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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. 91-7173

**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. 91-7173 was licensed by the Idaho Department of Water Resources ("IDWR" or the "Department") for a domestic beneficial use on November 25, 2008. *See* Affidavit of Sarah A. McCormack ("McCormack Aff.") ¶ 2, Ex. A. On February 1, 2011, Claimants filed a Notice of Claim to water right no. 91-7173 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. 91-7173. *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. 91-7173. 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. 91-7173.

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; Objector conflates the issues of structural encroachment and water rights diversion and is estopped from bringing a trespass claim based on diversion of a licensed water right; 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. 91-7173 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). The element of ownership to prove trespass has not been met in this case because Objector cannot prove that it owns the submerged lands it claims Claimants are allegedly encroaching upon. Therefore, Objector's Motion for Summary Judgment should be denied.

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 Coeur d'Alene Reservation (the "Reservation"). See McCormack

Affidavit ¶ 6, Ex. E. Contrary to Objector's assertions, Claimants are not attempting to 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. Claimants are, however, challenging Objector's expansive interpretation and application of *Idaho v. United States* to all lands in and around Lake Coeur d'Alene and its tributaries. Objector has brought a claim of trespass against Claimants and Claimants are entitled to challenge Objector'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 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. 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. *Id.*

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.

Objector claims that the determination of OHWM is immaterial. Objector’s Memorandum in Support of Motion for Summary Judgment, July 26, 2016 (“Objector’s Memo.”), at 22. However, determination of the historic OHWM is the key to determining which

submerged lands were quieted to the United States, so as to prevent continual expansion of those submerged lands. Lake Coeur d'Alene is expansive and the elevations above the historic OHWM are not owned by Objector. *See* McCormack Aff. ¶ 5, Ex. D. Applying the above-mentioned logic to the water right claim at hand, it is clear that when the point of diversion is above the historic OHWM, it is not part of the actual submerged lands recognized in *Idaho v. United States* and is, therefore, not owned by the United States for the benefit of Objector. 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 of Statehood, then the historic OHWM is about 2121.5 feet. The diversion works at hand can easily be situated above 2121.5 feet. Claimants' diversionary works are retractable and are only located underwater from May through October for summer domestic use. *See* McCormack Affidavit ¶ 7, Ex. F.

The case Objector cites in its Memorandum, *Jefferis v. East Omaha Land Co.*, 134 U.S. 178 (1890), supports this idea. *See* Objector's Memo. at 26. 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 to which they are entitled. 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 is not owned by Objector when it is

above the historic OHWM and Objector cannot simply claim it based on a court case. Therefore, Objector's Motion for Summary Judgment should be denied.

B. Objector Conflates the Issues of Structural Encroachments and Water Rights Diversion and Is Estopped from Bringing a Trespass Claim Based on Diversion of a Licensed Water Right.

Objector conflates the issues of structural encroachment and water rights diversion in this case. On one hand, Objector discusses how Claimants have "flouted tribal demands to either come into compliance with the tribal encroachment code or remove their encroachment" while, on the other hand, Objector discusses how Claimants claimed a water right claim "initiated in trespass upon those same submerged lands the Tribe fought so hard to reclaim." Objector's Memo. at 3. Objector may have enforced its tribal encroachment code in the past, but it has never enforced any rules against water right diversions. *See McCormack Affidavit* ¶ 8, Ex. G. This inconsistency in action estops Objector from now enforcing a new set of rules against water right diversions, and therefore, its Motion for Summary Judgment should be denied.

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 by using their water rights diversion. Objector's Memo. at 21. First, 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. Objector cites to a district court case in Benewah County, in which

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

the court recognized a tribal court trespass judgment for a structural encroachment in order to overcome its burden of recognizing a different foreign judgment in this Court. However, this cannot stand for three reasons. One, the case involves two separate parties, Kenneth and Donna Johnson, who are neither the party against whom the issue is asserted at this time or in privity with Claimants. As Objector pointed out, this fifth factor must be present in order to apply collateral estoppel. *D.A.R., Inc. v. Sheffer*, 134 Idaho 141 (2000). The Hawks' case before tribal court is completely separate from the Johnsons' case and cannot be considered the same. Second, the time for appeal has not run on this case and further litigation to challenge the recognition of the judgment may still occur. Finally, the case concerns a structural encroachment, including a dock and pilings, not a water right diversion. Again, Objector conflates the issues.

Objector actually admits that the claim to ownership of the submerged lands underlying Lake Coeur d'Alene and its related waterways has been "long ignored." Objector's Memo. at 4. 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 for almost ten years. *See McCormack Affidavit* ¶ 8, Ex. G. To allow Objector to benefit from the current position it is just now, years after the licensing of this water right claim, 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.

Quasi-estoppel is essentially a last-gasp theory under which a defendant who can point to no specific detrimental reliance due to plaintiffs' conduct may still assert that plaintiffs are estopped from

asserting allegedly contrary positions where it would be unconscionable for them to do so...The doctrine applies where it would be unconscionable to allow a party to maintain a position inconsistent with one in which he acquiesced or of which he accepted a benefit.

Schoonover v. Bonner Cnty., 113 Idaho 916, 919, 750 P.2d 95, 98 (1988). Waiver is the “voluntary intentional relinquishment of a known right or advantage” and the doctrine of laches denies equitable relief to one who has reasonably delayed pursuing an action to the prejudice or detriment of an adverse party. *Id.* at 919-20, 98-99. Therefore, the doctrines of estoppel, waiver, and laches bar Objector’s claim of trespass for Claimants’ water right diversion and its Motion for Summary Judgment should be denied.

C. Objector Cannot Collaterally Attack Claimants’ License.

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

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

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

A license issued by IDWR shall be prima facie evidence as to such right and “any attempt to redefine a license would be ‘tantamount’ to altering a real property right.” *Id.* at 11; IDAHO CODE § 42-220. Therefore, if a licensee failed to appeal the condition of a license when the license was issued, then the licensee has no judicial remedy. Order Granting Motion to Alter

or Amend; Amended Findings of Fact and Conclusions of Law and Recommendation (Subcase 36-08099) (August 20, 1999) at 3.

Objector's objection to water right claim no. 91-7173 is untimely because it is a collateral challenge to the Director's decision to issue license no. 91-7173. Objector had the opportunity to protest license no. 91-7173 at the time the application for permit was filed and published, leading to the issuance of the license in 2008. *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.

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).

Objector attempts to delegitimize this licensing procedure to make up for their failure to protest. Objector claims that "Claimants' permit was applied for under false pretenses." Objector's Memo. at 17. This is a gross overstatement of the truth. 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 property to which they had a right. *See McCormack Affidavit* ¶ 8, Ex. G. Claimants are well aware that their diversionary works extend past their property line, but believed they

were applying for public waters of the State of Idaho. No one, including Objector, expressed the need for a permit to apply for the water right. *Id.* Objector had ample opportunity to protest the source and point of diversion at the time of application. However, it did not. Therefore, Objector should not be allowed to collaterally attack a license in this manner and this Court should deny its 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
Attorneys for Claimants
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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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