

Counsel for the Coeur d'Alene Tribe

OBJECTOR TRIBE'S RESPONSE OPPOSING HAWKS' MOTION FOR SUMMARY JUDGMENT - 1

RECEIVED
JUL 27 2016
CLERK OF DISTRICT COURT
IDAHO

INTRODUCTION

On July 26, 2016, the Hawks filed their motion for summary judgment in subcase numbers 91-7102 and 91-7173. On July 27, 2016, the Tribe filed its motions for summary judgment in the same subcases. The factual backgrounds contained in the Tribe's motions for summary judgment are incorporated herein.

In its opening brief Claimants misconstrue the issue to be resolved on summary judgement and conflate 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. *See Tribe's Response Opposing the State of Idaho's Motion for Summary Judgment*, In Re CSRBA Case No. 49576, subcase nos. 91-7173; 91-7102 at § 1 (Aug. 10, 2016). Specifically, the Tribe argues in this memorandum that (1) Claimants have failed to provide any factual evidence to support their position on summary judgment or to support the validity of their claims; and (2) Claimants legal arguments do not change the fundamental fact that their water rights were initiated in trespass and are void. This Court should accordingly disallow their claims.

STANDARD OF REVIEW

Under Idaho Rule of Civil Procedure 56, summary judgment may properly be granted only where there are no genuine issues of material fact and the moving party is entitled to

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*).

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 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.

Importantly in this instance, 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.*

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.

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

I. THE RECORD IN THIS CASE ESTABLISHES THAT THE HAWKS' FAIL TO INTRODUCE ANY EVIDENCE WHICH WOULD SUBSTANTIATE A FINDING OF A DISPUTE OF MATERIAL FACT

The parties have filed cross-motions for summary judgment in this subcase. The record consists of the briefings, two affidavits of counsel with exhibits for the Tribe, the affidavit of Mr. Scott Rasor, with exhibits, and the affidavit of counsel for Claimants, with exhibits. Pursuant to statute, the Director's Report also constitutes part of the record. I.C. § 42-1411(4).

The State of Idaho did not file any supporting affidavit with its motion for summary judgment and based its motion on legal arguments only. The Tribe's response to Idaho's motion is the subject of a separate memorandum of law filed concurrent with this response to Claimants.

The Hawks set forth a myriad of arguments as to why summary judgment should be granted in their favor. At the outset, the factual foundations of the Hawks' arguments contain little, if any, support in the record and over-reach as to applicable law. *Cf.* I.R.C.P.56(c)(1) ("[a] party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record...; or, (B) showing that the materials cited do not establish the absence of presence of a genuine dispute, or that an adverse party cannot produce evidence to support the fact.").

It is well established that during summary judgment, a party cannot rely on mere

speculation and argument. *State ex rel Dep't of Labor & Indus. Servs. v. Hill*, 118 Idaho 278, 796 P.2d 155 (Ct. App. 1990) (a party may not rest upon bare allegations or general denials). A scintilla of evidence is insufficient to create a genuine issue of material fact. *Bollinger v. Fall River Rural Elec. Co-op., Inc.*, 152 Idaho 632, 637, 272 P.3d 1263, 1268 (2012). If the moving party fails to challenge an element of the nonmoving party's case, the initial burden placed on the moving party has not been met and therefore does not shift to the nonmovant. *Thomson v. Idaho Ins. Agency*, 126 Idaho 527, 887 P.2d 1034 (1994).

Upon review of Mr. Semanko's affidavit and its attachments, there is not a shred of evidence which establishes the Hawks' PODs are within their property boundaries. Aff. Semanko, pp. 1-3, Exs. A-I. Nor is there any evidence in the record that Hawks received permission *from anyone* for their PODs to be placed on the lands of another. *Id.*

Exhibits A and B of the Semanko affidavit are copies of the Hawks' water right licenses for claim Nos. 91-7102 and 91-7173. *Id.*, Exs. A-B. While the licenses purport that the PODs are within government lot 7, sec. 7, township 46 north, range 2 west, Benewah County, neither license purports to establish the Hawks own the property at the PODs.

Exhibits C through G of the Semanko affidavit are copies of deeds and plat maps purporting to show title transfers of certain portions of Castlio's Tracts. *Id.*, Exs. C-G. Exhibit H of the Semanko affidavit purports to show a portion of the plat map of Sylvia's Haven, Blocks 1, 2, and 3, lands which were at one time part of Castlio's Tracts. *Id.*, Ex. H. Again, none of the documents purport to establish where the PODs are located or that the Hawks own the property at the PODs.

Finally, Exhibit I of the Semanko affidavit is an alleged aerial photo, superimposed with

handwriting of unknown origin, of the area in and around Castlio's Tracts. *Id.*, Ex. I. Nothing on the exhibit purports to establish where the PODs are or that the Hawks own such property.

The Hawks have failed to lay an evidentiary foundation upon which their claim of ownership of the property at the PODs can rest. The evidence provided by the Tribe, on the other hand, demonstrates the POD locations are beyond the properties owned by Mr. and Mrs. Hawks. Aff. Rasor, ¶ 6. Exs. 1-2.

In short, as noted in the Tribe's motion for summary judgment, no issues of material fact remain and summary judgment should be granted as a matter of law. Claimants have failed to provide any evidence that would suggest they own the property in question or that they acquired proper authorization to initiate their water right on that property. This Court should rule against Claimants on this basis alone. Furthermore, as will be shown below, Claimants' arguments are legally insufficient and should be disregarded by the Court.

II. CLAIMANTS' LEGAL ARGUMENTS FAIL TO NEGATE THE FUNDAMENTAL FACT THAT THEIR WATER RIGHTS WERE INITIATED IN TRESPASS AND ARE VOID

In addition to providing inadequate evidence to establish the validity of their water right claims, Claimants fail to establish any legal basis to overcome the fundamental legal position of the Tribe, which is that Claimants' water rights were initiated in trespass and are therefore void. Specifically, the Tribe argues below that (A) it has provided substantial evidence to overcome the *prima facie* evidentiary standard afforded the director's report and Claimants retain the ultimate burden of persuasion to prove the validity of their water rights; (B) Claimants' water licenses were initiated in trespass and are therefore void and subject to collateral attack; (C) that the Tribe has conclusively established its ownership of the submerged lands at issue in these

subcases; and (D) the equitable doctrines of estoppel, laches, and waiver are inapplicable to this case.

A. The *prima facie* evidentiary standard afforded to the Director's Report has been rebutted in this case, and pursuant to I.C. § 42-1411(5), the burden remains upon the Hawks to prove the validity of their water right claims.

Claimants correctly note that the Idaho Department of Water Resources' ("IDWR") Director's Report is afforded a presumption of *prima facie* evidence. *Memorandum in Support of Claimants Steve and Deanne Hawks' Motion for Summary Judgment*, In Re CSRBA Case No. 49576, subcase nos. 91-7102; 91-07173 at 4-5 (July 27, 2016) (hereinafter "Hawks' Memo") (citing *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 742 (1997) (quoting I.C. § 42-1411(5)). While it is true that a party objecting to a director's report carries an initial burden of producing evidence to rebut the report, once rebutted, the burden reverts back to the claimant to ultimately prove the validity of their water right claim. I.C. § 42-1411(5). The Hawks, however, omit the operative language concerning *how* the *prima facie* presumption works.

In *Hagerman Water Right Owners, Inc.*, the Supreme Court of Idaho explains the "*prima facie*" evidentiary status accorded a Director's Report constitutes merely a rebuttable presumption which disappears when *substantial* evidence is introduced by another party. 130 Idaho at 745. Substantial evidence is *more than a scintilla*, but less than a preponderance. *Pines v. Idaho State Board of Medicine*, 158 Idaho 745, 750, 351 P.3d 1203, 1209 (2015). When rebutted, the presumption disappears and the party with the benefit of the presumption retains the burden of persuasion. *Id.* (citing *Bongiovi v. Jamison*, 110 Idaho 734, 718 P.2d 1172 (1986)).

The Hawks' argue that,

Objector does not dispute that the source and diversion exist as claimed and reported. Objector just wants the source and diversion moved somewhere else. Since Objectors have provided no evidence that rebuts the presumption of the Director's Report, Claimants should be granted summary judgment on Objector's objections and Claimants' water rights should be decreed as reported.

Hawks' Memo at 4-5. This argument mischaracterizes the issues at play in this subcase, misleads the reader, and fails to appreciate the evidence before this Court. The Tribe's actual objection is that the Hawks' water rights should not exist because they were initiated via trespass and are thus *void ab initio*.

In regard to Claimants' assertion that, "...Objectors have provided no evidence that rebuts the presumption afforded to the Director's Report...", the Tribe asks the Court to review its motion and memoranda for summary judgment along with accompanying affidavits. The Factual evidence and legal arguments therein establish the boundary between the submerged lands owned by the Tribe and lands owned by the Hawks (e.g., Lots 6 and 13, Block 2, Sylvia's Haven). *See* Tribe's Memos (filed on July 27, 2016); *see also* Aff. Mihara with exhibits; *see also* Aff. Hedden-Nicely with exhibits; *see also* Aff. Rasor with exhibits. Further, the evidence and legal arguments in those documents establish that the points of diversion ("PODs") for claim Nos. 91-7102 and 91-7173 are beyond the Hawks' property boundaries. *Id.*; *see esp.* Aff. Rasor, ¶ 6, Exs. 1-2. 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. K. Mihara, Ex. 8, p. 4 (91-7102 RFA 22); Aff. D. Hedden-Nicely, Ex. 9, p. 4 (91-7173 RFA 22). Claimants have admitted they never received permission from the Tribe or the United States to encroach upon these submerged

lands. Aff. K. Mihara, Ex. 1, p. 7-8 (91-7102 RFA 10-11); Aff. D. Hedden-Nicely, Ex. 3, p. 2-3 (91-7173 RFA 10-11). They have provided no evidence they received permission from any other alleged landowner, including the State of Idaho.

The evidence supporting the Tribe's objections that both water right claim nos. 91-7173 and 91-7102 were initiated in trespass is overwhelming. There is no question the Tribe has provided substantial evidence to rebut the findings of the director and therefore burst the bubble on any *prima facie* presumption of correctness afforded the director's report. Claimants' on the other hand, have failed to meet the burden of persuasion that they have retained to establish the legal validity of their claims. Their claims should accordingly be disallowed.

B. The Tribe has alleged that the Hawks' water rights claims were initiated via trespass and are void, and even if such allegation constitutes a collateral attack upon the licenses, such attack is permissible under the law.

The Idaho Code proscribes that the effect of 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. The Hawks cite a prior SRBA Court decision for support of their argument that an Objector may not collaterally attack a water right license.

Hawks' Memo, at 5-6 (citing *Supplemental Findings of Fact and Conclusions of Law (Facility Volume)* (Subcases 36-02048 et al.) (July 31, 1998) at 11-12.³

³ It is interesting the Hawks would make this argument as both their water right licenses note that the source of both water rights are in the St. Joe River. Aff. Semanko, Exs. A and B. Because the points of diversion ("PODs") are where water is diverted from its natural source, such PODs would have to be in the St. Joe River. The Hawks, however, now allege that the POD for claim No. 91-7102 is not in the St. Joe River, but rather in a "moorage lagoon" to which Claimants argue the Tribe cannot prove ownership. Hawks' Motion for Summary Judgment, p. 7. The Court should contrast the Hawks' position with the admissions on file in the record: the Hawks have admitted that their license for claim No. 91-7102 places the POD in the St. Joe River. Aff. Mihara, Ex. 2, p. 8 ("Claimants admit that the IDWR water right license no. 91-7102 states that

Without context, however, Claimants' quotation misleads the reader. The final order Judge Wood entered in the same case on December 29, 1999 contained the language cited by the Hawks, *See Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, Subcases 36-02048, et al. It also contained the following:

On the other hand, a license once issued by IDWR "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 of such right." I.C. § 42-220 [footnote 2 cited]. As applied, IDWR is part of the "state" as the word is used in I.C. § 42-220 [footnote 3 cited]. ...

...
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. [footnote 5 cited]. *See e.g., Mosman v. Mathison*, 90 Idaho 76, 408 P.2d 450 (1965); *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984). In this case, Claimant did not appeal the remarks addressing facility volume for water rights 36-07201, 36-07218, and 36-07568. Therefore, Claimant is bound by the licenses for these rights.

Id. (emphasis added). The omitted, underlined language is critical in understanding the quote in the Hawks' briefing. No portion of the Order mentioned that the issuance of a licensed right is conclusively binding upon an *objector*.

Even if that were the case, the passage above must be analyzed in conjunction with the legal foundation upon which it rests. In *Mosman*, at issue was whether a road abandonment decision by a local highway district was void due to an alleged conflict of interest by one of the highway district commissioners due to his status as an owner and lessee of property which

the point of diversion is the St. Joe River, which is a natural water source..."). It is the Hawks who collaterally attack the admitted and obvious terms of their license.

abutted the roadway subject to the abandonment. *Mosman*, 90 Idaho at 79. The Supreme Court of Idaho ruled that “[t]he qualifications of Mr. Matheson to participate in voting upon that question becomes an issue collateral to the issue of whether there was or was not an abandonment.” *Id.* at 85. The Court, however, set forth when collateral attacks are permitted:

[i]f the action was void, and such invalidity was self evident, the abandonment would have been subject to collateral attack. If the abandonment was voidable only, it would not be subject to collateral attack, and the only remedy would be by way of direct attack...

Mosman, 90 Idaho at 86.

Mosman is consistent with later SRBA Court precedent wherein Judge Melanson ruled that, “**Arguments Raised on Summary Judgment Constitute Collateral Attacks on a Previously Licensed Water Right Unless the License is Determined to be Void.**”

Memorandum Decision and Order on Cross-Motions for Summary Judgment Re: Bureau of Reclamation Streamflow Maintenance Claims, 12 SRBA 11, entered Sept. 23, 2008, pp. 12 to 15 (Subcase No. 63-03618) (bold and capitalization in original, italics added).⁴ In subcase No. 63-03618, Judge Melanson wrote, “[s]ubject to certain noted exceptions, the SRBA Court has consistently prohibited licenses from being collaterally attacked in the SRBA.” *Id.* at 12 (emphasis added). Judge Melanson continued,

...[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. at 15 (emphasis added).⁵

⁴ The Hawks fail to inform the Court of this precedent.

⁵ The plain language of I.C. § 42-220 states that the effect of a license is not binding upon

It is well established in Idaho that water rights initiated via trespass are *void ab initio*. *Branson v. Miracle*, 107 Idaho 221, 226, 687 P.2d 1348, 1353 (1984) (“valid water right cannot be initiated by trespass onto another’s property.”); *Lemmon v. Hardy*, 95 Idaho 778, 780, 519 P.2d 1168, 1170 (1974) (a water right, “initiated by trespass on private property is invalid.”). As noted by the State, “[i]n initiating a water right, it is incumbent upon the applicant to demonstrate an independent acquisition of all property rights or permissions necessary to convey the water to the place of use.” *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 10 (July 25, 2016) (hereinafter “State’s Memo”) (emphasis added). The foregoing is made clear by the case of *Marshall v. Niagara Springs Orchard Co.*, 22 Idaho 144, 125 P. 208 (1912). In *Marshall*, the Supreme Court of Idaho noted that,

[t]he right to enter the land of the appellant, therefore, should have been secured from the appellant, either by an agreement of the parties, or by condemnation proceedings, and, without such remedy being pursued, the respondent in making such entry would be a trespasser.

125 P. at 210. The fact the State’s Engineer in *Marshall* had issued a permit for the appropriation made no difference to the Court in invalidating the water right; “*the permit was of no force or*

anyone other than the State of Idaho but instead “shall be *prima facie* evidence as to such right.” Likewise, all recommended claims in a director’s report, whether their basis is beneficial use, a license, or a prior decree, are afforded *prima facie* weight. I.C. § 42-1411. If issuance of a *void* water right license were binding upon an objector as well as the State and a claimant, there would be no purpose for the *prima facie* evidentiary standard set forth in the Director’s Report for licensed rights. *See e.g.*, I.C. § 42-1411(4). There would be no reason for a *prima facie* standard because if an *objector* could not “collaterally attack” a void license issued by IDWR, the mere existence of a license would be *definitive, un rebuttable* evidence of a water right. There would be no need to include such rights in water adjudications because the existence of the license would definitively equate to the existence of the water right. This interpretation is wholly inconsistent with the plain language of both I.C. § 42-220 and I.C. § 42-1411.

effect by reason of the fact that it was based upon a trespass...” *Id.* at 213 (emphasis added).

Likewise, the same should be true for permits which morph into licenses.

All parties agree a valid water right cannot be initiated in trespass. State’s Memo at 8 (“a valid water right cannot be initiated by trespass onto another’s property.”); Hawks’ Memo at 9 (“the Idaho Supreme Court has consistently held “that a water right cannot be initiated in trespass upon private lands.””). This is because water rights initiated in trespass are *void ab initio*, regardless of whether the basis of the right is beneficial use, a license issued by IDWR, or a prior decree. Accordingly, even if the Tribe’s objection to the Hawks’ claims constitute a collateral attack on their license, that attack is permissible under Idaho law.

C. The Tribe has proven its ownership of the submerged lands it claims before the federal district court and such ownership has been affirmed by the Supreme Court of the United States of America.

The Hawks assert, “Objector cannot prove ownership of the submerged lands it claims and, therefore, cannot claim trespass by Claimants.” Hawks’ Memo at 6. They allege further, “[t]he element of ownership to prove trespass has not been met in this case because Objector cannot prove that they own the submerged lands they claim Claimants are allegedly encroaching upon.” *Id.* (emphasis added). As elaborated below, the Tribe has conclusively established its ownership of all submerged lands underlying navigable waters within the Reservation. *Aff. Mihara*, Ex. 7; *Aff. D. Hedden-Nicely*, Ex. 8. However, these subcases do not hinge on whether the Tribe owns these submerged lands because the evidence conclusively demonstrates that—regardless of who owns the submerged lands at Claimants’ point of diversion—we know that Claimants do not own them and they have never received permission from *anyone* to initiate their water right in that location. *Aff. K. Mihara*, Ex. 1, p. 7-8 (91-7102

RFA 10-11); Aff. D. Hedden-Nicely, Ex. 3, p. 2-3 (91-7173 RFA 10-11; Aff. Rasor, ¶ 6, Exs. 1-2.⁶ Accordingly, there is sufficient evidence for this Court to determine Claimants initiated their water right in trespass without making any finding regarding the ownership of these lands.

The Hawks conclude that, “[s]ince the licenses for both rights have already been issued, the alleged loss of ownership or right-of-way over the land described as the point of diversion cannot result in the loss of the water right.” Hawks’ Memo at 9.⁷ The Hawks are mistaken the Tribe cannot prove ownership and thus allege trespass against them. The Tribe has a *Judgment & Decree* which quiets title to the bed and banks of all submerged lands underlying navigable waters within the Tribe’s reservation. Aff. Mihara, Ex. 7; Aff. D. Hedden-Nicely, Ex. 8. The submerged lands at issue are admittedly underlying navigable waters, within the Tribe’s reservation. Aff. Mihara, Ex. 1, pp. 4-6 (RFA 5 and RFA 8); Aff. D. Hedden-Nicely, Ex. 1, pp. 4-6 (RFA 5 and RFA 8). The Tribe also has a judgment from the Tribal Court against the Hawks which holds them in trespass at their POD for claim No. 91-7173, as well as in the “lagoon” for their boathouse and piling anchored there. Aff. Mihara, Ex. 11; Aff. Hedden-Nicely, Ex. 11.

⁶ In alleging title to the underlying properties, the Hawks fail to observe well-established precedent which requires them to rely on the strength of their own title, not allege deficiencies of the Tribe’s title. *See Federal Land Bank of Spokane v. Union Central Life Ins. Co.*, 51 Idaho 490 (1931). The Tribe asserts that this Court is without jurisdiction to determine title. However, the Tribe readily acknowledges that this Court does have jurisdiction to determine whether a water right claim is void because it was initiated in trespass. This Court does not need to determine title because title has already been determined by the federal court in *Idaho II*.

⁷ The quoted statement from the Hawks’ briefing seems to assume that the licenses confer a right of way to the points of diversion, or, that the Hawks had a *pre-existing* right of way to the point of diversion. In either event, that is simply not the case. While loss of an existing right of way after a water right has been established is no basis for invalidating a water right, not having a right of way *before* establishing a point of diversion is a trespass and any water right initiated in trespass is *void ab initio*. *Lemon v. Hardy*, 95 Idaho 778, 780 (1974).

Claimants nonetheless allege, “[t]he moorage lagoon was built in the 1960s and provided a private access point for the owners of land in Sylvia’s Haven.” Hawks’ Memo at 7; *cf.* I.R.C.P. 56(c)(1) (“[a] party asserting that a fact cannot be or is genuinely disputed must support the assertion by; (A) citing to particular parts of materials in the record...”). None of the Hawks’ assertions were supported in their brief by citation to any evidentiary facts.⁸

None of the property deeds provided by Claimants establish when the “moorage lagoon was [allegedly] built,” nor do any of the photos establish that fact. Mr. Semanko’s affidavit alleges, “Attached hereto as Exhibit I is a true and correct copy of an aerial picture of Sylvia’s Haven in 1965, before the outlet moorage was built.” Aff. Semanko, ¶ 8. Mr. Semanko fails to lay a foundation for how he personally knows such photo was taken over 50 years ago in or around St. Maries, Idaho in 1965. The photo identified as Exhibit “T” (bates Hawks 3006) purports to have the following handwriting on the photo: “Steve Hawks 91-7102 + 91-7173.” Since the claimed priority date for claim no. 91-7173 is 2008, the handwriting must have been imposed after 2008. As for other notations, there is no indicia as to *why* such handwriting was placed on the exhibit.

For claim No. 91-7102, the Hawks allege—without citation to any evidentiary support regarding the actual location of their diversion works— that “[b]oth 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.” Hawks’ Memo at 7 (emphasis added). Mr. Rasor’s affidavit clearly rebuts this allegation. Aff. Rasor, ¶ 6, Exs. 1-2. Mr. Rasor, a PLS surveyor,

⁸ Furthermore, this so called “private moorage lagoon” does not have a tax ID number with Benewah County, meaning no one, Claimants or otherwise, are currently paying property taxes on these submerged lands within the lagoon.

licensed in the State of Idaho, provides affidavit testimony to this Court that:

Based on my training, education, experience, and physical inspection and investigation of Lots 6 and 13, along with the water diversionary works located thereon, it is my professional opinion that the end points of such diversionary works, e.g., where the water is diverted from its natural source, are located on property outside the boundaries of Lots 6 and 13 as noted on, and consistent with, Exhibits 1 and 2 attached hereto.

Id. (emphasis added). Mr. Rasor states that the PODs are not even close to the boundary lines.

For claim No. 91-7102, the POD is 5 feet outside the Claimants' property boundary for lot 6, and

for claim No. 91-7173, the POD is over 50 feet outside Claimants' property line for lot 13. *Id.*,

Ex. 1-2. The elevations of both PODs are well below the ordinary high water mark of 2128 feet.

Id.

More generally, the Hawks allege, "although the lands that are licensed and claimed for point of diversion are in the St. Joe River, they are above the submerged lands validly claimed by Objector under *Idaho v. United States, et al.* [i.e., the Coeur d'Alene Tribe], 533 U.S. 262 (2001)." Hawks' Memo at 7 (emphasis added). Their apparent theory is that the United States could not have reserved any lands other than the bed and banks of the St. Joe River which existed prior to statehood. *Id.* at 8. The Hawks cite the cases of *In re Sanders Beach*, 143 Idaho 443, 147 P.3d 75 (2006) and *Erickson v. State*, 123 Idaho 208, 970 P.2d 1 (1998) for support for their assertion that additional lands became submerged in 1907 after the completion of the Post Falls dam. Aff. Mihara, Ex.1, p. 5 (91-7102 RFA 6); Aff. D. Hedden-Nicely, Ex.1, p. 5 (91-7173 RFA 6).

The Hawks fail to acknowledge that until 1910, well before Mr. Castlio received his patent in 1912, the United States and Tribe owned *all the lands*, submerged as well as uplands,

within the Reservation. 36 Stat. 2494. *See also Confederated Salish and Kootenai Tribes of Flathead Reservation, Montana v. Namen*, 665 F.2d 951, 953 (9th Cir. 1982). The Hawks admit that as of 1907 the ordinary high water mark (“OHWM”) of the St. Joe River was 2128 feet. Aff. Mihara, Ex.1, p. 5 (91-7102 RFA 6); Aff. D. Hedden-Nicely, Ex.1, p. 5 (91-7173 RFA 6). Accordingly, if any Reservation lands were flooded in 1907 those lands were *owned by the Tribe*. When Claimants’ predecessor in interest’s received his patent in 1912, it would have only entitled him to the land above the ordinary high water mark *at the time of the patent*. *Jefferis*, 134 U.S. at 196. *See also Rochester*, 127 F.2d at 192 (“[t]he general rule, of course, is that patents of the United States to lands bordering navigable waters . . . convey only to the high water mark.”).

Further, as noted in the Tribe’s opening briefing, federal law squarely controls the disposition of submerged lands underlying navigable waters within the boundaries of an Indian reservation. *Idaho II, infra*; *see also Montana Power Co. v. Rochester*, 127 F.2d 189 (9th Cir. 1942); *see also Montana Power Co. v. FPC*, 459 F.2d 863, 865 (D.C. Cir. 1972); *see also Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982). Federal law likewise dictates that the boundary between submerged lands owned by the United States and adjacent uplands is the *present* ordinary high water mark. *Bonelli Cattle Co v. Arizona*, 414 U.S. 313, 318 (1973).

Assuming, *arguendo*, even if *Erickson* and *Sanders Beach* were applicable, the Hawks fail to cite applicable passages in both cases whereby the Supreme Court of Idaho noted the law presumes the ordinary high water mark (“OHWM”) for Coeur d’Alene Lake has been 2128 feet at least since Idaho statehood, not 1907. *Erickson*, 132 Idaho at 210-12 (“[i]t is not disputed that the State . . . owns the bed of the Lake below the OHWM as it existed at the time of statehood,”

and “[c]onsidering that the current OHWM of the Lake is 2128 feet, it is presumed that the State is holding the title to these lands in trust for the public. In order to prove otherwise, the Ericksons have the burden of proving their title by clear and convincing evidence.”).

Likewise, in *In re Sanders Beach*, the Supreme Court of Idaho explained that,

[t]he district court erred in disregarding the historical facts as to how the level of Lake Coeur d'Alene has been maintained since 1907. In *Erickson v. State*, 132 Idaho 208, 211, 970 P.2d 1, 4 (1998), we held, “Considering that the current OHWM of the Lake is 2128 feet, it is presumed that the State is holding the title to these lands in trust for the public.” In *Idaho Forest Industries, Inc. v. Hayden Lake Watershed Improvement District*, 135 Idaho 316, 319, 17 P.3d 260, 263 (2000), we explained that presumption as follows:

The presumption in *Erickson* was based upon the current OHWM of Lake Coeur d'Alene. Using dams located at Post Falls, the Washington Water Power Company has maintained the level of Lake Coeur d'Alene at 2128 feet above msl throughout the summer and into early fall of every year since 1907. The consistent maintenance of a single water level for over ninety years established a certain current OHWM, justifying the presumption the State was holding the property [below that level] in trust.

The presumption we stated in *Erickson v. State* must be considered in context of the historical facts and the issue in that case. The plaintiffs were seeking to prove that the OHWM was below 2128 feet. Considering that the existing OHWM of 2128 feet had been maintained for over ninety years, we held that it was presumed that land below that level was owned by the State and the plaintiffs would have to overcome that presumption by clear and convincing evidence. Because they had not done so, we reversed the judgment of the district court to the contrary. The presumption in *Erickson v. State* only applied to attempts to prove that the OHWM was below 2128 feet. When the effect upon the lake's water level caused by the dams maintained since 1907 is taken into consideration, it is clear that the OHWM on July 3, 1890, was not higher than its current level of 2128 feet. The dams did not lower the water level in the lake from its prior level.

143 Idaho at 448-49 (emphasis added).

When applying the presumed OHWM of Coeur d'Alene Lake against that of the St. Joe River it is a matter of physics that the St. Joe River's OHWM would have to be equal to or

higher than that of the lake because the River flows into the Lake. In *Erickson*, the Court observed that the Washington Water Power Company completed construction of its dams at Post Falls in 1907. 132 Idaho at 209. Those dams are located in the Spokane River approximately 10 miles downstream of Coeur d'Alene Lake. *Id.* The Court in *Sanders Beach* found that “[b]ecause the Spokane River is the outlet of Lake Coeur d’Alene, the dam raised that level, at least during parts of the year, in both the lake and in the Coeur d’Alene and St. Joe rivers that feed into the lake. There were also allegations that the dam caused flooding along the St. Maries River that feeds into the St. Joe River.” *Sanders Beach*, 143 Idaho at 449 (emphasis added)). The parties in *Erickson* agreed that the Lake and affected waterways are like a bathtub, in that it has the same level at all locations. 132 Idaho at 209, *accord In re Sanders Beach*, 143 Idaho at 447 (rejecting the notion that the OHWM could be different elevations at different points of the lake and finding that “courts will take judicial notice of the fact that water seeks its level; and if a witness should testify that it stood up in hillocks or piles, like stone or earth, a court would not be expected to believe it.”). Accordingly, to rule that the OHWM of the St. Joe River is *lower* than the OHWM of the Lake would be to hold that the St. Joe River flows backwards, an absurdity likely constituting clear error.

Idaho law places the burden of asserting an OHWM lower than 2128 feet for the St. Joe River on the Hawks to prove their allegations by clear and convincing evidence. *Erickson*, 132 Idaho at 211; *see also In re Sanders Beach*, 143 Idaho at 448-49. The Hawks have provided *no evidence*, let alone clear and convincing evidence, to support their bald assertion that the OHWM of the St. Joe River is anything other than 2128 feet.

The Hawks provide no proof that the PODs are on their property. The affidavit of Scott

Rasor, PLS, establishes that both of the Hawks' PODs are in waters at points well lower than 2128 feet. Aff. Rasor, ¶ 6, Exs. 1-2. In fact, Claimants' POD for claim no. 91-7173 overlies submerged lands at an elevation of 2112.94 feet, over *seven feet lower* than Claimants' asserted "historic" high water mark of 2120 feet. *Id.* See also Aff. D. Hedden-Nicely, Ex. 2, p. 10 (91-7173 Interrog. No. 10). The Hawks' admissions on file establish that the waters at their PODs are navigable and are within the boundaries of the Tribe's reservation. These lands are therefore owned by the Coeur d'Alene Tribe.

Based on the plain language of the *Judgment & Decree* in the case *United States v. Idaho*, Case No. CIV-94-0328-N-EJL, other undisputed federal and state law, as well as the undisputed *material* (and admitted) facts of this case, the Tribe owns the property at Claimants' points of diversion. Aff. Mihara, Ex. 1, pp. 4-6 (RFA 5 and RFA 8) Aff. D. Hedden- Nicely, Ex. 1, pp. 4-6 (RFA 5 and RFA 8).

D. The doctrines of estoppel, laches, and waiver do not apply in this case.

The Hawks assert that in the event the Tribe proves ownership of the submerged lands, it should be precluded from asserting trespass against them based on the doctrines of estoppel, waiver, and laches. Hawks' Memo at 9-10.

The Hawks allege that, "Objectors failed to bring any trespass claims against any Claimants until the commencement of the CSRBA, even though Claimants have been obtaining and using licenses for water since the 1990s and earlier." *Id.* at 10. The Hawks allege that to allow the Tribe to "benefit" from its current position for the first time in the CSRBA would be inequitable. *Id.* The Hawks allege that the Tribe "voluntarily and intentionally acquiesced to Claimants' water use for years and delayed pursuing an action until Claimants were forced to

participate in the CSRBA.” The Hawks fail to specify *how* the Tribe allegedly voluntarily and intentionally acquiesced to their alleged water use. The Hawks fail to prove the Tribe even knew about their alleged water use prior to the Director’s Report being published in the CSRBA.

Estoppel, waiver, and laches are equitable defensive doctrines which apply in equitable settings. Apparently, the Hawks’ “last-gasp theory” is that it would be inequitable for the Tribe to assert trespass because to do so would invalidate their water claims.

It is well established under Idaho law, the burden of proving an equitable defense rests upon the party asserting it. *Bunn v. Heritage Safe Co.*, 148 Idaho 760, 229 P.3d 365 (2010) (estoppel); *Goodspeed v. Shippen*, 154 Idaho 866, 303 P.3d 225 (2013) (waiver); *Thomas v. Arkoosh Produce, Inc.*, 137 Idaho 352, 48 P.3d 1241 (2002) (laches).

The Court should observe that the Hawks make all of the arguments in their briefing without citation to a shred of evidentiary support. Hawks Memo at 9-10; *cf.* I.R.C.P. 56(c)(1) (“A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record...”). There is not a single citation to the evidentiary record in the entirety of the Hawks’ briefing supporting their allegation of inequity. *Id.*

Because the Tribe owns the submerged lands, the Hawks are trespassers, and the doctrines of estoppel, laches, and waiver do not apply in this case. Even if such doctrines did apply, the Court should decline to entertain such arguments because the Hawks—as trespassers—come before this Court asserting equitable defenses with unclean hands.⁹

⁹ The doctrine of unclean hands allows a court to deny equitable relief on the ground that a litigant’s conduct has been “inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy at issue. *See e.g., Sword v. Sweet*, 140 Idaho 242, 251, 92 P.3d 492, 501 (2004)

Each of the Hawks' theories of estoppel, waiver, and latches will be discussed in turn.

The Hawks' foundational premise crumbles when applied to the facts of this case.

1. The doctrine of estoppel does not apply.

The Hawks do not delineate in their memoranda regarding which estoppel theory they are pursuing. Hawks Memo at 9-10. Due to the citation to *Schoonover*, the Tribe will assume the Hawks are referencing quasi-estoppel. *Schoonover v. Bonner Cnty.*, 113 Idaho 916, 919, 750 P.2d 95, 98 (1988).¹⁰

The Hawks cite *Schoonover* for the proposition that:

Quasi-estoppel is essentially a last-gasp theory under which a defendant who can point to no specific detrimental reliance due to plaintiff's 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.

Hawks' Memo at 9 (emphasis added). The Hawks omit an important portion of the holding and use the intentional omission placeholder of "...". That omitted portion of the *Schoonover* opinion,

("he who comes into equity must come with clean hands."). The Hawks come before the Court as trespassers begging the Court overlook their transgressions and that their water right claims were initiated via trespass.

¹⁰ In Idaho, estoppel can also take the form of equitable estoppel. *Winn v. Campbell*, 145 Idaho 727, 732, 184 P.3d 852, 857 (2008). Due to the fact that Claimants are seeking to avail themselves to an equitable defense, such burden is on them to argue and prove such theories. *Bunn v. Heritage Safe Co.*, 148 Idaho 760, 229 P.3d 365 (2010). Because no argument to a specific theory of estoppel has been made by the Hawks, their argument should be disregarded *pro forma*. Claimants' arguments would fail even if it were asserting equitable estoppel because they have pointed to *no evidence* that would suggest the Tribe has made *any* "false representation or concealment of a material fact . . . ; that [Claimants] did not know or could not discover the truth; that [the Tribe made any] false representation[s] or concealment . . . with intent that it be relied upon; and, that the misrepresentation resulted in detrimental reliance on the part of [Claimants]." *Schoonover*, 113 Idaho at 919.

as used by the Hawks, reads as follows:

The doctrine classified as quasi-estoppel has its basis in election, ratification, affirmance, acquiescence, or acceptance of benefits; and the principle precludes a party from asserting to another's disadvantage, a right inconsistent with a position previously taken by him. *Id.*

The doctrine of quasi-estoppel is wholly inapplicable to this case. The Hawks fail to set forth how the Tribe allegedly taken *any* position regarding this case before filing its objection or how it benefitted and "acquiesced to Claimants' water use for years." Hawks Memo at 10. The Hawks fail to point to the record to show this Court the Tribe had any actual knowledge of their water use or took a previous position which is inconsistent with the position it takes now.¹¹ The failure is due to the fact there is simply no evidence for the Hawks to point to. The Tribe has received no benefit from the Hawks' water use. It is the Hawks who have benefitted from their trespass by encroaching over or upon the Tribe's submerged lands for the purpose of securing a water right.

¹¹ It is interesting the Hawks would make this argument as both their water rights licenses note the source of their water is in the St. Joe River. Aff. Semanko, Exs. A and B. Because the PODs are where the water is diverted from its natural source, such PODs would have to be in the St. Joe River. The Hawks, however, now allege that the POD for claim No. 91-7102 is not in the St. Joe River, but rather in a "moorage lagoon" which the Tribe cannot prove ownership of. Hawks' Motion for Summary Judgment, p. 7. It is the Hawks who had taken a prior position, benefitted from that position by securing a water right, and now seek to disclaim the POD as anything but the St. Joe River. Further, in the license for claim No. 91-7173, it is specifically noted that, "[t]his right does not grant any right-of-way or easement across the land of another." Aff. Semanko, Ex. B. This notation was also on the permits for both claims. Now the Hawks seek to establish such a right of way and/or easement by resort to equitable arguments. Contrast the Hawks' position with the admissions on file in the record: the Hawks have admitted that their license for claim No. 91-7102 places the POD in the St. Joe River. Aff. Mihara, Ex. 2, p. 8 ("Claimants admit that the IDWR water right license no. 91-7102 states that the point of diversion is the St. Joe River, which is a natural water source..."). The Hawks' current position is contrary to a position they've taken during discovery and is inconsistent with the premise upon which the water rights were granted.

The Hawks claim prejudice but fail to explain *how* they are prejudiced in any way other than invalidating their water rights which were initiated in trespass. Hawks Memo at 10 (“This prejudices Claimants and puts Objector in an unfair advantage.”).¹² The Hawks are in the same position today as they would have been the first day their claims were initiated via trespass: trespassers.

The Hawks fail to meet their burden of proving the equitable defense of estoppel.

2. The doctrine of waiver does not apply.

Waiver is an equitable theory involving a question of intent. *Schoonover v. Bonner Cnty.*, 113 Idaho 916, 919 (1988). It is the “voluntary, intentional relinquishment of a known right or advantage.” *Id.* Waiver will not be inferred except from a clear and unequivocal act manifesting an intent to waive, or from conduct amounting to estoppel. *Id.* It must appear, however, that the adverse party has acted in reliance upon such position and altered his position. *Id.*

As discussed above, the Hawks fail to prove, or even allege, any act of the Tribe which would be tantamount to conduct warranting waiver. The Hawks’ briefing is void of any allegations which this Court could find a “clear and unequivocal act manifesting an intent to waive” any rights the Tribe would have to the submerged lands it owns, i.e., “the bed and banks of all of the navigable waters lying within the current boundaries of the Coeur d’Alene Indian Reservation... which includes... the St. Joe River...”. Aff. Mihara, Ex. 7; Aff. D. Hedden-

¹² As an aside and without discussing the details of any settlement proposals between the Tribe and the Hawks, the Tribe notes that it has settled its trespass objection with other Claimants on the St. Joe River if those claimants agree to (1) pay any back fees they may have for dock encroachments, if applicable; (2) apply for and receive a *free* water withdrawal encroachment permit from the Tribe; and (3) agree to a remark in their decree noting that access is conditioned upon continued authorization from the Tribe. The Tribe has offered to settle on this basis with *every* claimant claiming water from the St. Joe River within the Reservation.

Nicely, Ex. 8.

As the Hawks fail to allege any facts in support of their waiver theory.

3. The doctrine of laches does not apply.

Laches is essentially the equitable version of a statute of limitations. Whether or not a party is guilty of laches is primarily a question of fact and therefore its determination is within the province of the trial court. *Huppert v. Wolford*, 91 Idaho 249, 257 (1966).

The defense of laches is related to equitable estoppel. *Id.* The necessary elements of laches are: (1) defendant's invasion of plaintiff's rights; (2) delay in asserting plaintiff's rights, the plaintiff having notice and the opportunity to institute a suit; (3) lack of knowledge by defendant that plaintiff would assert his rights; and, (4) injury or prejudice to defendant in the event relief is accorded to plaintiff or the suit is not held to be barred. *Id.* While lapse of time is an important element, it is not alone in the determination of whether laches should apply, unless the party claiming laches was injured or placed at a disadvantage because of the delay. *Id.*

In *Huppert*, the Supreme Court of Idaho observed that there was admitted delay, but the delay did not place the appellant at a disadvantage or in a worse position that it would have if the case were prosecuted with greater diligence. *Id.*

The Tribe spent almost half a century embroiled in litigation to quiet title to the submerged lands underlying navigable waters within its reservation. In 1973, the Tribe intervened in a Federal Power Commission licensing proceeding for the Washington Water Power Company's (now Avista) operations at Post Falls Dam. 13 FERC ¶ 63, 051. In 1979, Avista, the Interior Department, and the Tribe litigated the ownership of the submerged lands within the Tribe's reservation. *Id.* The administrative law judge initially concluded that the

Reservation's submerged lands had passed to Idaho in 1890. *Id.* However, FERC reversed itself in 1983. Op. No. 199, 25 FERC ¶ 61,026 (1984). Finally, in 1988, FERC determined it lacked authority to determine the ownership issue. 43 FERC ¶ 61,254. On October 15, 1991, the Tribe filed suit against the State of Idaho seeking to quiet title to the navigable waterways of its reservation. *Coeur d'Alene Tribe v. Idaho*, 798 F.Supp. 1443, 1445 (D.Idaho 1992). Eventually, 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*"). 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 Coeur d'Alene Reservation. The Tribe intervened in that case. Following a two week trial the district court quieted title to such submerged lands in the United States as trustee, and the Tribe as the beneficially interested party. *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 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 a decade between the litigation in *Idaho I* and *Idaho II*.

From 1973 to 2001, the Tribe was litigating ownership of the very lands at issue in this subcase. It was a little preoccupied in establishing its title before the Supreme Court of the United States rather than pursuing objections in IDWR administrative hearings. Furthermore, prior to the Supreme Court decision in *Idaho II* in 2001, the state of Idaho asserted *it* owned the property at issue. Therefore, even if the Tribe had filed a protest alleging trespass, that protest

would likely have failed prior to the Supreme Court's decision in *Idaho II* because the Tribe would not have been able to establish its ownership.

Water right claim No. 91-7173 was licensed in 2008, well after the Supreme Court of the United States affirmed the federal District Court's order quieting title to the United States and Tribe to the relevant portions of the St. Joe River. *Idaho II*. In 2008, pursuant to *Idaho II*, the Hawks were on notice the Tribe owned the property at the POD.

The petition to commence the CSRBA was filed in July of 2008. *See* Petition (filed July 8, 2008). The water adjudication statutes and rules of procedure for the CSRBA Court *require* the Tribe enter objections to water rights it disagrees with. I.C. § 42-1412, *et seq.*; *see also* Administrative Order 1 ("AO1"). In this case, the Tribe timely objected. *See* Objections (subcases 91-7102 and 91-7173). Prior to the filing of the Director's Report for Basin 91, in 2015, the Tribe would not have had standing to object to the Hawks' water right claims in the CSRBA. It is hard to imagine how Claimants can assert that the Tribe "delay[ed] in asserting [it's] rights . . . having notice and the opportunity to institute a suit," when the Tribe filed an objection to this claim at the earliest possible time in the CSBRA. *Wolford*, 91 Idaho at 257. This is particularly true as applied to 91-7173, which was licensed on June 16, 2008, days before the CSRBA commenced.

Having disposed of each of the Hawks' pleas in equity, the Tribe observes that there are no disputes of *material* fact: the Tribe owns and controls the lands at the Hawks' PODs. The PODs underlie navigable waters, within the boundaries of the Tribe's reservation. The Hawks never received permission to encroach from either the United States or Tribe at the time such diversion works were installed, or any time thereafter. The Hawks' diversionary works at the

PODs were initiated in trespass and thus, their water right claims are void. What would be inequitable is not that the Court invalidates a water right initiated via trespass, but rather for it to sanction a water right initiated via trespass upon Tribal lands contrary to state, federal, and tribal law.

CONCLUSION

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

Based upon the undisputed and admitted material facts, the United States and Tribe own the bed and banks underlying navigable waters within the Tribe's reservation: the waters overlying the Hawks' PODs are navigable and are within the Tribe's reservation. Aff. Mihara, Exs. 1, 7; Aff. D. Hedden-Nicely, Exs. 1, 8. During times relevant hereto, the Hawks never sought nor received permission for their water diversionary works to be placed at the PODs for claims 91-7102 or 91-7173 from either the United States or Tribe. *Id.* Hence, the claims were initiated in trespass and are void.

Any attempt to dispute that the bed and banks at the Hawks' PODs for claim Nos. 91-7102 and 91-7173 is anything other than the St. Joe River, a natural watercourse, is foreclosed by the undisputed and admitted aspects of their licenses and established water court precedent.

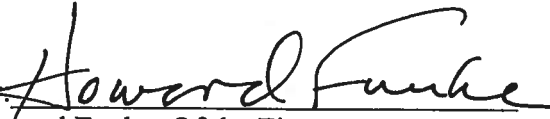
Finally, a formal survey of the Hawks' property reveals the PODs are outside their property boundaries. Aff. Rasor, ¶ 6, Exs. 1-2. In light of the foregoing, it is the Hawks' burden to prove their water rights were not initiated via trespass. I.C. § 42-1411(5). The Tribe has established it owns the lands underlying all navigable waters within its reservation, the waters overlying the PODs are navigable and within the reservation. Aff. Mihara, Exs. 1, 7; Aff. D. Hedden-Nicely, Exs. 1, 8. Regardless of who owns the property at the PODs, the Hawks fail to

establish that they received permission from *anyone* for the PODs to be placed where they are.

For the foregoing reasons, this Court should 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.

By: 
Howard Funke, Of the Firm
Attorneys for the Coeur d'Alene Tribe

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:

Norman Semanko
Sarah McCormack
Moffatt, Thomas, Barrett, Rock & Fields, Chtd.
P.O. Box 829
Boise, Idaho 83701-0829

☒ Email @ nms@moffatt.com
☒ Email @ SAM@moffatt.com
☐ First Class Mail, Postage Prepaid
☐ Facsimile @ (208) 385-5384
☐ Hand-delivery

Counsel for Claimant(s) and Respondent NIWRA members

Clive Strong
Steven Strack
Office of the Attorney General
State of Idaho
P.O. Box 83720
Boise, Idaho 83720-0010

☒ Email @ clive.strong@ag.idaho.gov
☒ Email @ steve.strack@ag.idaho.gov
☐ First Class Mail, Postage Prepaid
☐ Facsimile @ (208) 854-8072
☐ Hand-delivery

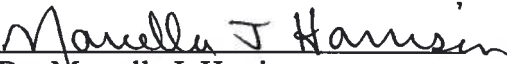
Counsel for Respondent State of Idaho

U.S. Department of Justice
Environment & Nat'l Resources
550 W. Fort St., MSC 033
Boise, Idaho 83724

☒ First Class Mail, Postage Prepaid
☐ Facsimile @ (303) 844-1350
☐ Hand-delivery

Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098

☒ First Class Mail, Postage Prepaid
☐ Facsimile @ (208) 287-6700
☐ Hand-delivery


By: Marcella J. Harrison