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DEPARTMENT OF
WATER RESOURCES

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF TWIN FALLS

In re CSRBA	)	
	)	Subcase Nos.: 91-7173; 91-7102
Case No. 49576	)	
	)	
	)	
Steve and Deanne Hawks,	)	
	)	
Claimant(s),	)	TRIBES' RESPONSE OPPOSING THE
	)	STATE OF IDAHO'S MOTION FOR
v.	)	SUMMARY JUDGMENT
	)	
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 response to the State of Idaho's ("State" and/or "Idaho") motion for summary judgment.

TRIBE'S RESPONSE OPPOSING
THE STATE OF IDAHO'S MOTION
FOR SUMMARY JUDGMENT - 1

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IDAHO

INTRODUCTION

In its opening brief the State misconstrues the issue to be resolved on summary judgement and conflates applicable law related to trespass.¹ The issue in this case is whether Claimants' water right claims may be decreed if they were initiated in trespass. To be clear, the Tribe asserts that Claimants initiated their water right in trespass and it is therefore void. The Tribe argues in this memorandum that (1) this court has jurisdiction to determine whether Claimants' water right was initiated in trespass; (2) the issuance of a water license *is not* binding upon the Tribe in this case and *is not* determinative as to whether a water right was legally initiated; and (3) the State's arguments regarding the authority to regulate distribution of water from the St. Joe River is not properly before 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(a).²

In determining whether any issue of material fact exists, this Court must construe all facts

¹ See *Objector's Memorandum in Support of Its Motion for Summary Judgment*, In Re CSRBA Case No. 49576, subcase nos. 91-7173 at 12-13, n. 4 (July 27, 2016) (noting there is a fundamental difference between the line of cases dealing with trespass *after* a water right has been initiated and those water rights that *initiated in trespass*).

² The current version of Rule 56 was adopted on March 1, 2016 and became effective on July 1, 2016. I.R.C.P. 56. The Tribe hereby notices the Court and the parties it inadvertently moved for summary judgment under the incorrect sub-rule of Rule 56 (Rule 56(c) versus Rule 56(a)). Claimants failed to identify *any* sub-rule of Rule 56 which they move for summary judgment. Hawks Motion for Summary Judgment, p. 2. The state of Idaho, likewise, moved for summary judgment under the *federal* rule. Idaho Motion for Summary Judgment, p. 1.

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.

Summary judgment may be entered in favor of the non-moving party. *Harwood v. Talbert*, 136 Idaho 672, 678, 39 P.3d 612, 618 (2001). A motion for summary judgment allows courts to rule on the issues placed before it as a matter of law and the moving party runs the risk that a court will find against it. *Id.*

The fact that parties have filed cross-motions for summary judgment does not change the applicable standard of review, and the Court must evaluate each party's motion on its own merits. *Stafford v. Klosterman*, 134 Idaho 205, 207, 998 P.2d 1118, 1119 (2000) (citing *Bear Island Water Ass'n, Inc. v. Brown*, 125 Idaho 717, 721, 874 P.2d 528, 532 (1994)).

ARGUMENT

1. THE ISSUE RAISED BY THE TRIBE’S OBJECTION IS WHETHER A WATER RIGHT MAY BE *INITIATED* IN TRESPASS

Idaho incorrectly states that the “primary issue to be decided on summary judgment is whether the decree of a licensed water right is foreclosed when the water users lack permission to maintain diversion and conveyance structures that allegedly lie over or upon submerged lands [owned by the Coeur d’Alene Tribe].” *State of Idaho’s Memorandum in Support of Motion for Summary Judgment*, In Re CSRBA Case No. 49576, subcase nos. 91-7102; 91-07173 at 2 (July 25, 2016) (hereinafter “Idaho Opening Brief”). The State characterizes this case as nothing more than a property dispute—an ejectment action by the Tribe against Claimants’ diversion works—that has nothing to do with water rights. *Id.* at 8. Idaho misconstrues the actual issue on summary judgment, which is whether the Claimants may legally initiate their water right in trespass.

The Tribe filed three objections to water right claim nos. 91-7173 and 91-7102. *See Coeur d’Alene Tribe’s Standard Form 1 Objection*, In Re CSRBA Case No. 49576, subcase nos. 91-7102; 91-07173 (June 23, 2015). The Tribe objected to the claimed point of diversion and source. The Tribe also asserted that the water right should not exist. *Id.* The stated reason for the Tribe’s objections is that “the claimant must have authorization from the Tribe to encroach upon tribal submerged lands for the purposes of using the navigable waters within the Reservation. *To date*, no such authorization has been obtained by the claimant and therefore, this water right should not exist.” *Id.* (emphasis added).

The Tribe did not fully brief its objection on the standard form 1 objection form. Instead,

the Tribe focused on “checking the correct boxes” and providing adequate notice to Claimants regarding the nature of the Tribe’s objections. However, there can be no confusing the Tribe’s objection. The Tribe asserts in its objection that (1) the Tribe is the owner of the submerged lands at Claimants’ point of diversion; (2) Claimants’ have not received permission to encroach upon tribal submerged lands; and therefore (3) the water right should not exist. The Tribe clearly and unambiguously objected to these claims on the basis that they were initiated in trespass, making them void *ab initio*.

2. WHETHER A WATER RIGHT WAS INITIATED IN TRESPASS IS PROPERLY WITHIN THE JURISDICTION OF THE WATER COURT

The State argues that “[t]he SRBA District Court is a court of limited subject matter jurisdiction.” Idaho Opening Brief at 6. The State goes on to argue that the Court’s “jurisdiction requires that the district court undertake ‘a comprehensive determination of the nature, extent and priority of the rights of all users of surface and groundwater’ in the basin being adjudicated.” *Id.* Ultimately, as the State points out, this Court has jurisdiction over those issues that must be determined in order to “define and administer the water rights acquired under state law.” *Id.* at 7 (citing I.C. § 42-1411(2)).

This Court has held that “the SRBA Court’s practice, consistent with existing case law, has been to determine the issues that require definition of the elements of a water right. The SRBA Court has *exclusive* jurisdiction of these issues.” *Order Granting in Part, Denying in Part, Motion to Dismiss; Consolidating Common Issues into Consolidated Subcase; and Permitting Discovery Pending Objection Period in Basin 02; and Notice of Scheduling Conference*, In Re SRBA Case No. 39576, subcase no. 92-23 at 7 (2007) (hereinafter “Order re Subcase No. 92-23”). Accordingly, the jurisdiction of the Court is not limited strictly to the

determination of the elements listed in I.C. § 42-1411 but instead has jurisdiction over *all issues related to those elements as well*. The Court there pointed out

[t]he case of *O’Crowley v. Olivas*, (SRBA subcase 94-00013) is illustrative of this separation of issues. The case originated with the filing of a complaint involving disputes over a water right claim which also included causes of action in tort such as trespass, nuisance and damage claims. The SRBA Court resolved the issues over which it had exclusive jurisdiction such as ownership, *validity and scope* of the disputed water right and then transferred the remainder of the causes of action to the district court in the county where the tort causes of action originated. *Id.*

This highlights a critical distinction that the State’s briefing fails to grasp. The State argues that the Tribe is simply seeking “a determination of rights-of-way necessary to divert water and convey it to the place of use.” *Idaho Opening Brief* at 8. If this were the case then, much like the torts at issue in *O’Crowley*, this Court likely would not hear the issue. However, this is *not* the basis for the Tribe’s objection. The Tribe objects to water claim nos. 91-7102 and 91-7173 because they were initiated in trespass and are therefore void. In other words, the Tribe challenges the underlying validity of the water rights that have been claimed.

Nothing is more relevant to the definition of a water right than the determination of whether it should legally exist. *See* I.C. § 42-1411(2). Indeed, if the Tribe were to initiate a lawsuit in any other state court requesting the court determine the existence of these water rights that court would lack subject matter jurisdiction over the question. *Walker v. Big Lost River Irr. Dist.*, 124 Idaho 78, 81 (1993). Once the CSRBA was commenced, “jurisdiction to resolve *all* of the water rights claims within the scope of the general adjudication is in the [C]SRBA district court only.” *Id.* Accordingly, all other district courts in the State lack subject matter jurisdiction over “disputed issues concerning the right to the use of water.” *Id.* The Water Court has

exclusive jurisdiction over any issue that requires the application of “findings and assumptions concerning the underlying water rights.” *Id.* The legal existence of the Claimants’ water rights unquestionably fits this description.

The Water Court has always taken an inclusive view of its jurisdiction. In 1995 the Twin Falls and North Side Canal Companies filed a petition for declaratory relief in the SRBA Court, seeking to have the Conjunctive Management Rules declared unconstitutional. *Order and Memorandum Decision for Denying Motion to Dismiss Petition for Declaratory Relief and Denying Motion for Disqualification of Judge Without Cause*, In Re SRBA Case No. 39576, subcase no. 92-00012 (1995) (hereinafter “Conjunctive Management Case”). The State motioned for dismissal, arguing that the questions related to the Conjunctive Management Rules do “not fall within the limited jurisdiction of the SRBA District Court to adjudicate water rights.” *Id.* They further argued the Court was without subject matter jurisdiction because “the SRBA Court was created by statute and has no authority to hear administrative appeals” *Id.* at 2.

The Court, citing *Walker supra*, found that “[t]his action for declaratory relief falls squarely within the jurisdiction outlined in *Walker*.” The Court so found because

“[t]he . . . canal companies are claimants in the SRBA [The companies] further aver that the application of the Rules, the subject of the declaratory judgment action, impairs and threatens to interfere with or impair their state water rights and contractual water rights. Specifically, they allege that the Rules violate the prior appropriation doctrine of the Idaho Constitution, [the separation of powers doctrine, all IDWR discretion to compel surface water users to convert [to groundwater], and that the regulatory scheme serves to deny the Canal Companies their priority date

The Canal Companies only have standing to challenge the regulations where they can demonstrate ownership of a water right or water rights. Further, the nature of the challenge clearly

implicates a determination of priority date, point of diversion, quantity, and a potential reduction of quantity Therefore, a challenge to these administrative rules as a declaratory judgment can only be resolved by a judicial determination of one or more of the elements of the Canal Companies' water rights.

Id. at 3. The Court's holding make clear that the Court's jurisdiction does not begin and end with a mechanical determination of whether IDWR correctly reported the elements found in I.C. § 42-1411, but extends to *any issue* that must be determined to conclusively *define* and administer the water rights claimed in the CSRBA.

In fact, this Court has taken jurisdiction over the issue of whether a water right was initiated in trespass on numerous occasions. *See e.g.*, SRBA Subcase Nos. 36-02708, 36-07201, 36-07218, 51-10199, 63-07539, 57-11124, 63-07539. The Court has expressly found that objection to a water right initiated by trespass “constitutes a legally cognizable objection to a water right claim.” *Order re: Motion to Disallow Costs and Attorneys' Fees; Special Master's Report; Findings of Fact and Conclusion of Law for Water Right 63-07539*, In Re SRBA Case No. 39576, subcase no. 63-07539 at 2 (2008) (emphasis added).³

In another case, Clear Lakes Trout Company “alleged that Clear Springs was required to obtain a right-of-way from Idaho Power [the land owner] to properly perfect the right.” *Memorandum Decision and Order on Challenge*, In Re SRBA Case No. 39576, subcase nos. 36-02708 *et al.*, at 33 (1999) (hereinafter “Memorandum Decision for Subcase no. 36-02708”).

³ At issue in subcase 63-07539 was that the objector initially asserted the water right was initiated in trespass and that the claimant's license had an error. *Memorandum Decision and Order on Challenge (Whitted's Claims); Order of Recommitment*, In Re SRBA Case No. 39576, subcase no. 92-23 at 10 (2009). The objector later changed his objection to permissive use. However, before doing so, the Court at no time indicated it did not have jurisdiction over the trespass issue. In fact, during a hearing, Special Master Booth said “just because there perhaps is a mistake in the document doesn't necessarily invalidate the water right. *The real question to me is this trespass issue.*” *Id.* (emphasis added).

Objector Clear Lakes raised issues related to both private waters and trespass in this case. The Court found that

[d]epending upon the particular facts and circumstances of a given case, this Court finds the legal issues may be separable. In other words, one issue may be whether the water is appropriable, i.e., private water under I.C. § 42-212 vs. “public” water defined by I.C. § 42-101. It may be an entirely different issue whether the public water has been lawfully appropriated, i.e., whether there is a problem because the right was initiated by trespass.

Id. Importantly, neither of these issues, whether a source is “private water” or whether a water right was initiated in trespass, are elements of a water right under I.C. § 42-1411. However, they are issues that must be determined in order to fully define the elements of a water right. *See Order re Subcase No. 92-23 at 7.* Accordingly, the Court determined them both, finding first that the water was public water subject to appropriation and second that “[t]here is no evidence of trespass.” *Memorandum Decision for Subcase no. 36-02708 at 34.* At no point did any of the Parties allege these issues were not properly within the jurisdiction of the Court. Likewise, the Court assumed jurisdiction and decided the issues on the merits.

The United States Bureau of Land Management also objected to the water rights of Joyce Livestock, asserting its rights were perfected through trespass. *Order on Motion to Alter or Amend; Order on Summary Judgment; and Order on Motion to Withdraw Admissions, In Re SRBA Case No. 39576, subcase no. 57-11124 et al at 11 (1997).* Rather than determine it lacked jurisdiction, the Court addressed this issue on the merits. It found that although water may be appropriated on land not owned by the appropriator, “[t]he exception to this rule is that a trespasser cannot perfect a water right on private property.” *Id.* Ultimately, the Court found that “Joyce has operated on BLM land as a licensee” and, as a result, it did not initiate its water rights

in trespass. *Id.* This is yet another example of the trespass issue being determined by the Water Court.

The Court has also addressed the issue of whether a water right may be legally initiated on the public domain without the permission of the United States. *Memorandum Decision and Order on Challenge*, In Re SRBA Case No. 39576, subcase no. 55-10288B *et al* at 9 (2005). The Court there held that “[t]he general rule in Idaho is that excluding trespass, an appropriator need not have an ownership interest in the land in order to appropriate a water right.” Citing the line of cases that include *Mahoney v. Neiswanger*, 6 Idaho 750 (1899); *Sarret v. Hunter*, 32 Idaho 536 (1919); *First Security Bank v. Idaho*, 49 Idaho 740 (1930), the Court concluded that although “[a] person cannot initiate a water right on the land of another through trespass,” “Idaho law clearly supports the ability of a private party to appropriate a water right [on the public domain].” *Id.* at 11.

Finally, the issue of whether a water right was initiated in trespass was addressed *three different times* in subcase no. 51-10199. *Special Master Report*, In Re SRBA Case No. 39576, subcase no. 51-10199 at 2 (2001). There, Special Master Haemmerle initially addressed the trespass issue, determining that “as a matter of law that the water right was not initiated in trespass” *Id.* at 3. However, the Master’s successor, Terrance Dolan reconsidered the decision, not because he determined that the court lacked jurisdiction, but because he believed that Master Haemmerle had misapplied the law regarding trespass, concluding that “[t]here seems to be no argument that 1) Buckaroo Spring is a spring, 2) it is located on private land, and 3) the Urquidis have not given the Lahtinens *express (written)* permission to use the spring to

water livestock.” *Id.* at 4.⁴ Ultimately, the Master determined that Buckaroo Spring is public water, subject to appropriation, and that no trespass had occurred because, at the time of the appropriation, “the Lahtinens . . . had federal grazing privileges [that included the] Urquidi’s property.”⁵

In closing, the Tribe highlights that this is not the first time the State has questioned the jurisdiction of this court. *See, Conjunctive Management Case, supra.* In that case the State made a strikingly similar argument as it has here:

These water distribution issues are separate and distinct from the judicial determination of the specific elements of individual – water rights required to be determined by the SRBA District Court under the provisions of Chapter 14, title 42, Idaho Code.

Id. at 7 (quoting *Memorandum In Support of Motion to Dismiss Petition for Declaratory Relief, In Re SRBA Case No. 39576, subcase no. 92-00012* at 5 (January 27, 1995)). In response, the Court stated “where, as here, an action is brought before the court which necessarily requires resolution of one or more elements of a water right, the matter falls within the jurisdiction defined by the Supreme Court in *Walker*. *Id.* The Court also found the State’s arguments to be “false and misleading” and that “the State’s motion to dismiss, represents a continued attempt to use jurisdiction as both a sword and a shield for the purpose of the State’s litigation advantage. It is simply an attempt at forum shopping.” *Id.* at 4. The Court also highlighted:

[i]t is noteworthy as well that the State claims declaratory judgment actions are beyond this court’s jurisdiction. This court sits as a district judge duly elected for the Fifth Judicial District. The SRBA has been assigned to it by the Idaho Supreme Court

⁴ Written permission would have been required had the water been private water pursuant to I.C. § 42-212

⁵ The Master also found that “Urquidi has an agreement with BLM whereby BLM manages that land [where the spring is located]” *Id.* at 18.

pursuant to statute. Neither the statute creating the SRBA nor the Supreme Court's order of assignment has in anyway divested this court of its status as a full district court in the Fifth Judicial District. The Constitution of the State of Idaho and statutes defining the judicial branch would not allow such a limit be placed on a sitting district judge. While this court's principle responsibility, as a function of time spent, resides with the SRBA, throughout the pendency of this action this court has heard all manner of civil and criminal cases The State's claimed jurisdictional limitation on the court to hear declaratory judgments does not exist and is contrary to relief is has sought before this court. *Id.* at 3.

In the end, the Court found it had jurisdiction because "to resolve this matter, the ultimate issue which must be determined is the extent of the Defendants' water rights." *Id.* at 4. *See also id.* at 7 ("Determination of the extent of Defendants' water rights is the ultimate issue to be determined in this matter This court clearly has jurisdiction"). Just like that case, the Tribe here asserts that the ultimate issue to be determined is the extent of Claimants' water rights and whether they should exist. The Tribe asserts they should not exist given the fact that they were initiated in trespass. The Court clearly and unambiguously has jurisdiction over this question.

3. A WATER LICENSE DOES NOT CONCLUSIVELY ESTABLISH THE LEGAL EXISTENCE OF A WATER RIGHT

The State's entire legal position on summary judgment is predicated on its argument that "[a] different calculus [than the case law regarding water rights initiated in trespass] applies when it is alleged, after issuance of a water right license, that a right-of-way necessary for a point of diversion or conveyance structure has been withdrawn or otherwise lost." At the outset, the Tribe is not alleging that it has withdrawn permission formerly granted to Claimants or that Claimants have ever had permission to access the place of their point of diversion. Further, the

State provides *no evidence* to support its assertion this water right was legally initiated or that Claimants have ever had permission from anyone before developing their diversion works pursuant to their permit.

Instead, the State's argument seems to presume that water right claims 91-7102 and 91-7173 were legally initiated simply because IDWR issued the Claimants a license for those claims. Based upon this premise, the State concludes the Tribe's objections amount to nothing more than a property dispute regarding whether Claimants continue to have proper authorization from the Tribe to access their point of diversion. According to the State, the CSRBA Court does not have jurisdiction over this issue.

The State provides no factual or legal support for this conclusory and self-serving argument regarding the unfettered sanctity of a water license. Instead, the State seems to *imply* a position similar to Claimants' argument in their motion for summary judgment that a license is not subject to collateral attack. This argument presumes the Tribe is bound by the issuance of the license and that this Court must assume the licenses here operated to validly initiate Claimants' water rights. If this is the State's argument it is unfounded. The Idaho Code, clearly and unambiguously describes the effect of a license: "a license shall be *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 (emphasis added). The Water Court has extended the binding nature of a license to the licensee/claimant, stating

Having determined that I.C. § 42-220 binds the state to licensed rights, those same licenses are also binding on the license holder. If a party is aggrieved by any aspect of 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 (1997). If the license is

not appealed when issued, any attempt to appeal the license in a subsequent judicial proceeding, like the SRBA, would constitute a collateral attack on the license.

Order on Challenge (Consolidated Issues) of “Facility Volume” Issue and “Additional

Evidence” Issue, In Re SRBA Case No. 39576, subcases 36-02708 *et al.* (Dec. 29, 1999) (citing

Mosman v. Mathison, 90 Idaho 76, 408 P.2d 450 (1965); *Bone v. City of Lewiston*, 107 Idaho

844 693 P.2d 1046 (1984)).⁶ The Water Court has also extended this rationale to parties other

than the licensee *unless the license is determined to be void*. *Memorandum Decision and Order*

on Cross-Motions for Summary Judgment Re: Bureau of Reclamation Streamflow Maintenance

Claim, In Re SRBA Case No. 39576, subcase 63-03618 (Sept. 23, 2008) (hereinafter

“Streamflow Maintenance Claim”).⁷

⁶ The Tribe argues that the water court’s finding that anyone other than the State of Idaho is bound by a license is inconsistent with the plain language of the Idaho Code. *See* I.C. § 42-220. The fact that the Code specifically enumerates that a license shall be binding upon the State indicates the Legislature did not intend for it to be binding upon anyone else. As applied to everyone other than the State, the Code clearly and unambiguously states that a license is not to be binding evidence but instead “shall be prima facie evidence as to such right.” *Id.* Likewise, neither of the more general statutes I.C. § 42-1701(A) or I.C. § 67-5270 can operate to overrule the specific language found I.C. § 42-220. “It is axiomatic that where a general statute and a specific statute deal with the same subject matter and are in conflict, the provisions of the specific statute must control. *Streamflow Maintenance Claim* at 20 (quoting *State Dept. of Parks v. Idaho Dept. of Water Administration*, 96 Idaho 440, 445 (1974)). Accordingly, to the extent these statutes are in conflict, the specific language found in I.C. § 42-220 should control. Although it is true that a party aggrieved by the issuance of a license has the ability to protest that license pursuant to I.C. §§ 42-1701(A) and 67-5270, those statutes do not change the ultimate effect of a license, which “shall be prima facie evidence as to such right” as against anyone other than the State.

⁷ Binding *all parties* to a water license is tantamount to allowing IDWR rather than this Court to determine the legal validity of an entire class of water rights. If no one can object to a water right claim based upon a license without it being declared an impermissible collateral attack then the adjudication process becomes nothing more than an exercise of decreeing licensed rights as licensed and subsequently reported by the department. The Legislature could not have intended for this to be the case as the CSRBA is clearly meant to be a “*comprehensive* determination of

The water court's foundational legal basis for its conclusion that parties may not collaterally attack a license was the Idaho Supreme Court's decision in *Mosman v. Mathison*. The Court there determined that whether an administrative action is subject to collateral attack depends upon whether the action taken by the agency was "actually void or merely voidable[]." 90 Idaho at 86. Where the action was "void and such invalidity was self-evident [the administrative action] would have been subject to collateral attack." *Id.* However, where the

the nature, extent and priority of the rights of users of surface and ground water" I.C. § 42-1406B (emphasis added). Clearly, the Legislature intended for all water rights, including licensed rights, be adjudicated by the district court as the adjudication statutes carve out no exceptions to the evidentiary treatment of licensed rights or in any way indicate they should be treated any differently by the Court once investigated and reported by the director. I.C. § 42-1411. *See also*, section 4, *infra*. Such a finding would render administratively issued water licenses *more binding* on more parties in the adjudication than even *prior judicially decreed water rights*, which are only binding upon parties to the prior adjudication and their privies. *State v. Hagerman Water Right Owners Inc.*, 130 Idaho 736, 740 (1997) Further, such a finding would require the court find that the Legislature intended for the district court be stripped of the ability to review licensed rights in the director's report and "apply the law to the facts as established in that report" *In re SRBA Case No. 39576*, 128 Idaho 246, 259 (1995). The Idaho Supreme Court has already found this to be "an unconstitutional intrusion into the province of the judicial department of government." *Id.* It is this court, not IDWR, that ultimately determines the legal validity of all rights in the CSRBA. That "inherent jurisdiction" "cannot be constitutionally conferred upon any other department or agency." *Id.* (citing *State v. Finch*, 79 Idaho 275, 281 (1957)). As the Court pointed out in *Finch*,

It should always be kept in mind that the evil of administrative action which must be guarded against is not the fact-finding power, but the conclusiveness of the fact-finding power coupled with the order based on the findings made which would deprive a person of a property right. Such is the full exercise of judicial power, and such power in this state can be exercised only by one of the enumerated courts. *Finch*, 79 Idaho at 281.

It is simply inconceivable that the Legislature intended, or that the Idaho Supreme Court would allow, for IDWR water licenses to be absolutely binding upon *all parties* in a water rights adjudication that is "within the original jurisdiction of the district court" *In re SRBA*, 128 Idaho at 258.

action is merely voidable, “it would not be subject to collateral attack . . .” *Id.*

The water court has recognized this critical distinction, holding that a license is not subject to collateral attack “[u]nless the [l]icense is [d]etermined to be [v]oid.” *Streamflow Maintenance Claim* at 15. Although Judge Melanson ultimately determined the license at issue in that case was not void, he expressly found that

[t]he Court acknowledges that the failure of IDWR to follow statutory procedures in issuing a license may very well invalidate a license. The Court also acknowledges that an invalid license may also constitute an exception to the collateral attack prohibition.

Id. Accordingly, the validity of a water right *does not* begin and end with whether a license has been issued by IDWR.

In this case, the Tribe asserts that water right claims 91-7102 and 91-7173 were initiated in trespass. The Idaho Supreme Court has found that “[i]t is quite generally held that a water right initiated by trespass is void.” *Lemmon v. Hardy*, 95 Idaho 778, 780 (1974) (quoting *Bassett v. Swenson*, 51 Idaho 256, 259 (1931)) (emphasis added).⁸ The Idaho Supreme Court has applied this rationale to water rights acquired by beneficial use and water rights appropriated under the water statutes. In response to the assertion that a permit is evidence of a validly initiated water right, the Idaho Supreme Court found that “*the permit was of no force or effect by reason of the fact that it was based upon a trespass...*” *Marshall v. Niagara Springs Orchard Co.*, 22 Idaho 144, 125 P. 208, 213 (1912) (emphasis added). Regardless of the way the water right was acquired—through beneficial use or via the water statutes—the Court found that “where an

⁸ For a full analysis of the Tribe’s arguments regarding water rights initiated in trespass, please see *Objector’s Memorandum in Support of its Motion For Summary Judgment*, In Re CSRBA Case No. 49576, subcase nos. 91-07173 at § 3, 91-07102 at § 1 (July 27, 2016)

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.

If this Court finds that these claims were in fact initiated in trespass, then the licenses would be void and subject to attack. Accordingly, the Tribe is not bound by the licenses and there is no basis to the State’s argument that we should presume these water right claims were legally initiated.

4. A RECOMMENDED CSRBA WATER RIGHT CLAIM BASED UPON A LICENSE IS AFFORDED NOTHING MORE THAN *PRIMA FACIE* WEIGHT LIKE ALL OTHER RECOMMENDED CLAIMS

Having determined Claimants’ licenses are subject to attack in this case, the Idaho Code clearly declares that a license is to be “*prima facie* evidence as to such right . . .” I.C. § 42-220. Likewise, the code affords *all recommended water rights in a director’s report* the same evidentiary weight—*prima facie* weight—regardless of whether the basis of the claim is beneficial use, a license, or a prior decreed water right. I.C. § 42-1411(4). Although the term “*prima facie*,” as it is used in I.C. § 42-220, has not been defined it undoubtedly has the same meaning as the term is used in I.C. § 42-1411(4).

The Idaho Supreme Court has found that the *prima facie* weight afforded the director’s report constitutes a rebuttable evidentiary presumption. *In re SRBA Case No. 39576*, 128 Idaho 246, 255-56 (1995). The burden is one of production whereby the objector must come forward with “substantial evidence of the nonexistence of the fact.” *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 745-46 (1997). 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). Once the objector provides the requisite evidence to rebut the presumption, “the presumption disappears and the party with the benefit of the presumption retains the burden of persuasion on the issue.” *Hagerman*, 130 Idaho at 746.

In this case, the Tribe bears the burden of producing “more than a scintilla” of evidence that would suggest the water right should not exist as a result of it being initiated in trespass. There is overwhelming evidence to support the Tribe’s position that both claim nos. 91-7102 and 91-7173 were initiated in trespass. Claimants have asserted that either they or the State of Idaho own the submerged lands at Claimants’ point of diversion. Aff. D. Hedden-Nicely, Ex. 1, p. 13 (91-7173 Interrog. No. 8); Aff. K. Mihara, Ex. 1, p. 13 (91-7102 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” Aff. D. Hedden-Nicely, Ex. 9, p. 4 (91-7173 RFA 22); Aff. K. Mihara, Ex. 8, p. 4 (91-7102 RFA 22).⁹ Further, Scott Rasor, PLS, has conclusively

⁹ The State answer to this interrogatory, as well as its argument in its opening brief, is an impressive display in splitting hairs. The State admits it is “enjoined from asserting ownership of the submerged lands of the St. Joe River,” but it limits that injunction to submerged lands “lying below the natural ordinary high water mark within the exterior boundaries of the Coeur d’Alene Indian Reservation” Aff. D. Hedden-Nicely, Ex. 9, p. 4 (91-7173 RFA 22); Aff. K. Mihara, Ex. 8, p. 4 (91-7102 RFA 22). The Judgment actually states: “[t]he State of Idaho is permanently enjoined from asserting any right, title, or otherwise interest in or to the bed and banks of all the navigable waters lying within the current boundaries of the Coeur d’Alene Indian Reservation” Aff. D. Hedden-Nicely, Ex. 8 (Judgment & Decree from *United States and Coeur d’Alene Tribe v. Idaho*, 95 F.Supp.2d at 1094) (emphasis added). There is *no* limiting language regarding the ordinary high water mark, natural or otherwise. The State’s hair splitting continues as it attempts to argue that although the presumed ordinary high water mark for Lake Coeur d’Alene is 2128 feet, “[t]he Court did not address whether such presumption would apply in determining the limits of submerged land ownership within the Reservation.” Idaho Opening Brief at 3, n. 2. In other words, according to the State the Tribe’s two trips to the Supreme Court determined *nothing* because before the Tribe can enforce its property rights we must determine the *real question*, which is where the ordinary high water mark was in 1873. This demonstrates

established that the point of diversion for both claims are beyond Claimants' property boundaries. Aff. S. Rasor, Ex. 1-2. Claimants have admitted they never received permission from the Tribe or the United States to encroach upon these submerged lands. Aff. D. Hedden-Nicely, Ex. 3, p. 2-3 (91-7173 RFA 10-11); Aff. K. Mihara, Ex. 1, p. 7-8 (91-7102 RFA 10-11). Further, they have provided no evidence they received permission from any other alleged landowner, including the State of Idaho.

In other words, the evidence conclusively demonstrates (1) Claimants' do not own the property at their point of diversion; and (2) they did not receive permission from *anyone* to have their diversion works on these submerged lands at the time they first began appropriating water. This evidence—let alone the remaining evidence provided by the Tribe in its opening

a truly impressive level of disregard for the decision of the federal district court, the Ninth Circuit and the United States Supreme Court.

For its part, the Tribe has not abandoned its position that Claimants are in trespass regardless of the ordinary high water mark. No matter where the ordinary high water mark may be, Claimants' point of diversion is beyond their property boundary and they have not established they had permission to be on that property when initiating their water rights. The issue of the ordinary high water mark is nothing more than a distraction conjured up by Claimants to mask their trespass. For the sake of argument, the Tribe extensively briefed the issue of ordinary high water mark in its opening briefs. For brevity, the Tribe will not rehash those arguments here. Suffice it to say, the Tribe argues that (1) determination of the boundary between tribal submerged lands and adjacent uplands is a matter of federal law; (2) under federal law, that boundary is the present ordinary high water mark, which is 2128 feet, regardless of whether it has changed due to natural or artificial conditions; (3) the Tribe would prevail even if state law were applied because the ordinary high water mark in the St. Joe River should be presumed to be at least 2128 feet; (4) if the boundary between the Tribe and Claimants' property were set on some date certain, that date would be date the patent was issued in 1912, after the ordinary high water mark was unquestionably set at 2128 feet; and (5) as applied to 91-7173, Claimants' diversion works are located upon submerged lands at an elevation of 2112.94 feet, well below Claimants' alleged natural ordinary high water mark of 2120 feet. *See Objector's Memorandum in Support of its Motion For Summary Judgment*, In Re CSRBA Case No. 49576, subcase nos. 91-07173 at § 3 (July 27, 2016)

brief—overwhelmingly supports the Tribe’s argument that these water rights were initiated in trespass. At the very least, this evidence is substantial enough to burst the bubble and the “ultimate burden of persuasion” should properly shift back to Claimants’ to establish the validity of their claims. I.C. § 42-1411(5); *Hagerman*, 130 Idaho at 746.

5. THE STATE OF IDAHO’S ARGUMENTS REGARDING THE AUTHORITY TO REGULATE DISTRIBUTION OF WATER FROM THE ST. JOE RIVER IS NOT PROPERLY BEFORE THIS COURT

In an apparent attempt to recover from its loss in *Idaho II*, the State of Idaho attempts to back-door an argument regarding its authority to regulate distribution of water from the St. Joe River. Idaho Opening Brief at 4-5.¹⁰ That issue is not properly before this court because it is

¹⁰ The State’s use of passive language is a clinic on how to minimize the effect of a judgment and decree that went against you. The State’s arguments imply that the litigation in *Idaho II* was *pro forma* and its results mean little. However, the State’s attempt to minimize the effort that went into and impact that resulted from *Idaho II* is misplaced and disingenuous. In fact, The Tribe spent almost half a century embroiled in litigation to quiet title to the submerged lands underlying navigable waters within its reservation. That battle began in 1973, when the Tribe intervened in a Federal Power Commission licensing proceeding for the Washington Water Power Company’s (“WWPC”) operations at Post Falls Dam. 13 FERC ¶ 63, 051. The ownership issue was initially litigated in 1979 between WWPC, the Interior Department, and the Tribe. *Id.* The administrative law judge initially concluded that the submerged lands had passed to Idaho in 1890. *Id.* However, FERC reversed itself in 1983. Op. No. 199, 25 FERC ¶ 61,026 (1984). Finally, after fifteen years of litigation, FERC determined it lacked authority to determine the ownership issue in 1988. 43 FERC ¶ 61,254. Rather than quit, the Tribe responded by filing suit against the State of Idaho in federal court seeking to quiet title to the submerged lands underlying navigable waters within its 1873 Reservation. *Coeur d’Alene Tribe v. Idaho*, 798 F.Supp. 1443, 1445 (D.Idaho 1992). The Supreme Court of the United States determined the Tribe’s suit was barred by the Constitution’s Eleventh Amendment immunity provision. *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261 (1997) (“*Idaho I*”). Then, in 1994, The United States filed suit against the State of Idaho seeking to quiet title to the submerged lands beneath navigable waters within the current Coeur d’Alene Reservation. The Tribe intervened in that case and after a two week trial the district court quieted title to the submerged lands within the current reservation in the United States as trustee for the benefit of the Tribe. *United States and Coeur d’Alene Tribe v. Idaho*, 95 F.Supp.2d 1094 (D. Idaho 1998). That ruling was affirmed by the Federal Court of Appeals for

beyond the scope of the Tribe's objection in this case. The Tribe has not raised the question of whether the State, as a general matter, has the sovereign authority to regulate the distribution of water from the St. Joe River and the Tribe makes no comment on that issue here. The State has acknowledged as much, stating in its brief "the Tribe's objections do not contest the State's authority to regulate the diversion and use of water from the St. Joe River" Idaho Opening Brief at 5.

The primary reason the Tribe has not raised this issue is that *its determination is not necessary to resolve this subcase*. The Tribe's objection does not call into question the State's general regulatory police power of water rights any more than any other objection in the CSRBA. Instead, the Tribe argues that the State is duty-bound to follow its own laws when exercising its regulatory authority. A quintessential part of Idaho's water law is that a water right initiated in trespass is void. That argument simply does not trigger the regulatory issue the State seeks to inject here. Accordingly, the State's argument is beyond the scope of the objections that initiated these subcases and should not be considered by this court because (1) the issue is beyond the jurisdiction of this Court; (2) the Tribe has not waived its sovereign immunity for resolution of this issue; and (3) the issue is non-justiciable

the Ninth Circuit. 210 F.3d 1067 (9th Cir. 2000). The U.S. Supreme Court also affirmed the quiet title holding in 2001. *Idaho v. United States and Coeur d'Alene Tribe*, 533 U.S. 262 (2001) ("*Idaho II*"). The litigation between the State of Idaho, the Tribe, and the United States spanned almost a decade between the litigation in *Idaho I* and *Idaho II*. Now, after that long battle in which the State fought tooth and nail, the State tries to convince this Court that *Idaho II* actually means nothing in the face of an invalid water license issued by IDWR. The Tribe notes that the State's attorney of record in *Idaho II* is the attorney of record in these subcases as well. The Tribe impresses this history upon the Court so that it can have a clearer understanding of why these trespass issues are important to the Tribe. The Tribe invested *everything it had* in reaffirming ownership of these submerged lands. These objections represent the Tribe's continuing effort to protect its homeland, which it has fought so hard to retain.

A. This Court Lacks Jurisdiction to Determine the Issue of Authority to Regulate the Distribution of Water

The Tribe notes that the State simultaneously argues that this Court should bless its authority to regulate the distribution of water while at the same time arguing this Court is one of limited jurisdiction that can only determine the elements of a water right found in I.C. § 42-1411.¹¹ It goes to great lengths to argue that the “Snake River Basin Adjudication district court is vested with ‘special jurisdiction’ to determine ‘the nature, extent and priority of the rights of users of surface and ground water’” Idaho Opening Brief at 7. It argues that this vests the Court with the jurisdiction to determine nothing beyond the elements of a water right found in I.C. § 42-1411(2) because those are the elements “the legislature has determined are appropriate to “define and administer the water rights acquired under state law.” *Id.* (quoting I.C. § 42-1411(2)). It nonetheless proceeds to make arguments regarding its own regulatory authority over water, something that is clearly not an element listed in I.C. § 42-1411(2), nor otherwise at issue here.

¹¹ The State arguments demonstrate that it once again seeks to use this Court’s jurisdiction “as both a shield and a sword for the purpose of the State’s litigation advantage.” *Conjunctive Management Case* at 4. In fact, the State’s actions in this case are even more egregious than in the *Conjunctive Management Case* because in this case it is making contradictory arguments implicating this Court’s jurisdiction *in the same brief*. Under the doctrine of judicial estoppel, the State is precluded from “advantageously taking one position, then subsequently seeking a second position that is incompatible with the first. *McCallister v. Dixon*, 154 Idaho 891, 894 (2013). “The policy behind judicial estoppel is to protect ‘the integrity of the judicial system, by protecting the orderly administration of justice and having regard for the dignity of the judicial proceeding.’” *Id.* (quoting *A & J Const. Co. v. Wood*, 141 Idaho 682, 684 (2005). The purpose of the doctrine is also “to prevent parties from playing fast and loose with the legal system.” *Id.* The State should not be allowed to simultaneously argue that that this Court lacks jurisdiction over any issue beyond the determination of the elements found in I.C. § 42-1411 and then proceed to argue the issue of its own regulatory authority over the distribution of water, something that is unquestionably *not listed* in I.C. § 42-1411, nor put at issue by the Tribe’s objections.

Although the Tribe would argue this Court has broader jurisdiction than the State apparently believes—certainly broad enough to determine whether a water right was initiated in trespass—there is no question that the statutes and case law cited by both the Tribe and the State make clear that the State’s regulatory authority over water rights is beyond the jurisdictional scope of this Court. The State has acknowledged this in its brief, quoting the Idaho Supreme Court’s opinion in *Idaho Conservation League*, which made clear that “the ‘state’s ownership of water,’ and the legal obligations implied by such ownership, cannot be determined in an adjudication.” Idaho Opening Brief at 6 (quoting *Idaho Conservation League, Inc. v. State*, 128 Idaho 155, 157 (1995)). The Tribe agrees with the State that the issue of whether it has authority to regulate water pursuant to its alleged ownership of said water is beyond this Court’s jurisdiction. As the State has already pointed out, the Idaho Supreme Court has made this point crystal clear, stating that it is “[t]he proprietary rights to use water [that] are the subject of the SRBA.” *Idaho Conservation League*, 128 Idaho at 157. However, the Court found that “The state’s ownership of the water that is the subject of the adjudication, is not before the SRBA court” *Id.* at 156. Simply put, Idaho has already pointed to binding precedent that precludes this Court from answering the question raised by the State as to whether it has the authority to regulate distribution of water from the St. Joe River.

B. The Tribe has not Waived its Sovereign Immunity Regarding the Issue of Authority to Regulate Distribution of Water

Upon entering the CSRBA, the Tribe expressly and unambiguously reserved its sovereign immunity “for any matters beyond the determination of the nature, extent, and priority of water rights properly before the above mentioned court. The Tribe otherwise expressly reserves all of its sovereign immunity to suit, to the fullest extent of applicable law.” *Notice of Appearance*, In

Re CSRBA Case No. 49576 (May 6, 2015). As the State has pointed out, the Idaho Code proscribes that a determination of the “nature, extent, and priority” of a water right requires the determination of those issues necessary to define the elements of a water right listed in I.C. § 42-1411. Therefore, the extent of the Tribe’s waiver of sovereign immunity is limited to issues related to the determination of “proprietary rights to use water” and in no way has the Tribe waived its sovereign immunity over the issues related to the “state’s [sovereign] ownership of water” and the legal obligations implied by such ownership” Idaho Opening Brief at 6 (quoting *Idaho Conservation League*, 128 Idaho at 156).

The Coeur d’Alene Tribe “exercises inherent sovereign authority over [its] members and territories.” *Oklahoma Tax Com’n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) (citing *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831)). As a result, “[s]uits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.” *Id.* (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). Importantly, the Supreme Court has held that “a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the Tribe. *Id.* See also, *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513 (1940). The Court in *United States Fidelity & Guaranty Co.* held that “[p]ossessing . . . immunity from direct suit, we are of the opinion [that Indian tribes] possess a similar immunity from cross-suits.” *Id.*

Although the State’s response to the Tribe’s objection is not a counterclaim or cross-suit, the Supreme Court rule is nonetheless applicable. The Supreme Court has made it abundantly clear that tribal sovereign immunity is not waived for any issues beyond those initially plead by

the Tribe. Despite the fact that a water rights adjudication “present unique circumstances, often requiring a departure from established rules of procedure,” *In re SRBA Case No. 39576*, 128 Idaho at 254, that departure cannot be used as a justification for abrogating tribal sovereign immunity in direct contravention of United States Supreme Court precedent. Accordingly no party, regardless of the procedural games they play, may broaden the scope of issues beyond those initially raised by the Tribe. In short, the Tribe waived its sovereign immunity to resolve competing claims to the use of water and in these specific subcases for the determination of the point of diversion and source elements, as well as for a determination of whether the water rights should exist in light of the fact they were initiated in trespass. The Tribe did not waive its sovereign immunity to subject itself to back-door challenges regarding broader questions of sovereignty and regulatory jurisdiction.

C. The Authority to Regulate Distribution of Water from the St. Joe River is Non-Justiciable

The question of whether the State has the authority to regulate distribution of water from the St. Joe River is non-justiciable in this case because the question is not ripe for review and answering that question would amount to the issuance of an impermissible advisory opinion.

For an issue to be ripe for review, the Idaho Supreme Court requires the petitioner to prove “1) that the case presents definite and concrete issues, 2) that a real and substantial controversy exists, and 3) that there is a present need for adjudication.” *Noh v. Cenarrusa*, 137 Idaho 798, 801 (2002) (citing *Boundary Backpackers v. Boundary County*, 128 Idaho 371, 376 (1996)).

Ripeness has been considered by the SRBA Court as well. *See e.g., Order Designating*

Basin-Wide Issue Re: To What Extent, If Any, Should the Swan Falls Agreement Be Addressed in the SRBA or Memorialized in a Decree, In Re SRBA Case No. 39576, Basin-Wide Issue 91-13 (2004). The Court there concluded that “[i]ssues pertaining to the [i]nterpretation or [s]ubstance of the Swan Falls Agreement are not ripe, jurisdictionally proper or properly before the court.” *Id.* at 5. In so doing, the Court highlighted that “[i]t is not the intent of the Court *to extend the scope of the proceedings beyond the issues raised in the objections . . .*” *Id.* (emphasis added). The Court went onto to find that “[i]ssues pertaining to the scope and substance of the Swan Falls Agreement are not properly before the Court at this time, as no dispute has been raised regarding the interpretation or application of the *Swan Falls Agreement*.” *Id.* (emphasis in original). The Court also pointed out that if it were to interpret the agreement, “the Court would essentially be deciding the matter in a vacuum, as there are no set of facts within which to decide or interpret its application.” *Id.*

In this case, there is no real or substantial controversy in existence because the Tribe has not challenged the State’s authority to regulate water in the CSRBA. Just the opposite, the Tribe relies upon *state* water law to support its position that a state law right cannot be initiated in trespass. Furthermore, as with the interpretation of the Swan Falls Agreement in SRBA Basin-Wide Issue No. 13, the Court here would have to decide the regulatory issue in a vacuum because no party in this subcase has provided any facts or evidence on this question, aside from the conjecture provided by the State. The Tribe has never argued in the CSRBA that the State lacks the authority to grant water rights from the St. Joe River. Instead the Tribe argues that the State must follow its own laws when doing so. As a result, there is no need for adjudication of this issue, making it not ripe for review.

Likewise, to address this issue would be tantamount to rendering an impermissible advisory opinion. This Court has found that “[a]dvisory opinions are those cases whereby the question before the court is hypothetical and ‘where the existence of a ‘controversy’ is dependent upon the happening of future events.’” *Order on Summary Judgment (Consumptive Use)*, In Re SRBA Case No. 39576, subcase 36-00003A *et al* (Jan. 27, 1997) (quoting *Insurance Co. v. Ag. Development, Inc.*, 107 Idaho 961 (1984)). “An advisory opinion has also been defined as a ‘decision that does not resolve an actual case or controversy.’” *Id.* (quoting *State of Illinois v. Archer Daniels Midland Co.*, 704 F. 2d 935 (7th Cir. 1983)).

In this case, addressing the State’s arguments regarding its regulatory authority to distribute water would be an impermissible advisory opinion because it would decide an issue that is not currently in controversy. Instead, the State argues in the hope that this Court will issue an opinion on the hypothetical question of who has the authority to distribute water on the St. Joe River. The Tribe has not questioned the State’s authority in this regard and, in fact has stipulated to the issuance of partial decrees in a number of subcases with points of diversion from the St. Joe River within the Reservation. *See* subcase nos. 91-4113, 91-7026, 91-7131, 91-7386, 91-7471, 91-7027. The State of Idaho was a party to all of these subcases. This Court cannot and should not render an opinion regarding the hypothetical situation where the Tribe challenges the State’s authority to regulate distribution of water. That challenge is not occurring here and to the extent that such a controversy may arise in the future, this Court should let the matter be decided then.

CONCLUSION

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

The issue in this case is whether Claimants' water rights were initiated in trespass. This issue goes to the heart of the "definition" of these water right claims and is therefore squarely within the jurisdiction of this Court to determine. I.C. § 42-1411(2). Furthermore, the licenses in this case are not binding upon the Tribe because they were initiated in trespass and are therefore void, making them subject to collateral attack.

As a result, these claims are afforded no better weight than any other claim recommended by IDWR in its director's report; *prima facie* weight. In this case, the evidence conclusively demonstrates (1) Claimants' do not own the property at their point of diversion; and (2) they did not receive permission from *anyone* to have their diversion works on these submerged lands at the time they first began appropriating water. This evidence, along with the remaining evidence provided by the Tribe in its opening brief, overwhelmingly supports the Tribe's argument that these water rights were initiated in trespass. In any case, the Tribe has provided substantial evidence sufficient to burst the bubble, shifting the "ultimate burden of persuasion" back to Claimants' to establish the validity of their claims. I.C. § 42-1411(5); *Hagerman*, 130 Idaho at 746.

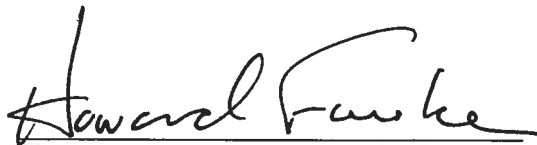
The State's argument regarding its own regulatory authority to distribute water from the St. Joe River is not properly before this Court because it is beyond the scope of the objections that initiated these subcases. Simply put, the Tribe's objections do not question the State's regulatory authority over the distribution of water. The State's argument should not be considered by this court because (1) this Court does not have jurisdiction to hear it; (2) the Tribe

has not waived its sovereign immunity for resolution of the issue; and (3) the issue is non-justiciable because it is not ripe for review and any decision by this Court would amount to an impermissible advisory opinion.

Ultimately, the State's arguments have no bearing on the fundamental fact in this case: Claimants' water rights were initiated in trespass and are therefore void and should not exist. For the foregoing reasons, this Court should deny the State's motion for summary judgment and disallow claim Nos. 91-7102 and 91-7173 and deny partial decrees therefor.

Respectfully submitted this 10th day of August, 2016.

HOWARD FUNKE & ASSOCIATES, P.C.

A handwritten signature in black ink, appearing to read "Howard Funke", written over a horizontal line.

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A handwritten signature in black ink, appearing to read "D. Hedden-Nicely", written over a horizontal line.

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Certificate of Service

I hereby certify that on the 10th day of August, 2016, a copy of the foregoing document was served on the following counsel of record and other entities via the method indicated below:

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