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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

**CLAIMANTS' MEMORANDUM IN
OPPOSITION OF OBJECTOR'S
MOTION FOR SUMMARY
JUDGMENT**

Steve and Deanne Hawks,

Claimants,

vs.

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

Objector.

INTRODUCTION AND BACKGROUND

Claimants Steve and Deanne Hawks' ("Claimants") water right no. 91-7102 was licensed by the Idaho Department of Water Resources ("IDWR" or the "Department") for a domestic beneficial use on July 20, 1990. *See* Affidavit of Sarah A. McCormack ("McCormack Aff.") ¶ 2, Ex. A. On October 15, 2014, Claimants filed an Amended Notice of Claim to water right no. 91-7102 in the Coeur d'Alene Spokane River Basin Adjudication ("CSRBA"). *See* McCormack Aff. ¶ 3, Ex. B. On February 24, 2015, the Department issued its CSRBA Director's Report in Basin 91, including a report for Claimants' water right claim no. 91-7102. *See* McCormack Aff. ¶ 4, Ex. C.

On June 24, 2015, the Coeur d'Alene Tribe ("Objector" or the "Tribe") objected to water right claim no. 91-7102. The objection included objections to source, point of diversion, and asserted that the water right should not exist. In support, the objection relies 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 the North Idaho Water Rights Alliance ("NIWRA") filed responses to Objector's objections to water right claim no. 91-7102.

Objector's Motion for Summary Judgment should be denied for the following reasons: there are genuine issues of material fact proving Objector does not own the submerged

lands beneath Claimants' point of diversion, and Objector cannot collaterally attack Claimants' license.

ARGUMENT

A. Objector's Motion for Summary Judgment Should Be Denied Because There Are Genuine Issues of Material Fact Proving Objector Does Not Own the Submerged Lands Beneath Claimants' Point of Diversion.

The basis of Objector's objection to water right no. 91-7102 in this case is that Claimants are trespassing on Objector's land with the diversion and use of their licensed water. However, there are genuine issues of material fact proving Objector does not own the submerged lands beneath Claimants' point of diversion and, therefore, Objector 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).

Objector inappropriately relies on a *Judgment and Findings of Fact and Conclusions of Law* in Tribal Court action CV-DE-2016-0074 to determine Claimants have trespassed. Objector's Memorandum in Support of Motion for Summary Judgment, July 26, 2016 ("Objector's Memo."), at 12. A tribal court action is not recognized in this Court.¹ It is a foreign judgment and has no bearing on these proceedings in the CSRBA.

¹ In *Wilson v. Marchington*, 127 F.3d 805, 807 (9th Cir. 1997), the Ninth Circuit explained that the full faith and credit clause "applies only to the states." *Wilson*, 127 F.3d at 808. The Ninth Circuit explained that the Constitution does not afford full faith and credit to Indian tribal court judgments. *Wilson*, 127 F.3d at 808. The Ninth Circuit also held that

The element of ownership to prove trespass has not been met in this case because Objecter cannot prove that it owns the submerged lands it claims Claimants are allegedly encroaching upon. Therefore, Objecter's Motion for Summary Judgment should be denied.

1. **Although *Idaho v. United States, et al.*, 533 U.S. 262 (2001) quieted title to the United States in benefit for the Tribe, the Tribe does not own the lands beneath Claimants' point of diversion.**

Claimants readily admit and have admitted that there is case law quieting title in favor of the United States, as trustee, and the Tribe, as the beneficially interested party of the trusteeship, to the submerged bed and banks of Coeur d'Alene Lake and the St. Joe River within the current boundaries of the Reservation (the "Reservation"). See McCormack Affidavit ¶ 12, Ex. K. Contrary to Objecter's assertions, Claimants are not attempting to "collaterally attack a quiet title decree entered by the federal court" or use CSRBA proceedings to challenge all ownership of land by the Tribe within the Reservation. See Objecter's Memo at 11. Claimants are, however, challenging Objecter's expansive interpretation and application of *Idaho v. United States* to all privately owned lands in and around Lake Coeur d'Alene and its tributaries. Objecter has brought a claim of trespass against Claimants and Claimants are entitled to challenge Objecter's ownership in order to prove they are not trespassing.

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) (emphasis added). It is these submerged lands within the

Congress did not extend full faith and credit to tribal court judgments in the implementing statute found at 28 U.S.C. § 1738.

reservation—and only these submerged lands—that are owned by the United States in trust for the Tribe. 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. The Tribe admitted to the fact that some areas, specifically Heyburn State Park, are excepted from the submerged lands quieted in favor of the United States for the benefit of the Tribe. *See* Objector's Memo. at 9. Although the Tribe gives no explanation as to why an area like Heyburn State Park would be excepted, the Ninth Circuit makes it clear that the area submerged in the Heyburn State Park area could not be included in the submerged lands quieted to the United States because the construction of Post Falls Dam expanded that area to include more lands than originally meant to be quieted to the United States. *United States*, 210 F.3d at 1079, n.18.

It is well known that additional lands within the reservation boundary, like the ones in Heyburn State Park, 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). While the ordinary high water mark ("OHWM") is currently 2128 feet and has been at that level since 1907 (*Erickson*, 132 Idaho at 211, 970 P.2d at 4), this higher level is the result

of “the dam [that] raised the water level. . .in both the lake and in the Coeur d’Alene and St. Joe rivers that feed into the lake.” The dam has been recognized as “raising the elevation of the water . . . approximately 6 1/2 feet This increased height in the dam naturally resulted in submerging the lands adjacent to Coeur d’Alene Lake and the streams flowing into the lake to an elevation of at least 2,126.5 feet.” *In re Sanders Beach*, 143 Idaho 443, 147 P.3d 75 (emphasis added); *see also*, *Deffenbaugh*, 24 Idaho at 520-21, 135 P.2d at 253-54 (“the elevation is raised six or eight feet above the ordinary elevation of the water in the summer and fall”). 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.

Lake Coeur d’Alene is expansive and the elevations above the historic OHWM are not owned by Objector. *See* McCormack Aff. ¶ 10, Ex. I. Applying this logic to the water right claim at hand, it is clear that the point of diversion is above the actual submerged lands recognized in *Idaho v. United States*. The survey provided by Objector states that the elevation of the “foot valve” of Claimants’ water right diversionary works is 2123.75 feet. *See* McCormack Affidavit ¶ 11, Ex. J. If the current OHWM is 2128, as shown above, and we subtract the approximate 6 1/2 feet from 2128 to determine the elevation of the water at the time before the construction of the dams, then the historic OHWM is about 2121.5 feet and is well below Claimants’ diversionary works.² At the very least, the submerged lands beneath Claimants’ point of diversion is owned by the State of Idaho and Claimants have been permitted

² This fact does not take into account that Claimants’ diversionary works are retractable and that the diversionary works are only located underwater from March 15 through November 15 for the irrigation of Claimants’ lawn and garden. *See* McCormack Aff. ¶ 13, Ex. L.

to use it through the licensing process with the Department. However, as further evidence will show, the land beneath Claimants' point of diversion is instead privately owned by Claimants.

2. The submerged lands beneath Claimants' point of diversion was and is privately owned land.

Regardless of the interpretation of *Idaho v. United States*, the submerged lands beneath Claimants' point of diversion were and are privately owned land. There are genuine issues of fact, which Objector ignores, that prove that the land beneath the point of diversion is privately owned land that was deeded to Claimants.

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 McCormack Aff.* ¶ 5, Ex. D. Cyril ("Cy") Chase purchased Lots 6-9 of Castillo's Tracts through two transactions in 1964 and one other transaction in 1967. *See McCormack Aff.* ¶¶ 6-7, Exs. E-F. The deeds that transferred 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 "dockage lagoon" over Block 2. *See McCormack Aff.* ¶ 8, Ex. G. The dockage lagoon was built in the 1960s and provided a private access point to water for owners of land in Sylvia's Haven.

For water right claim no. 91-7102, the lands that are licensed and claimed for the 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 McCormack Aff.* ¶ 9, Ex. H. 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 deeds transferred to Cy Chase. *See McCormack Aff.* ¶¶ 6-7, Exs. E-F. 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.

The case Objector cites in its Memorandum, *Jefferis v. East Omaha Land Co.*, 134 U.S. 178 (1890), supports this idea. Objector's Memo. at 8. As the court in *Jefferis* stated, "the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold by the same boundary." *Jefferis*, 134 U.S. at 188. Objector incorrectly applies this concept to Claimants. Claimants are not the ones attempting to expand the land deeded to them. Instead, it is Objector that is attempting to expand the land lawfully quieted to the United States in trust for it. Objector cannot and does not become the owner of land because it becomes submerged at any time. This idea would cut against Idaho's fundamental policy of protecting private property. *Roark v. Caldwell*, 87 Idaho 557, 561, 394 P.2d 641, 642-43 (1964) ("It is fundamental that [Idaho Constitution Art. 1, Secs. 13 and 14] prohibit the taking of private property for a public use without just compensation."). The submerged lands beneath Claimants' point of diversion are private land and Objector cannot simply claim it based on a court case. Therefore, Objector's Motion for Summary Judgment should be denied.

B. Objector Cannot Collaterally Attack Claimants' License.

Objector makes a point to say that Claimants cannot collaterally attack their own license. Objector's Memo. at 13-14. However, Claimants are unsure why Objector makes this point, since they would be happy to have the Department decree their water right claim no. 91-7102 in line with the details found in their license no. 91-7102. It is Objector that wants to collaterally attack Claimants' license to change the source, point of diversion, and the existence

of the water right. However, Objector cannot collaterally attack Claimants' license, and therefore, its Motion for Summary Judgment should be denied.

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 no. 91-7102 is untimely because it is a collateral challenge to the Director's decision to issue license no. 91-7102. 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 *McCormack Aff.* ¶ 2, Ex. A. However, Objector failed to do so and therefore waived any challenge to the issuance of the license. The CSRBA does not provide a venue to revive lost challenges to licensing decisions.

Objector claims that Claimants fail to proffer any evidence they had permission to establish their point of diversion on lands they do not own and in the process, seeks to delegitimize the licensing procedure of the Department to make up for their failure to protest. Idaho Code Section 42-202 requires that an application for permit set forth the location and description of the proposed diversionary works and the amount of water to be diverted and used. Claimants complied with this statute in their application for a water right and the Department conducted its usual investigation in order to license that right. A water right does not vest until the statutory procedures for obtaining a license are completed. *Idaho Power Co. v. Idaho Dep't of Water Res. (In re Licensed Water Right No. 03-7018)*, 151 Idaho 266, 255 P.3d 1152 (2011).

Although Claimants admit “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), Claimants initiated and participated in the licensing process under the real and correct understanding that they were applying for a water right on private land owned by them. *See McCormack Aff.* ¶ 14, Ex. M. No one, including Objector, expressed that Claimants needed a permit to apply for the water right. *Id.* Objector had ample opportunity to protest the water use at the time of application. However, it did not. In addition, Objector failed to bring any trespass claims against Claimants until the commencement of the CSRBA, even though Claimants have been obtaining and using their license for water since the 1990s. To allow Objector to benefit from the current position it is just now, years after the licensing of these water right claims, asserting in the CSRBA for the first time is inequitable. Objector 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. Objector cannot

be allowed to collaterally attack Claimants' license in this manner and, therefore, this Court should deny Objector's Motion for Summary Judgment.

CONCLUSION

For the foregoing reasons, Claimants respectfully request this Court deny Objector's Motion for Summary Judgment.

DATED this 9th day of August, 2016.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 
Sarah A. McCormack – Of the Firm
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of August, 2016, I caused a true and correct copy of the foregoing **CLAIMANTS' MEMORANDUM IN OPPOSITION OF OBJECTOR'S MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

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