimants’ predecessors in interest, which took place in

The submerged lands of the St. Joe River must be either the same elevation or at a higher elevation than Coeur d’Alene Lake. Accordingly, if the OHWM of the Lake is 2128 feet then the OHWM necessarily must be at least 2128 feet in the St. Joe River at Claimants’ point of diversion.

¹⁰ The Supreme Court has overruled *Bonelli*, to the extent that it now holds that “whenever the question . . . is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, *the title shall have passed*, then that property . . . is *subject to state legislation . . .*” *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 377 (1977). Accordingly, the Court has “made clear that *Corvallis* . . . does *not* apply ‘where the [United States] Government has never parted with title and its interests in the property continues.’” *California ex rel. State Lands Com’n v. United States*, 457 U.S. 273, 282 (1982) (quoting *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 670 (1979)). The Ninth Circuit has held at least twice that where submerged lands owned by the United States in trust for an Indian tribe are at issue, the choice of law is federal law. *Rochester*, 127 F.2d at 191; *United States v. Milner*, 583 F.3d 1174, 1182 (9th Cir. 2009) (“[f]ederal common law governs an action for trespass on Indian lands.”).

¹¹ This is because federal common law dictates that “[w]here a water line is the boundary of a given lot, that line, no matter how it shifts, remains the boundary . . .” *Jefferis*, 134 U.S. at 188. This is true regardless of whether the boundary has changed as a result of natural or artificial causes. *Bonelli Cattle Co.*, 414 U.S. at 327.

1912. *Jefferis v. East Omaha Land Co.*, 134 U.S. 178, 196 (1890) (when a patent is issued by the United States, “the water-course, and not the meander line, as actually run on the land, is the boundary.”). Before the Coeur d’Alene Allotment Act, the United States owned in trust for the Tribe *all land*—submerged lands and uplands—within the current boundary of the Reservation. See *United States and Coeur d’Alene Tribe v. Idaho*, 95 F. Supp.2d at 1096 (describing the boundaries of the 1873 Reservation); 26 Stat. 989, 1027 (Mar. 3, 1891). The United States did not open the Reservation to homesteaders until 1910, three years after Avista began to control lake elevation in 1907. 36 Stat. 2494. See also *Confederated Salish and Kootenai Tribes of Flathead Reservation, Montana v. Namen*, 665 F.2d 951, 953 (9th Cir. 1982). The land Claimants own was not patented until 1912. Aff. of Counsel, Ex. 10.

Claimants have admitted that “prior to the issuance of the patent [Aff. of Counsel, Ex. 10] any land conveyed in that patent was owned by the United States.” Aff. of Counsel, Ex. 4, p. 4 (RFA 41). Accordingly, if any lands within the Reservation were flooded in 1907, those lands were owned by the United States in trust for the Tribe. Furthermore, Claimants’ predecessor in interest’s patent would have only entitled him to the land above the ordinary high water mark *at the time of the patent*. *Jefferis*, 134 U.S. at 196. See also *Rochester*, 127 F.2d at 192 (“[t]he general rule, of course, is that patents of the United States to lands bordering navigable waters . . . convey only to the high water mark.”) (citing *Shively v. Bowlby*, 152 U.S. 1 (1894); *Martin v. Waddell’s Lessee*, 41 U.S. 367 (1842)). Claimants have admitted that in 1912, the ordinary high water mark was 2128 feet and therefore, that would be the boundary between their land and the submerged lands owned by the Tribe.

Finally, even under Claimants’ theory of the case, Claimants are in trespass. Claimants have admitted there “is water at Claimants’ point of diversion at all times of the year.” Aff. of

Counsel, Ex. 2, p. 4 (RFA 24). In other words, Claimants' point of diversion is located below the ordinary *low* water mark. Claimants simultaneously assert the actual "historic" or "natural" high water mark of the St. Joe River is 2120 feet. Claimants' assertion is supported by *no evidence* and is both legally and factually inaccurate. However, even if we were to assume *arguendo* the applicable elevation were 2120 feet, Claimants' point of diversion is located above submerged lands at 2112.94 feet, *well below* 2120 feet. Aff. S. Rasor, Ex. 2.

Claimants' theory regarding the boundary of the submerged lands owned in trust for the Tribe is clearly inconsistent with the applicable law and facts in this case. However, regardless of Claimants' theory regarding the ordinary high water mark of the St. Joe River, their point of diversion is unquestionably located upon submerged lands owned by the Coeur d'Alene Tribe.

CONCLUSION

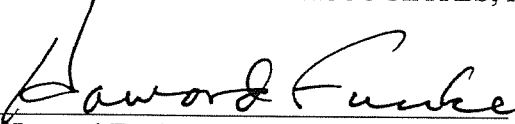
As shown above there are no disputes as to *material* facts.

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. Accordingly, those submerged lands are owned by the United States in trust for the benefit of the Coeur d'Alene Tribe. During times relevant hereto, Claimants never received permission for their water diversionary works to be placed at their point of diversion for claim 91-7173 from either the United States or the Tribe. Hence, claim No. 91-7173 was initiated via trespass and is void.

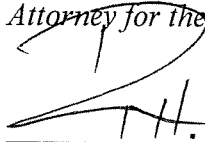
For the foregoing reasons, this Court should dismiss claim No. 91-7173 and refuse to enter a partial decree therefore.

Respectfully submitted this 26th day of July, 2016.

HOWARD FUNKE & ASSOCIATES, P.C.

A handwritten signature in cursive script that reads "Howard Funke".

Howard Funke, Of the Firm
Attorney for the Coeur d'Alene Tribe

A handwritten signature in cursive script that reads "Dylan R. Hedden-Nicely".

Dylan R. Hedden-Nicely, Of the Firm
Attorney 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:

Norman Semanko

Sarah McCormack

Moffatt, Thomas, Barrett, Rock & Fields, Chtd.

P.O. Box 829

Boise, Idaho 83701-0829

☒ First Class Mail, Postage Prepaid

☐ Facsimile @ (208) 385-5384

☐ Hand-delivery

Counsel for Claimant(s) and Respondent NIWRA members

Clive Strong

Steven Strack

Office of the Attorney General

State of Idaho

P.O. Box 83720

Boise, Idaho 83720-0010

☒ First Class Mail, Postage Prepaid

☐ Facsimile @ (208) 334-8072

☐ Hand-delivery

Counsel for Respondent State of Idaho

U.S. Department of Justice

Environment & Nat'l Resources

550 W. Fort St., MSC 033

Boise, Idaho 83724

☒ First Class Mail, Postage Prepaid

☐ Facsimile @ (303) 844-1350

☐ Hand-delivery

Idaho Department of Water Resources

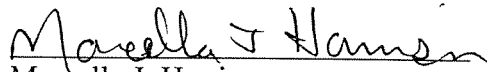
P.O. Box 83720

Boise, Idaho 83720-0098

☒ First Class Mail, Postage Prepaid

☐ Facsimile @ (208) 287-6700

☐ Hand-delivery


Marcella J. Harrison