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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

Case No. 49576

Subcase Nos. 91-7102; 91-7173

**REPLY BRIEF IN SUPPORT OF
CLAIMANTS STEVE AND DEANNE
HAWKS' MOTION FOR SUMMARY
JUDGMENT**

Steve and Deanne Hawks,

Claimants,

vs.

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

Objector.

INTRODUCTION

For the reasons set forth in the *Memorandum in Support of Claimants Steve and Deanne Hawks' Motion for Summary Judgment*, July 26, 2016 ("Claimants' Memo in Support"), and *Claimants' Memoranda in Opposition of Objector's Motion for Summary Judgment* for subcase nos. 91-7102 and 91-7173, August 10, 2016 ("Claimants' Memo in Opposition"), in the above-referenced subcases, which are adopted in their entirety as if fully set forth herein, Claimants Steve and Deanne Hawks ("Claimants") file this Reply Brief in support of their Motion for Summary Judgment. The factual background contained in Claimants' above-mentioned memoranda and the affidavits filed with them are incorporated herein.

ARGUMENT

A. Claimants Have Provided Ample Evidence to Show Objector Does Not Own the Submerged Lands at Claimants' Points of Diversion and, Therefore, There is No Genuine Issue of Material Fact Regarding Objector's Trespass Claim.

Objector Coeur d'Alene Tribe ("Objector") claims that "there is not a shred of evidence which establishes the Hawks' PODs are within their property boundaries . . . [n]or is there any evidence in the record that [sic] Hawks received permission from anyone for their PODs to be placed on the lands of another." Objector Tribe's Response Opposing Hawks' Motion for Summary Judgment, August 10, 2016 ("Objector's Response"), at 5. These statements mischaracterize the question at issue. The question in this case is whether or not Claimants' point of diversion ("POD") is located on submerged lands owned by Objector, in order to establish whether or not Claimants are trespassing. Claimants have provided ample evidence to show Objector does not own the land at Claimants' points of diversion and,

therefore, have shown that there is no genuine issue of material fact regarding Objector's trespass claims.

First, in order for Objector to bring a claim of trespass, Objector must prove that it owns the land in question. *See* IDAHO CODE § 6-202. Trespass is an invasion of one's exclusive use of his or her property. *Mock v. Potlatch Corp.*, 786 F. Supp. 1545, 1548 (D. Idaho 1992). The burden is not on Claimants to prove they are not trespassing, but on Objector to prove that Claimants are trespassing by proving that Claimants are invading Objector's exclusive use of its property. Therefore, Objector's claim that "these subcases do not hinge on whether the Tribe owns the submerged lands" cannot be true. *See* Objector's Response at 13. If Objector owns the land, it may bring and prove a claim of trespass. If Claimants or even someone else owns the land, Objector has no standing or right to bring a claim of trespass.

Second, despite the burden being on Objector, Claimants have provided extensive evidence and legal argument that they own the land at their PODs. Claimants rely on their arguments in Claimants' Memo in Support and Claimants' Memo in Opposition and the affidavits filed with them. Claimants cited multiple documents proving that the submerged lands at the POD for water right claim no. 91-7102 are privately owned lands not subject to Objector's ownership. *See* Claimants' Memo in Opposition (91-7102) at 4-8; *see* Affidavit of Sarah A. McCormack ("McCormack Aff."). In addition, Claimants cited case law and legal argument demonstrating that the submerged lands at the POD for water right claim no. 91-7173 are not submerged lands quieted to the United States for the benefit of Objector, but instead owned by Claimants. *See* Claimants' Memo in Opposition (91-7173) at 3-7; *see* McCormack Aff.

In addition, Objector further claims that Claimants cannot show that Objector does not own the submerged lands at Claimants' PODs because Claimants have provided no

evidence “to support their bald assertion that the OHWM of the St. Joe River is anything other than 2128 feet.” Objector’s Response at 19. Again, Claimants rely on their arguments in Claimants’ Memo in Support and Claimants’ Memo in Opposition and the affidavits filed with them. Precedent has established that the construction of the dams has been recognized as raising the elevation of the water approximately six and a half to eight feet. *In re Sanders Beach*, 143 Idaho 443, 147 P.3d 75 (2006); *see also*, *Deffenbaugh v. Wash. Water Power Co.*, 24 Idaho 514, 520-21, 135 P.2d 247, 253-54 (1913). It is well established that these additional lands within the reservation boundary became submerged only after the construction of one or more dams, culminating with the construction of Post Falls Dam in 1907. *In re Sanders Beach*, 143 Idaho 443, 147 P.3d 75 (2006); *Erickson v. State*, 132 Idaho 208, 970 P.2d 1 (1998); *Deffenbaugh*, 24 Idaho 514, 135 P. 247 (1913); *Petajaniemi v. Wash. Water Power Co.*, 22 Idaho 20, 124 P. 783 (1912); *Wash. Water Power Co. v. Waters*, 19 Idaho 595, 115 P. 682 (1911). The case law is clear; these additional submerged lands are beyond those recognized in *Idaho v. United States*, 533 U.S. 262 (2001) and were not quieted to the United States for the benefit of Objector.

Therefore, Claimants have provided ample evidence to prove that there is no genuine issue of material fact that Objector owns the submerged lands at Claimants’ PODs and Claimants’ Motion for Summary Judgment should be granted.

B. Objector Cannot Collaterally Attack Claimants’ Licensed Water Rights.

Objector makes a point to say that Claimants cannot collaterally attack their own license. Objector’s Response at 9-10. Objector goes so far as to say that Claimants contradict themselves by saying the source of water for their water right claims is the St. Joe River, but that their POD for claim no. 91-7102 is in a private “moorage lagoon.” Objector’s Response at 9, n.3. By doing so, Objector inaccurately correlates source with POD. Claimants have never

denied that the source of their water is the St. Joe River. However, that does not preclude them from claiming their POD for claim no. 91-7102 on private property within a moorage lagoon or from claiming their POD for claim no. 91-7173 on land owned by Claimants. In addition, Claimants are unsure why Objector makes this point, since Claimants would be more than content if the Department decreed their water right claims in line with the details found in their licenses. It is Objector that collaterally attacks Claimants' licenses, attempting to change the source, point of diversion, and the existence of the water right. However, as established by precedent, Objector cannot collaterally attack Claimants' license. Claimants' Memo in Support at 5-6.

Objector claims that Claimants "fail to inform the Court" of precedent which states that "[a]rguments raised on summary judgment constitute collateral attacks on previously licensed water rights unless the license is determined to be void." Objector's Response at 11; *see* Memorandum Decision and Order on Cross-Motions for Summary Judgment Re: Bureau of Reclamation Streamflow Maintenance Claims, 12 SRBA 11, Sept. 23, 2008, at 15 (Subcase No. 63-03618). However, Claimants do not believe that this "exception" to collateral attacks exists in this case. First, Claimants' license has not been determined void because Objector has not proven trespass. Second, the cited precedent itself only states that "an invalid license may also constitute an exception to the collateral attack prohibition." *Id.* at 19 (emphasis added). The SRBA court, in fact, found that the license was not invalid because the Idaho Department of Water Resources (the "Department") followed the proper procedure in issuing the license. *Id.*

Here, the Department also followed proper procedure in issuing Claimants' licenses. Idaho Code Section 42-202 requires that an application for permit set forth the location and description of the proposed diversionary works and the amount of water to be diverted and

used. Claimants complied with this statute in their application for a water right and the Department conducted its usual investigation in order to license Claimants' rights, including the facilitation of a protest period.

Objector attempts to delegitimize this licensing procedure to make up for their failure to protest and contemplates voiding all water rights on Lake Coeur d'Alene and the St. Joe River that they have just now noticed allegedly encroach on their lands. Although Claimants admit "that a water right cannot be initiated in trespass upon private lands," *Jones v. McIntire*, 60 Idaho 338, 91 P.2d 373 at 376 (1939), Claimants initiated and participated in the licensing process under the genuine and accurate understanding that they were applying for a water right on property to which they had a right. *See McCormack Aff.* ¶ 8, Ex. G. No one, including Objector, expressed the need for any kind of permission to apply for or divert the water from Claimants' PODs. *Id.* Objector had ample opportunity to protest the source and point of diversion at the time of application. However, it did not. Therefore, Claimants' licenses are not subject to the "exception" Objector claims and Objector cannot collaterally attack those licenses. Consequently, Claimants' motion for summary judgment should be granted.

C. Objector is Estopped From Claiming Trespass by the Doctrines of Estoppel, Waiver, and Laches.

Objector argues that Claimants have alleged no facts to support their arguments that Objector is estopped from claiming trespass by the doctrines of estoppel, waiver, and laches. Objector's Response at 20-21. However, Claimants are entitled to relief under the doctrine of quasi-estoppel, waiver, and laches because Objector acquiesced to Claimants' diversion of water for years before its objections to Claimants' water right claims.

Contrary to Objecter's claim, Claimants do delineate in their memoranda that they are pursuing quasi-estoppel as described in *Schoonover v. Bonner Cnty.*, 113 Idaho 916, 919, 750 P.2d 95, 98 (1988). *See* Objecter's Response at 22. Objecter claims that quasi-estoppel is inapplicable to this case because Claimants fail to show how Objecter took a position regarding this case before filing its objection. Objecter's Response at 23. However, Claimants have shown in both Claimants' Memo in Support and Claimants' Memo in Opposition that Objecter acquiesced to Claimants' water use for years by failing to take any action against Claimants, despite their alleged trespass. Objecter did not protest at the time of the permit application. *See* Claimants Memo in Support at 6. Objecter did not create or enforce any tribal rules against water right diversion prior to its objections to Claimants' water right claims. *See* Claimants' Memo in Opposition at 7; *see also* McCormack Aff. ¶ 8, Ex. G. In addition, Objecter took no action to express to Claimants the need for permission to divert water prior to its objections to Claimants' water right claims. *See* Claimants' Memo in Opposition at 11. This inaction is completely inconsistent with Objecter's current position and provides clear evidence that Objecter acquiesced to Claimants' use of water.

Objecter claims that Claimants fail to prove any act of Objecter that would warrant waiver. Objecter's Response at 24. However, as mentioned above, Objecter voluntarily and intentionally relinquished any rights to a claim for trespass by complete inaction. It is telling that Objecter has completely ignored the lands it claims it fought so hard for. The description of litigation in Objecter's Response is irrelevant. *See* Objecter's Response at 25-26. Objecter can be involved in all the litigation it wants over lands, but if it does not take any action on water right applications that intrude upon its alleged lands, how can Claimants know Objecter will later claim they are trespassing? Objecter waived its trespass claim. To allow Objectors to benefit

from the current position they are just now, years after the licensing of these water rights, asserting in the CSRBA for the first time is inequitable.

Not only did Objector acquiesce to Claimants' diversion of water and voluntarily relinquish its right to a trespass claim, it also significantly delayed its action against Claimants. As stated above, the opportunity to challenge the water right diversions was during the licensing process. Waiting until Claimants have used the licensed water rights for years and then pursuing an action in the Coeur d'Alene Spokane River Basin Adjudication ("CSRBA") gives Objector an unfair second bite at the apple. This prejudices Claimants and puts Objector in an unfair advantage.

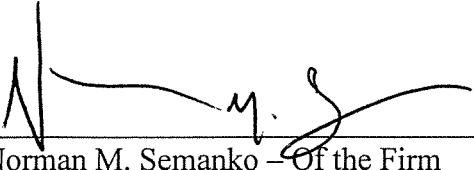
Thus, the doctrines of estoppel, waiver, and laches bar Objector's claim of trespass and Claimants should be granted summary judgment on Objector's objections.

CONCLUSION

For the reasons stated above, Claimants Steve and Deanne Hawks are entitled to judgment as a matter of law on Objector's objections and Claimants' motion for summary judgment should be granted in full.

DATED this 17th day of August, 2016.

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By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of August, 2016, I caused a true and correct copy of the foregoing **REPLY BRIEF IN SUPPORT OF CLAIMANTS STEVE AND DEANNE HAWKS' MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

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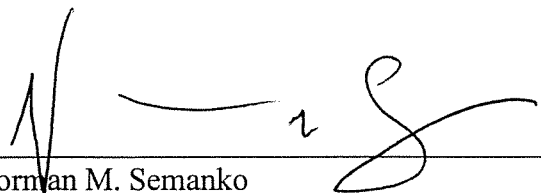
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