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DEPARTMENT OF
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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. 91-7102; 91-07173
	)	
Case No. 49576	)	
	)	
_____	)	STATE OF IDAHO'S MEMORANDUM
	)	IN REPLY TO TRIBE'S RESPONSE
Steve and Deanne Hawks,	)	OPPOSING STATE'S MOTION FOR
	)	SUMMARY JUDGMENT
Claimants,	)	
	)	
v.	)	
	)	
Coeur d'Alene Tribe, a federally-recognized	)	
Indian Tribe,	)	
	)	
Objector.	)	
_____	)	

INTRODUCTION

The State filed a response in these subcases to address the assertion in the Tribe's objections that the water right "should not exist" because "the claimant must have authorization

from the Tribe to encroach upon tribal submerged lands” and “[t]o date, no such authorization has been obtained by the claimant.” By its plain terms, the Tribe’s objection asserted that a licensed water right should cease to exist if the water user fails to obtain and maintain a valid encroachment permit from the Tribe. Such an assertion would, for all intents and purposes, allow the Tribe to determine whether or not a licensed water right should continue to exist. Therefore, the State filed a response to confirm that the Tribe’s authority to regulate encroachments on submerged lands did not alter the State’s jurisdiction and authority to issue permits, licenses, and decrees for the use of water on lands owned by non-members within the Coeur d’Alene Indian Reservation.

The State also responded to the Tribe’s objections to clarify that the State’s issuance of a water right does not authorize encroachment over or upon submerged lands. That being the case, it is not necessary to resolve the allegations of current (i.e., “to date”) trespass that the Tribe alleged in its objections: rather, such allegations are fully resolved if the decrees include a remark that the water right does not grant any right-of-way or easement across the land of another. In other words, the State’s issuance of a decree for domestic water use from the St. Joe River does not limit the Tribe’s authority to regulate encroachments and pursue trespass actions if, in fact, any encroachment exists. Thus, it is not necessary for this Court to resolve factual disputes regarding the extent of tribal ownership of submerged lands and the location of the diversion structures in relation to such ownership.

In its response to the State’s summary judgment motion,¹ the Tribe does not appear to contest the State’s assertion that a water right cannot be conditioned on continuous and

¹ As the Tribe points out, the State of Idaho’s summary judgment motions mistakenly cited Federal Rule of Civil Procedure. The State requests that the Court overlook this clerical error and proceed under I.R.C.P. 56(a).

uninterrupted maintenance of a tribal encroachment permit. Nor does the Tribe contest the State's assertion that the inclusion of a remark that the water right does not grant any right-of-way or easement across the land of another is sufficient to address any current encroachment issues. Rather, on summary judgment, the Tribe's argument is centered on an assertion not presented on the face of its objections, i.e., that the water rights at issue were *initiated* in trespass, thus making them, in the Tribe's view, void *ab initio*. The State submits this memorandum in reply to this assertion.

ARGUMENT

A. THE TRIBE IS PROHIBITED FROM COLLATERALLY ATTACKING THE LICENSES BASED ON FACTUAL CIRCUMSTANCES THAT EXISTED BEFORE OR AT THE TIME THE LICENSES WERE ISSUED.

The Tribe asserts that by the terms of Idaho Code § 42-220, it is not prohibited from collaterally attacking the licenses at issue here. Idaho Code § 42-220 provides that licenses “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.” The Tribe interprets this to mean that with regard to everyone but the State and the water user, the license is only *prima facie* evidence of the elements therein, so that the Tribe may rebut such elements by demonstrating, many years after the fact, that the water rights were initiated in trespass.

The SRBA Court, however, “has repeatedly held that attempting to amend a licensed water right in the SRBA proceedings based on circumstances existing prior to the issuance of the license constitutes an impermissible collateral attack on a license.” SRBA Court, *Order Conditionally Granting Motion to Set Aside Partial Decrees*, Subcase Nos. 37-07454 and 37-07602 (Dec. 3, 2003) at 11 (emphasis added). While in those subcases the SRBA Court was addressing an objection by the water right claimants, who are bound by the license terms, it has, on other occasions, emphasized that “unlike a prior decree, the binding effect of a license

extends beyond the parties to the administrative proceedings and their privies,” in part because, as the Court explained in a footnote, “[p]ublication notice is given and any affected person can initiate a contested case.” SRBA Court, *Memorandum Decision and Order on Challenge and Order Disallowing Water Rights based on Federal Law*, Subcase 29-11609 (Oct. 6, 2006) at 13.²

Given the holdings described above, the fact that Idaho Code § 42-220 describes a license as *prima facie* evidence of the elements therein does not open the door to re-examination of the factual circumstances existing at the time the license was issued. Rather, the statute provides that licenses are *prima facie* evidence because “the elements of the water right are not insulated from re-examination [because] [e]lements can subsequently be changed voluntarily such as through contract or by operation of law (i.e., forfeiture or abandonment).” SRBA Court, *Memorandum Decision and Order on Cross-Motion for Summary Judgment*, Consolidated Subcase 91-63 (Sept. 2, 2008), at 12. In other words, a “licensed right is not conclusive as to the extent of the water right, since a license does not insulate a claimant from practices occurring after the license was issued such as abandonment or forfeiture.” SRBA Court, *Memorandum Decision and Order on Challenge and Order Disallowing Water Rights based on Federal Law*, Subcase 29-11609 (Oct. 6, 2006) at 13.

In short, elements in a license can be rebutted by evidence showing changes in water use *subsequent* to the issuance of the license, but parties in the CSRBA cannot re-litigate factual issues that could have been raised at the time of the license’s issuance.

² So far as the State can determine, while the SRBA Court may have examined trespass claims with regard to some licensed water rights, it never directly addressed the issue of whether a license could be collaterally attacked if diversion or conveyance structures were trespassing on another’s property prior to or at the time the license was issued. And, SRBA Court decisions addressing the issue of whether a water right based on beneficial use should be denied because initiated in trespass do not provide any guidance on such issue, because in such instances the Court’s examination of the factual circumstances regarding beneficial use is not a collateral attack on any prior judicial or administrative determination. Thus, the Tribe’s citation of the Special Master’s Report in SRBA Subcase 53-10199, which addressed a beneficial use claim, is inapposite.

The one exception the Court has stated may exist to the above rule is determination of the legal issue of whether a licensed water right is void *ab initio* due to lack of IDWR authority to issue the license in the first place. SRBA Court, *Memorandum Decision and Order on Cross-Motions for Summary Judgment Re: streamflow Maintenance Claim*, Subcase 63-03618 (Sept. 23, 2008) at 19 (“the Court also acknowledges that an invalid license may also constitute an exception to the collateral attack prohibition”).

Together, the SRBA Court’s decisions regarding attacks on prior licenses incorporate the well-established distinction between “void” and “voidable” agency actions. A State’s action, if “in excess of, and without, its jurisdiction,” is “absolutely void.” *Ex parte Cox*, 3 Idaho 530, 532, 32 P. 197, 198 (1893). But, if a State’s action “was a mere erroneous exercise of power,” it is “voidable only.” *Id.* The distinction is critical because if an agency action is void, it is subject to collateral attack, but if merely voidable, “it would not be subject to collateral attack.” *Mosman v. Mathison*, 90 Idaho 76, 86, 408 P.2d 450, 456 (1965). In short, this Court can find the licenses at issue “void” only upon a showing that IDWR lacked jurisdiction to issue the licenses due to a statutory or constitutional violation. But such a finding cannot be made here. There is no statutory requirement that IDWR verify permission for placement of diversion and conveyance works, unless the water is being diverted from a privately-owned lake, pond, pool or spring. Idaho Code § 42-213.³ When issuing a license to divert water from streams and rivers, the Idaho Code requires that an applicant for a domestic water right need only provide the following information:

³ “It is a universally recognized rule of construction that, where a constitution or statute specifies certain things, the designation of such things excludes all others.” *Local 1494 of Int’l Ass’n of Firefighters v. City of Coeur d’Alene*, 99 Idaho 630, 639, 586 P.2d 1346, 1355 (1978). Thus, the fact that the Idaho Code only requires verification of written permission to divert private waters strongly suggests that such verification is not needed for applications to appropriate water from streams and rivers.

- (a) The name and post-office address of the applicant.
 - (b) The source of the water supply.
 - (c) The nature of the proposed use or uses and the period of the year during which water is to be used for such use or uses.
 - (d) The location of the point of diversion and description of the proposed ditch, channel, well or other work and the amount of water to be diverted and used.
 - (e) The time required for the completion of construction of such works and application of the water to the proposed use.
-
- (4) . . . a plan and map of the proposed works for the diversion and application of the water to a beneficial use, showing the character, location and dimensions of the proposed reservoirs, dams, canals, ditches, pipelines, wells and all other works proposed to be used by them in the diversion of the water, and the area and location of the lands proposed to be irrigated, or location of place of other use.

Idaho Code § 42-202. Upon receipt, the department must publish notice of the application to appropriate waters, and provide ten days from the last date of publication for the filing of protests. Idaho Code § 42-203A. If no protest is filed, the department “may forthwith approve the application, providing the same in all respects conforms with the requirements of this chapter, and with the regulations of the department of water resources.” *Id.*

IDWR rules require the department to evaluate “whether an application is made in good faith or whether it is made for delay or speculative purposes.” IDAPA 37.03.08.045.01.c. In part, an “application will be found to have been made in good faith if [the] application shall have legal access to the property necessary to construct and operate the proposed project, has the authority to exercise eminent domain authority to obtain such access, or in the instance of a project diverting water from or conveying water across land in state or federal ownership, has filed all applications for a right-of-way.” IDAPA 37.03.08.045.01.c.i.

Upon submission of proof that water is being put to beneficial use, “it shall be the duty of the department to carefully examine the same, and if the department is satisfied that the law has been fully complied with and that the water is being used at the place claimed and for the

purpose for which it was originally intended, the department shall issue to such user or users a license confirming such use.” Idaho Code § 42-219.

In sum, an examination of the Idaho Code provisions addressing issuance of permit and licenses verifies that permission for placement of diversion and conveyance structures is not a statutory prerequisite to issuance of a water right permit or license. Rather, such permission, or the lack thereof, is a factual issue that the department considers at the permit application stage in determining whether the applicant will make a good faith effort to put the water to beneficial use. If on the face of the application it appears the applicant may not be able to acquire the necessary permission, or if the owner of affected lands files a protest, the department may deny the water right application.

Here, nothing on the face of the applications would have alerted IDWR that the water rights would be initiated in trespass. IDWR implements IDAPA 37.03.08.045.01.c. by requiring water right permit applicants to indicate whether they own the point of diversion, and if not, to “describe the arrangement enabling the applicant to make this filing.” Affidavit of Steven W. Strack, Exhibit 3. Here applicant Steve Hawks indicated that Cyril Chase⁴ owned the point of diversion for water right 91-7102, and in response the Department’s action on the application included the condition that “[t]he issuance of this permit in no way grants any right-of-way or easement across the lands of another.” Hawks’ application for water right 91-7173 indicated that he owned the point of diversion. Affidavit of Steven W. Strack, Exhibit 4. Because the water right applications were uncontested, the Department properly relied on the applicant’s statements regarding ownership of the points of diversion.

⁴ The point of diversion lies in an artificial lagoon or canal created by developer Cyril Chase as an amenity for lot owners in the Sylvia’s Haven subdivision. *See* Memorandum in Support of Claimants Steve and Deanne Hawks’ Motion for Summary Judgment at 7.

In these proceedings, ownership of the land at the points of diversion continues to be in dispute. Therefore, even if the Court were to address the issue of ownership of the points of diversion, the Court could conclude, at most, that the Department acted erroneously in issuing the license without independently verifying ownership of the land at the points of diversion. But the Court cannot conclude that IDWR violated any statutory requirements when it issued the licenses, because nothing in the Idaho Code requires the department to independently assess or review ownership of the point of diversion. This is a distinction with a difference: while the Court may declare a license void if IDWR lacked the authority to issue it, it cannot reach back and determine factual issues that, if they had been raised at the time of the permit application, would have led IDWR to conclude that the application was voidable, so that the license should not have been issued.⁵

In summary, the Coeur d'Alene Tribe had legal notice of the permit applications that led to the two licenses at issue here.⁶ The notices named the St. Joe River as the water source. In neither case did the Tribe appear before IDWR to assert that the proposed diversion would

⁵ As the Tribe points, out, several decisions in the SRBA appeared to address issues of trespass. But, at least some of these cases address diversion from springs, and such diversions are subject to the statutory requirement that the “application shall state that the applicant has the written permission from such owner [of the land surrounding the springs] to divert or appropriate such water. Idaho Code § 42-213. For example, in SRBA Subcases 36-02708 *et. al*, the Special Master found that springs are “private waters” that require, under Idaho Code § 42-213, a right of way from the land owner in order to perfect a water right. The Special Master then concluded that no such requirement applied to appropriations from streams and other public water ways. SRBA Court, *Memorandum Decision and Order on Challenge*, Subcase Nos. 36-02708 *et. al* (July 9, 1999) at 34 (quoting Special Master’s decision). The Court concurred that an assertion of trespass to appropriate public waters “may be an entirely different issue,” and confirmed the Special Master’s conclusion that Idaho Code § 42-213 does not apply to appropriations from public waters. *Id.* at 35-36. Importantly, none of the SRBA subcases cited by the Tribe address the critical issue of whether a license is void *ab initio*, as opposed to voidable, if it is later determined that the water user did not request permission for diversion or conveyance structures crossing land not owned by the water user. As discussed in Section B of this Memorandum, the issue of voidable versus void is especially critical when the alleged land owner, at the time of initial diversion, did not require permission for encroachments upon its land,

⁶ See affidavit of Steven W. Strack, exhibits 1 and 2.

trespass on tribal lands. Given those facts, the Tribe cannot collaterally attack the issuance of the license by reaching back and attempting to prove in these proceedings that the rights were initiated in trespass.

The Court should note that such a holding does not leave the Tribe without remedies to resolve the alleged trespasses. The Tribe's ability to bring a trespass action in a court of general jurisdiction is not inhibited, because this Court's decree of the water right does not adjudicate the trespass issue, a fact that the court can clarify with the inclusion of a remark noting that the water right does not authorize use of lands not owned by the water users.

B. ALTERNATIVELY, THE TRIBE CANNOT ASSERT THAT A TRESPASS EXISTED AT THE TIME OF LICENSE ISSUANCE IF, AT SUCH TIME, THE TRIBE DID NOT REGULATE OR PROHIBIT ENCROACHMENTS.

These subcases present two different factual scenarios relevant to the assertion that the water rights were *initiated* in trespass. In subcase 91-7173, the license was issued in 2008, ten years after title to submerged land under navigable waterways was quieted in the Tribe by the 1998 judgment in *United States v. Idaho*, CIV-94-0328 (D. Idaho 1998). As noted above, the Tribe failed to raise the issue of trespass at the time the permit and license were issued, and is barred from collaterally attacking the license.

In subcase 91-7102, however, the license was issued on July 20, 1990, with a priority date of July 22, 1988, a full ten years before the judgment in *United State v. Idaho*. The Tribe alleges that the artificial lagoon is submerged land and thus owned by the Tribe. The claimant asserts that the lagoon remains private property.⁷ But this factual dispute need not be resolved

⁷ In comparison, the State does not assert ownership of lands underlying artificial lagoons constructed adjacent to state-owned navigable waterways. The lands under artificial lagoons remain private property, but may be subject to regulation under the State's police powers to protect the public right of navigation, which goes where the water goes. *See Burrus v. Rutledge Timber Co.*, 34 Idaho 606, 202 P. 1067 (1921), and cases cited therein. The State is not aware of any cases recognizing tribal authority to regulate navigable waters overlying privately-owned lands, and "[a]s a general rule . . . 'the

by the Court. While *United States v. Idaho* found that the United States has, since at least 1889, held the beds and banks of the St. Joe River in trust for the Tribe, there is no evidence in the record that either the United States or the Coeur d'Alene Tribe required land owners along the St. Joe River to obtain federal or tribal permission for encroachments upon submerge lands until sometime after the judgment was entered in *United States v. Idaho*. In fact, as pointed out in the State's opening brief, the United States affirmatively declared in 1976 that Coeur d'Alene Lake was not navigable for purposes of federal encroachment permit requirements. 33 U.S.C. § 59m.

In short, when the license was issued for water right 91-7102 in 1988, neither federal nor tribal law required the water user to obtain an encroachment permit for the water pump in the lagoon. Given the complete lack of any federal or tribal permit requirement in 1988, the Tribe's argument that the water right was initiated by trespass upon tribal lands cannot be sustained: it would essentially punish the water user for not complying with laws that did not exist until many years later. The fact that the Tribe enacted a permit program after quieting title to submerged lands in 1998 cannot establish, retroactively, that the license was initiated in trespass against the Tribe.

The fact that the water users did not obtain State encroachment permits at the time the State was regulating encroachments within the Reservation likewise does not establish that the water rights were initiated in trespass. The Court's holding in *United States v. Idaho* was that the United States has, at all times since at least 1889, held the beds and banks of navigable waterways within the current Reservation boundaries in trust for the Tribe. Because the State

tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land.'” *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 329 (2008), quoting *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 430 (1989) (opinion of White, J.).

never owned the beds and banks, the diversion structures at issue did not constitute a trespass against the State.

But, even if the water user's failure to obtain a state permit at the time the State regulated encroachments were relevant, the State has not objected to these water right claims, or any other water right claims, on the basis that failure to obtain a state encroachment permit constitutes a trespass. The State has never asserted that unpermitted water lines over or upon state-regulated submerged lands render the water right void *ab initio*. When the State discovers an unpermitted water pump over or upon submerged lands, it does not seek to dissolve the water right license, nor does it seek to resolve such trespass by filing an objection to a recommended decree. Rather, as the State has suggested the Tribe do here, the State brings an action under its encroachment authorities, Idaho Code title 58, chapter 13, to resolve the unpermitted encroachment.

In summary, any allegation that diversion structures constructed over submerged lands within the Reservation prior to the judgment in *United States v. Idaho* were "initiated in trespass" cannot be reconciled with the fact that neither the United States nor the Tribe required permits for such encroachment until sometime after 1998. Water users cannot be punished for not complying with permit requirements that did not exist at the time of licensure of the initial diversion.

C. THE STATE HAS NOT REQUESTED THE COURT TO DETERMINE THE STATE'S JURISDICTION TO CONTROL DISTRIBUTION OF WATER FROM THE ST. JOE RIVER.

The Tribe goes to great lengths to convince the Court that the issue of the State's authority to regulate distribution of water from the St. Joe River is non-justiciable. The State, however, did not request the Court to rule on the issue of jurisdiction. The only judgment the State asked the Court to enter was a decree of "the water right as claimed, with the addition of a remark noting that the water right "does not grant any right-of-way or easement across the land

of another.” The State addressed the issue of jurisdiction only to clarify that the Tribe cannot control the diversion of water by imposing on water decrees a condition that the water user maintain a current tribal encroachment permit. In its response, the Tribe disclaims any issue relating to *current* encroachments, and instead alleges only that water rights are void if *initiated* in trespass. Further, the Tribe does not contest the Court’s jurisdiction to decree or deny the water rights at issue, and “has not challenged the State’s authority to regulate water in the CSRBA.” *Tribe’s Response Opposing the State of Idaho’s Motion for Summary Judgment* at 26. As a matter of law, the Tribe will be bound by any decree issued in these subcases. See *Waller v. State, Dep’t of Health & Welfare*, 146 Idaho 234, 238, 192 P.3d 1058, 1062 (2008) (“[t]he general rule is that once a judgment is entered it is *res judicata* with respect to all issues which were or could have been litigated”). Given the Tribe’s clarifications, the State agrees that the Tribe’s objections do not assert a challenge to the State’s jurisdiction, and the Court need not make any jurisdictional determinations in order to decree the rights as requested in the State’s summary judgment motions.

Respectfully submitted this 16th day of August, 2016.

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CERTIFICATE OF SERVICE

I certify that on the 16th day of August, 2016 I caused to be served a true and correct copy of the foregoing STATE OF IDAHO'S MEMORANDUM IN REPLY TO TRIBE'S RESPONSE TO STATE'S MOTION FOR SUMMARY JUDGMENT upon the following parties by the method listed below:

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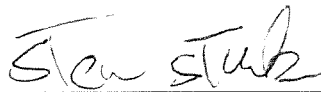
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