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DEPARTMENT OF
WATER RESOURCES

Counsel for the Coeur d'Alene Tribe

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

In re CSRBA	)	
	)	Subcase Nos.: 91-7173; 91-7102
Case No. 49576	)	
	)	
	)	
_____	)	
Steve and Deanne Hawks,	)	
	)	
Claimant(s),	)	OBJECTOR TRIBE'S REPLY TO THE
	)	STATE OF IDAHO AND CLAIMANTS
v.	)	STEVE AND DEANNE HAWKS
	)	
Coeur d'Alene Tribe, a federally-recognized	)	
Indian Tribe,	)	
	)	
Objector.	)	
_____	)	

COMES NOW, Objector, the Coeur d'Alene Tribe (hereinafter referred to as "Tribe" and/or "Objector"), and hereby offers the Court this memorandum of law in reply to the State of Idaho's ("State" and/or "Idaho") and to Claimants Steve and Deanne Hawks' ("Hawks" and/or "Claimants") response to the Tribe's motion for summary judgment.

OBJECTOR TRIBE'S REPLY TO THE STATE OF IDAHO AND
CLAIMANTS STEVE AND DEANNE HAWKS - 1

INTRODUCTION

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The issues raised in these subcases are of the utmost importance to the Coeur d'Alene Tribe. As a sovereign the Tribe must be able to protect its lands and ensure its laws are respected. Pursuant to *Idaho II*, there is no question that the lands at issue in these subcases belong to the Tribe. It fought a nearly half-century long legal battle to secure and reaffirm its title to these lands. *At the same time*, Claimants in this case initiated their water right permit at issue in subcase 91-7102. Both the State and Claimants were on notice that the Tribe made claim to this land and chose to ignore it. In 2008, a full seven years *after* the decision of the United States Supreme Court in *Idaho II*, Claimants applied for their permit in 91-7173. Despite *knowing* the lands at issue were owned by the Tribe, the State issued that permit and license as well. Now, both the State and Claimants ask this Court to sanction that behavior because the Tribe, which has sovereign immunity from suits both judicial and administrative, refused to waive that sovereign immunity by protesting the issuance of these licenses that were void from the start.

Since at least 2003, Claimants have consistently flouted tribal demands to either come into compliance with the tribal encroachment code or remove their encroachments. Aff. D. Hedden-Nicely, Ex. 12, p. 2 (Findings of Fact and Conclusions of Law).¹ Since 2003, the Tribe

¹ Shortly after the decision in *Idaho II*, the Tribe began developing and enforcing its encroachment code. Since then tribal permission to be upon tribal submerged lands has been memorialized through the issuance of an encroachment license. However, the Tribe has owned the lands since time immemorial and pursuant to *Idaho II* they have been owned by the United States in trust for the Tribe since at least 1873. Therefore, since at least 1873, *Anyone* seeking to encroach upon these lands needed permission from the Tribe. Just because the Tribe developed a formal procedure for memorializing its authorization in the early 2000s does not grant everyone who had trespassed before that time a free pass to continue doing so. The Tribe's inherent right to exclude is not predicated upon the development of a permitting procedure. *New Mexico v.*

has offered to Claimants an encroachment permit upon the same terms offered to all other riparian owners within the Reservation. The Tribe, it should be noted, has almost unanimous compliance with its encroachment Code. Since 2003, Claimants have consistently ignored tribal law and have actually added *more* out-of-compliance encroachments, including the diversion works at issue in 91-7173. Claimants have given the Tribe no choice but to object to these water right claims in the CSRBA and move for ejectment of their encroachments in Coeur d'Alene Tribal Court.

The Tribe filed its objection to these claims in the CSRBA because the Hawks' diversion works are, and always have been, in trespass upon the lands of the Coeur d'Alene Tribe. The Tribe asks this Court to not sanction that trespass.

On July 26, 2016 the Tribe filed motions with this Court for summary judgment in subcase nos. 91-7173 and 91-7102. Both the State and Claimants filed memorandums in opposition to the Tribe's motions. The State's response to the Tribe's motion for summary judgment was limited to the single argument that a water license is not subject to collateral attack in the CSRBA. Claimants' made an identical argument, among others.

In reply, the Tribe submits this single memorandum of law to both the State and Claimants' responsive briefing for both subcase nos. 91-7102 and 91-7173. Since the State shares its collateral attack argument with the Claimants, that argument will be addressed first. The Tribe will then address Claimants' remaining arguments.

Mescalero Apache Tribe, 462 U.S. 324, 410 (1983); *Merrion v. Jicarila Apache Tribe*, 455 U.S. 130, 147 (1982); *Water Wheel Camp Recreational Area, Inc. v. Larance*, 642 F.3d 802, 808 (9th Cir. 2011). Instead the presumption should be that unless a non-member of the Tribe has established a right to be upon tribal land, that person is a trespasser. *Id.*

Claimants' arguments do an excellent job at confusing the facts and law applicable to this case. However, the dispositive facts remain the same. The Tribe owns all submerged lands underlying navigable waters within the current boundaries of the Coeur d'Alene Reservation; Claimants' points of diversion are located upon submerged lands overlying navigable waters within the Reservation; and Claimants have never requested or received permission from the Tribe to place their diversion works upon these submerged lands. Therefore, Claimants' water rights were initiated in trespass, making them void *ab initio*.

STANDARD OF REVIEW

Under Idaho Rule of Civil Procedure 56, summary judgment may properly be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(a).²

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

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.

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.

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

At the outset, the Tribe asks this Court to take notice of the arguments both opposing parties failed to rebut in their responsive briefing. Neither party refutes or objects to the Tribe's statement of facts. *Objector's Memorandum in Support of its Motion For Summary Judgment*, In Re CSRBA Case No. 49576, subcase nos. 91-07173 at 4-9 (July 27, 2016) (hereinafter "Tribe's Opening Brief 91-7173"); *Objector's Memorandum in Support of its Motion For Summary Judgment*, In Re CSRBA Case No. 49576, subcase nos. 91-07102 at 2-6 (July 27, 2016) (hereinafter "Tribe's Opening Brief 91-7102")

Further, neither party counters the Tribe's legal argument that a water right may not be initiated in trespass and that any attempt to do so is void. Tribe's Opening Brief 91-7173 at § 1; Tribe's Opening Brief 91-7102 at § I. Claimants do not disprove that both of their diversion works are located outside their property boundaries nor do they assert they have received

permission from anyone to be on the submerged lands in question. Tribe's Opening Brief 91-7173 at 23; Tribe's Opening Brief 91-7102 at 4.

Claimants have not argued any of the substantive factual or legal findings of the Coeur d'Alene Tribal Court are incorrect. Tribe's Opening Brief 91-7173 at § 2; Tribe's Opening Brief 91-7102 at 12.

Claimants fail to rebut the Tribe's argument that determination of the extent of the Tribe's submerged lands is a question of federal law. Tribe's Opening Brief 91-7173 at 23-27; Tribe's Opening Brief 91-7102 at 7-12. Claimants have not rebutted the fact that any land within the Reservation allegedly overflowed in 1907 continued to be owned by the United States for the benefit of the Tribe. Tribe's Opening Brief 91-7173 at 25-26. Specifically for 91-7173, Claimants have not rebutted the findings of S. Rasor, PLS, that the elevation of the submerged lands at Claimants' point of diversion is 2112.94 feet, a full seven feet below Claimants' asserted ordinary high water mark of 2120 feet. Tribe's Opening Brief 91-7173 at 27. Neither opposing party argues that the ordinary high water mark of the St. Joe River must be either equal to or higher than Lake Coeur d'Alene. Tribe's Opening Brief 91-7173 at 24, n. 9; Tribe's Opening Brief 91-7102 at 2.

The Tribe now turns to Claimants' last remaining arguments. Specifically, the Tribe replies with three primary arguments in this brief. **First**, the Tribe will establish that Claimants' water right licenses are subject to collateral attack in this case because they are void as applied to the Tribe. **Second**, the Tribe will rebut each of Claimants' bald assertions that issues of material fact exist in this case. More specifically, the Tribe addresses Claimants' persistent misconstruction of *Idaho II*, as well their misapplication of the decisions by the Idaho Supreme

Court that have addressed the effect—or lack thereof— of the Post Falls dam on the ordinary high water mark of Lake Coeur d’Alene and the St. Joe River. The Tribe also addresses the effect of the tribal court judgment finding trespass against the Hawks in the very locations at issue here as well as Claimants unsubstantiated claim to ownership in the side-channel lagoon at issue in subcase 91-7102. **Third**, the Tribe will dispose of Claimants’ arguments in equity.

1. CLAIMANTS’ WATER LICENSES ARE VOID AND SUBJECT TO COLLATERAL ATTACK

Both Claimants and the State of Idaho argue that the Tribe cannot collaterally attack a water license in the CSRBA.³ The Tribe has already explained how the rule cited by opposing parties does not apply to agency actions that are void *ab initio*. This is made clear by underlying precedent cited by Opposing Parties for the assertion that a license is not subject to collateral attack. *See Mossman v. Mathison*, 90 Idaho 76, 408 P.2d 450 (1965). The Court in *Mossman* was unequivocal: whether an administrative action is subject to collateral attack depends upon whether the action taken by the agency was “actually void or merely voidable[.]” 90 Idaho at 86. Where the action was “void and such invalidity was self-evident [the administrative action] would have been subject to collateral attack.” *Id.* However, where the action is merely voidable, “it would not be subject to collateral attack” *Id.*

Mossman is not an isolated case; the Idaho Supreme Court has repeatedly found void actions *by any tribunal*, including agencies, are subject to collateral attack. *Werneck v. St. Maries Jt. School Dist. No. 401*, 147 Idaho 277, 286 (2009); *Burns v. Baldwin*, 138 Idaho 480

³ This is the only section the Tribe briefs that is also in reply to the State of Idaho. For the purposes of this section, the Tribe will collectively refer to Claimants and the State of Idaho as the “opposing parties.”

(2003); *Andre v. Morrow*, 106 Idaho 455 (1984).⁴ The Court in *Wernecke* stated

Although [defendant] asserts that Wernecke is attempting an impermissible collateral attack of the Commission's order . . . we disagree because we find the order to be void. A void judgment can be attacked at any time. *Id.* (quoting *Burns v. Baldwin*, 138 Idaho 480, 486, n. 10 (2003)).

The Court went on to quote *Martin v. Soden*: “A void judgment . . . may be entirely disregarded or declared inoperative by any tribunal in which effect is sought to be given it It may be attacked by a person adversely affected by it, in any proceeding, direct or collateral, and at any time.” *Id.* (quoting 81 Idaho 274, 281 (1959)). See also, *Andre v. Morrow*, 106 Idaho at 459 (“a judgment by a tribunal without authority, or which exceeds or lies beyond its authority is necessarily void, and may be shown to be so in collateral proceedings”).

This Court has recognized this principle, holding that a water license is not subject to collateral attack “[u]nless the [l]icense is [d]etermined to be [v]oid.” *Memorandum Decision and Order on Cross-Motions for Summary Judgment Re: Bureau of Reclamation Streamflow Maintenance Claim*, In Re SRBA Case No. 39576, subcase 63-03618 (Sept. 23, 2008) (hereinafter “*Streamflow Maintenance Claim*”). Although Judge Melanson ultimately determined the license at issue in that case was not void, he expressly found that

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

An agency action can be void—and therefore collaterally attacked—in a number of situations. Foremost, agency actions that are beyond the jurisdiction of the agency are void.

⁴ As pointed out below, the Court in *Wernecke* applies precedent regarding collateral attacks on void judicial judgments to agency action. 138 Idaho at 486, n. 10. The Court clearly views the legal standards for the two to be identical.

Utah-Idaho Sugar Co. v. Intermountain Gas Co., 100 Idaho 368, 374 (1979). *See also, Hartman v. United Heritage Prop. & Cas. Co.*, 141 Idaho 193, 197 (2005) (“[a] judgment is void if there is some jurisdictional defect”). Furthermore, notice and other procedural deficiencies that result in denial of due process to a party are also void and subject to collateral attack. *Id.*⁵

In this case, IDWR lacked jurisdiction to issue these permits in two separate respects. First, the Tribe never waived its sovereign immunity in the licensing proceedings. Therefore, pursuant to federal law, it is beyond the jurisdiction of IDWR to bind the license against the Tribe, making it void. Second, under Idaho state law a water right initiated in trespass is void.

⁵ In addition to being void for lack of jurisdiction, the licenses for 91-7102 is likewise **void for lack of proper notice**. *Hartman*, 141 Idaho at 197. The Notice published in the St. Maries Gazette incorrectly stated that the point of diversion was located in government lot 1 rather than government lot 7. Aff. K. Mihara, Ex. 18 (Notice of Publication 91-7102). Without proper notice of where Claimants’ actual diversion was located, the Tribe cannot be fairly expected to have been in a position to protest the permit.

Moreover, the license for 91-7173 was issued under false pretenses. Claimants falsely stated that they owned the land at their point of diversion on their application for permit when in fact their point of diversion is located over fifty feet outside their property. Aff. Rasor, Ex. 2. Claimants assert they “participated in the licensing process under the real and correct understanding that they were applying for a water right on property to which they had a right.” Claimants’ 91-7173 Response at 10. However, Claimants have admitted their “diversionary works extend past the legal description of Claimants’ property” *Id.*, Ex. 2, p. 4 (RFA 23). *See also, Id.*, Ex. 4, p. 6 (RFA 45) (Claimants admit their Point of diversion for water right claim No. 91-7173 “is not physically located within the exterior boundaries of Parcel No. RP005300200130A”). Claimants admit this once again in their briefing but go on to argue that they “believed they were applying for public waters of the State of Idaho.” Claimants’ 91-7173 Response at 11. Claimants argue this despite the fact that they filed application for permit in 2008, a full decade after the district court decision in *Idaho II* and seven years after the affirmation by the Supreme Court. Claimants’ admitted they were aware of the decision in *Idaho II*. Aff. K. Mihara, Ex. 12, p. 36. (Dep. S. Hawks). Claimants’ briefing does not explain away the fact that they misstated facts on their application for permit. Claimants very well could have thought they were “applying for public waters of the State of Idaho” but there is simply no good-faith basis for their statement that they owned the land at their point of diversion.

Accordingly, any attempt by IDWR to issue a license in trespass is beyond their jurisdiction, making that license subject to collateral attack.

A. Tribal Sovereign Immunity Precludes IDWR from Binding the Tribe to a License

The Tribe may collaterally attack Claimants' licenses in the CSRBA because the Tribe never waived its sovereign immunity during the licensing proceedings and therefore IDWR lacked any jurisdiction to render a decision that would be binding against the Tribe. *United States v. U. S. Fidelity & Guar. Co.*, 309 U.S. 506, 513 (1940).

The very issue in *Fidelity* was whether “a former judgment against the United States on a cross-claim, which was entered without statutory authority . . . [is] *res judicata* in this litigation . . .” *Id.* at 509. In that case, the United States had leased tribal lands for the purposes of coal mining. *Id.* at 510. The lessee company went into receivership and the United States filed a claim for royalties. *Id.* The lessee counter-claimed for \$11,060.90 and the United States failed to assert sovereign immunity. *Id.* Later, the United States filed a suit in federal district court “for the same royalties involved in the [first] proceedings.” *Id.* In response, the trustee of the original lessee asserted “[the original] judgment as a bar to recovery by the United States.” *Id.*

Specifically, the defendant argued the first judgment was not subject to collateral attack by the United States because “there was a waiver of immunity by a failure to object to the jurisdiction of the [original court] over the cross-claim.” *Id.* at 513. The Supreme Court stated unequivocally “this is not permissible.” *Id.* at 514. The Court went on to explain

The reasons for the conclusion that this immunity may not be waived govern likewise the question of *res judicata*. As no appeal was taken from this Missouri judgment, **it is subject to collateral attack only if void**. It has heretofore been shown that **the suability**

of the United States and the Indian Nations, whether directly or by cross-action, depends upon affirmative statutory authority. Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void. The failure of officials to seek review cannot give force to this exercise of judicial power. Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body. *Id.* (emphasis added).

There is no question that this rule applies to state agencies as well. *Puyallup Tribe, Inc. v. Department of Game of the State of Washington*, 433 U.S. 165 (1977). In that case, the Washington Department of Game did not even attempt to institute an administrative enforcement action against the Puyallup Tribe but instead went directly to state court. *Id.* at 167. The Tribe responded by attacking the jurisdiction of the court and the Supreme Court held “[t]he attack is well founded. Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe.” *Id.* at 172.

For its part, the Idaho Supreme Court has determined that agency actions beyond the jurisdiction of the agency are void. *Utah-Idaho Sugar Co.*, 100 Idaho at 374. Furthermore, it has consistently found that the rule regarding collateral attack of agency actions is *identical* to the rule regarding collateral attack of judicial decisions and orders. *Wernecke*, 147 Idaho at 286. Specifically, the Idaho Supreme Court applied *Martin v. Soden* to the agency action at issue to find that “[a] void judgment . . . may be entirely disregarded or declared inoperative by any tribunal in which effect is sought to be given it It may be attacked by a person adversely affected by it, in any proceeding, direct or collateral, and at any time.” *Id.* (quoting 81 Idaho 274, 281 (1959)). Both agency and judicial actions are void when the tribunal lacks jurisdiction. *Wernecke*, 147 Idaho at 286.

It goes without saying that the doctrine of tribal sovereign immunity applies to IDWR's licensing procedures. The process is quasi-judicial; a person aggrieved by the issuance of a permit typically must protest and participate in administrative hearings. If no one protests then the "default judgment" is the issuance of a permit. However, just as much as an actual court, administrative agencies acting in their quasi-judicial capacity have no jurisdiction to render a default judgment against an Indian Tribe that has not waived its sovereign immunity. In this case, the Tribe—which has not waived its sovereign immunity—is not subject to the jurisdiction of IDWR's quasi-judicial licensing procedure.⁶ It follows that the Tribe would likewise not be subject to any "default judgment" rendered by IDWR issuing a water license directly affecting tribal lands. Simply because the Tribe "fail[ed] to object," or protest, does not waive the Tribe's sovereign immunity in this case. *Fidelity*, 309 U.S. at 513.

To rule otherwise would be tantamount to finding that a state agency could coerce a Tribe into waiving its sovereign immunity or face agency action by default. Such a concept turns the doctrine of tribal sovereign immunity on its head and renders it entirely meaningless. The Supreme Court has rejected this argument as against the federal courts of the United States, as well as state courts; it seems unlikely it would approve of the same action when done by a state agency in its quasi-judicial capacity. *Id.*

⁶ This argument becomes more potent when the Court considers that any protest regarding the license would be appealed to an Idaho state court, which would not have jurisdiction over the Tribe absent a clear and expressed waiver of sovereign immunity. *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001); *See also Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (2014); *Oklahoma tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Puyallup Tribe, Inc. v. Department of Game of Washington*, 433 U.S. 165 (1977); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998); *Turner v. United States*, 248 U.S. 354 (1919); *Fidelity*, 309 U.S. at 506.

As applied to the Tribe, Claimants' licenses are void because the Tribe never waived its sovereign immunity during the licensing process. As such, IDWR did not have jurisdiction to render a decision that would adversely impact the Tribe. Without jurisdiction, the licenses issued by IDWR are void as against the Tribe, making them subject to collateral attack.

B. Claimants' Water Rights Were Initiated in Trespass, Making Them Void and Subject to Collateral Attack

An agency "has no authority other than that given to it by the legislature. It exercises limited jurisdiction and nothing is presumed in favor of its jurisdiction." *Washington Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875, 879 (1979). Further an agency's jurisdiction is "to be strictly construed." *Id. See also Welch v. Del Monte Corp.*, 128 Idaho 513, 514 ("[a]n administrative agency is a creature of statute, limited to the power and authority granted it by the Legislature and may not exercise its sub-legislative powers to modify, alter, or enlarge the legislative act which it administers"); *Burnside v. Gate City Steel Corp.*, 112 Idaho 1040, 1047 (1987) ("it is axiomatic, under the principles of administrative law, that an agency cannot act *ultra vires*; that is, it cannot assume more power than the legislature delegated to it.").

Accordingly, a challenge asserting that an agency acted beyond their statutory authority is a challenge to its jurisdiction, one of the enumerated and well established exceptions to the rule against collateral attack of agency action. The Idaho Supreme Court has found that "[o]rders by an administrative agency which authorize something prohibited by the statute are not merely erroneous, but are **void**." *Wernecke*, 147 Idaho at 286 (citing C.J.S. *Public Administrative Law Procedure* § 122) (emphasis in original).

In this case, the Idaho legislature has vested in IDWR jurisdiction to issue water permits and licenses. I.C. § 42-205; I.C. § 42-219. However, that jurisdiction is limited to issuing

permits and licenses consistent with Idaho law. *In re SRBA*, 157 Idaho 385, 393 (2014) (“[t]he IDWR has a statutory duty to allocate water This means that the Director cannot distribute water however he pleases at any time in any way; he must follow the law.”).

The Supreme Court has expressly limited IDWR’s jurisdiction under I.C. § 42-202 to prohibit the issuance of a water permit in trespass, stating “[t]he . . . filing an application for a water permit with no possessory right in the land designated as the place of use amount[s] to speculation” *Lemmon v. Hardy*, 95 Idaho 778, 781 (1974). The Court went on to hold that, regardless of whether a permit has been issued

[i]t is quite generally held that a water right initiated by trespass is void. That is to say, one who diverts water and puts it to a beneficial use by aid of a trespass does not, pursuant to such trespass, acquire a water right. Any claim of a right thus initiated is void. *Id.* at 780 (quoting *Bassett v. Swenson*, 51 Idaho 256, 259 (1931)).

The Court in *Marshall v. Niagara Springs Orchard Co.* was even more explicit: “the permit was of no force or effect by reason of the fact that it was based upon a trespass...” 22 Idaho 144, 125 P. 208, 213 (1912). The Court added language that applied to water rights as a general matter, holding that “where an attempt is made to initiate the right to appropriate the public water of the state by trespass upon private property, such initiation of such right is void” *Id.* at 212 (emphasis added).

It is simply inconceivable that a water license based upon a void permit could ripen into a valid water right. This question is unprecedented, however, most likely because no one has yet had the nerve to argue that it should. Indeed, even Claimants have admitted that “neither IDWR water permit no. 91-7173 nor IDWR water right license no. 91-7173 could have been initiated in

trespass” Aff. D. Hedden-Nicely, Ex. 2, p. 5 (RFA 26); Aff. K. Mihara, Ex. 2, p. 5 (RFA 27). Accordingly, a license based upon a void permit is likewise void.⁷

Separate and apart from the issuance of the permit, the issuance of the license *per se* was a separate agency action beyond the jurisdiction of IDWR in this case. Once again, agency action inconsistent with Idaho law is beyond the jurisdiction of IDWR, which makes the action subject to collateral attack. *Wernecke*, 147 Idaho at 286. Here, IDWR issued a water right license for a water right in trespass, something clearly illegal under Idaho law and beyond IDWR’s statutory authority. *See e.g., Lemmon*, 95 Idaho at 778; *Niagara*, 22 Idaho at 144, 125 P. at 208; *Toby v. Bridgewater*, 22 Idaho 566 (1912). As such, IDWR does not have jurisdiction to issue water licenses initiated in trespass. Such water rights are subject to collateral attack and are void. *Id.*

Ultimately, the Idaho Supreme Court has carved out no exception to its overarching rule against initiating a water right in trespass. *Rabido v. Furey*, 33 Idaho 56, 190 P. 73, 75 (1920) (citing WIEL, WATER RIGHTS IN WESTERN STATES § 221, 391 (3d. Ed.); *McRae v. Small*, 48 Or. 139 (1906); *Niagara*, 22 Idaho at 144, 125 P. at 208). Regardless of whether a water right is established by beneficial use or through the statutory procedures, a water right initiated in

⁷ Another reason IDWR is without jurisdiction in this case is that since at least 1948, the United States has required rights-of-way for any purpose for encroachments over Indian lands. 25 U.S.C. § 323. Moreover, such rights-of-way required the consent of the Tribe as well. 25 U.S.C. § 324. As such, under federal law, IDWR is *precluded* from issuing water licenses on points of diversion located upon tribal lands without proof of authorization for the encroachment. Furthermore, under state law, IDWR is required to “carefully examine” any water permit to ensure “the law has been fully complied with” prior to issuing a license. I.C. § 42-219. Under its own regulations, it should have ensured the Hawks had acquired “legal access to the property necessary to construct and operate the proposed project,” *before* it authorized their licenses. IDAPA 37.03.08.045.01.c.i. Then, as now, the Hawks failed to show such authorization. As such, IDWR acted outside its legal authority and beyond its jurisdiction in issuing these licenses, making them void.

trespass is void. *Niagara*, 125 P. at 212; *Lemmon*, 95 Idaho at 780. Since a water license initiated in trespass is void, it is likewise subject to collateral attack. *Mossman*, 90 Idaho at 86; *Streamflow Maintenance Claim* at 15.

2. CLAIMANTS' PROVIDE NO EVIDENCE THAT WOULD SUGGEST ANY ISSUES OF MATERIAL FACT

The Hawks argue the Tribe does not own the submerged lands underlying navigable waters at their points of diversion. Hawks' Response 91-7102 at 3-8; Hawks' Response 91-7173 at 3-7. However, rather than cite to factual evidence actually contained in the record, Claimants make several legal arguments trumped up as issues of material fact. These arguments include (1) unsubstantiated assertions that *Idaho II* does not apply to this case; (2) unsubstantiated assertions that the "historic" ordinary high water mark of the Lake and River is 2121.5 feet rather than 2128 feet; and (3) that the Tribe is "inappropriately" relying upon a Tribal Court judgement which holds them in trespass at the locations of their points of diversion. Finally, Claimants' also assert the submerged lands beneath their points of diversion are privately owned by them, or perhaps the state of Idaho. *Id.* at 7. None of these arguments are supported by either the factual evidence or the law applicable to this case.

A. Claimants Continue to Misconstrue the Holding in *Idaho II*, which quieted title to *All Submerged Lands Within the Present-Day Coeur d'Alene Reservation*

Claimants "readily admit and have admitted there is case law quieting title in favor of the United States [for the benefit of the Tribe] to the submerged bed and banks of Coeur d'Alene Lake and the St. Joe River within the current boundaries of the Reservation." Hawks' Response 91-7102 at 4; Hawks' Response 91-7173 at 3. However, Claimants go on to argue that "[t]he U.S. Supreme Court and the Ninth Circuit Court of Appeals specifically recognized that the

United States reserved . . . the submerged lands that existed prior to statehood in 1890. . . . It is these submerged lands within the reservation—and only these submerged lands—that are owned by the United States in trust for the Tribe.” *Id.* at 4-5 (emphasis in original). Despite using the term “specifically,” Claimants can pinpoint to absolutely no specific language from any opinion in *Idaho II* that even remotely supports their argument. This is because that argument is based upon a misconstruction of those cases.

Judge Lodge plainly stated what was at issue in *Idaho II*,

[t]his case involves a dispute over the ownership of the bed and banks of Coeur d’Alene Lake and the St. Joe River (the “submerged lands”) lying within the exterior boundaries of *present-day* Coeur d’Alene Indian Reservation.

United States and Coeur d’Alene Tribe v. Idaho, 95 F.Supp.2d 1094, 1095 (D. Idaho 1998) (hereinafter “Lodge Opinion”) (emphasis added). The Court went on to note “[t]he United States’ claims are specifically limited to the submerged lands included within the boundaries of the present-day Coeur d’Alene Reservation.” *Id.* at n. 3. Ultimately, Judge Lodge concluded that the United States had reserved these submerged lands for the benefit of the Tribe and quieted title to “the bed and banks of *all of the navigable waters* lying within the current boundaries of the Coeur d’Alene Indian Reservation” Aff. of D. Hedden-Nicely, Ex. 8; Aff. K. Mihara, Ex. 7 (Judgment & Decree from Lodge Opinion) (emphasis added).

The Ninth Circuit affirmed. *United States v. Idaho*, 210 F.3d 1067 (9th Cir. 2000) (hereinafter “*Ninth Circuit Op. Idaho II*”). In so doing, the Federal Court of Appeals reaffirmed that the “issue in this case is the ownership of submerged lands lying within the *present-day* boundaries of the Coeur d’Alene Indian Reservation, which was originally set aside by executive order in 1873.” *Id.* at 1069 (emphasis added). It also noted that “the district court issued a

lengthy and meticulous decision in which it concluded that the United States retained *these submerged lands* for the benefit of the Coeur d'Alene Indian Tribe.” *Id.* See also *id.* at 1072 (“[t]he United States, seeking to quiet title to submerged lands with the present-day reservation, initiated this action Following trial, the district court . . . found that the submerged lands lay within the boundaries of the present-day reservation”). Ultimately, the Ninth Circuit “affirm[ed] the district court’s ruling quieting title to submerged lands within the *present-day* Coeur d’Alene Reservation for the benefit of the Tribe.” *Id.* at 1073-74 (emphasis added).

The United State Supreme Court affirmed. *Idaho v. United States*, 533 U.S. 262 (2001) (hereinafter “*Idaho II*”). In so doing, the Court noted that “[t]he United States . . . initiated this action . . . to quiet title . . . to the submerged lands within the exterior boundaries of the Tribe’s current reservation, which encompass the lower third of Lake Coeur d’Alene and part of the St. Joe River.” *Id.* at 271 (emphasis added). See also *id.* at 272 (“the District Court quieted title ‘in favor of the United States [in trust for the Tribe] the bed and banks of the Coeur d’Alene Lake and the St. Joe River lying within the *current boundaries* of the Coeur d’Alene Indian Reservation.’”) (emphasis added).

Nothing in these opinions could be fairly used to suggest the District Court, Ninth Circuit, or Supreme Court viewed the submerged lands at issue to be limited to only those lands submerged in 1873 or at statehood. Just the opposite, as Claimants have already pointed out, these courts were on notice that “the physical situation” on the Lake and St. Joe River is different today than in 1873 “[d]ue to the construction of a dam” *Ninth Circuit Op. Idaho II*, 210 F.3d

at 1079, n. 18.⁸ Certainly, these courts had the opportunity and ability to limit their holdings to only those lands that were submerged in 1890 but expressly refused to do so. Instead, in the face of this changed “physical situation” these courts quieted title to “the bed and banks of *all of the navigable waters* lying within the *current* boundaries of the Coeur d’Alene Indian Reservation . . .” Aff. of D. Hedden-Nicely, Ex. 8; Aff. K. Mihara, Ex. 7 (Judgment & Decree from Lodge Opinion) (emphasis added).

Claimants nonetheless cite to a footnote in the Ninth Circuit opinion for the proposition that the opinion limits the scope of the submerged lands to which title was quieted to those existing as of 1873. Claimants allude to this Court that there are submerged lands other than those of Heyburn State Park that are excepted from the federal court’s Judgment & Decree. Hawks’ Response 91-7173 at 4; Hawks’ Response 91-7102 at 5 (“The Tribe admitted to the fact that some areas, specifically Heyburn State Park, are excepted from the submerged lands quieted in favor of the United States for the benefit of the Tribe.” (emphasis added)). Such a proposition is both factually and legally incorrect. The Judgment & Decree in *Idaho II* speaks for itself: with the *lone* exception of the lands in Heyburn State Park, it quiets title to *all* submerged lands underlying navigable waters within the Tribe’s reservation. Aff. K. Mihara, Ex. 7; Aff. Hedden-Nicely, Ex. 8.

While the Hawks complain the Tribe “gives no explanation as to why an area like Heyburn State Park would be excepted,” the very portion of the Ninth Circuit’s opinion to which footnote 18 is appended sets forth the explanation. 210 F.3d at 1079-81. The reason the

⁸ This is not to say that the ordinary high water mark has changed. However, it goes without saying that the physical behavior has been changed as a result of the dam at Post Falls. Namely, the Lake and St. Joe are now held at the ordinary high water mark of 2128 feet for a portion of the summer when their natural elevation would typically be receding. See section 2(B), *infra*.

submerged lands were excepted from the Court's judgment was because, as a result of the unique legal history regarding how the park was sold to the State by Congress, the United States' complaint did not allege ownership of the submerged lands within the park.⁹ Whether or not additional lands became submerged after statehood within Heyburn State park simply had nothing to do with the reason why those particular submerged lands were excepted from the judgment and decree in *Idaho II*.

The decisions in *Idaho II* also make clear that the Tribe's reservation was for *all land*—submerged lands and uplands—within the exterior boundary of the Reservation. The allegation by the United States in the district court was that “the Executive Order of 1873 setting apart the reservation *also* reserved for the benefit of the Tribe the bed and banks of the Lake and other navigable waterways lying within the outer boundaries of the reservation.” *Lodge Opinion*, 95 F.Supp.2d at 1097 (emphasis added). The district court went on to note that

The reservation boundaries established by the 1873 agreement embraced the Hangman Valley, the Coeur d'Alene River (from its mouth to the Coeur d'Alene Mission of the Sacred Heart), the St. Joe River (from its mouth to the present site of St. Maries), and all but a small portion of the Lake.”

Id. at 1095-96. Judge Lodge was even more specific:

Besides Hangman Valley, the boundaries of the proposed reservation enclosed all but a small portion of the Lake, the Coeur

⁹ The Tribe argued, however, that the congressional conveyance to Idaho included only uplands; not the submerged lands within the Park. The Tribe also read the State's answer as putting the submerged lands within the park at issue in the litigation and the Tribe sought to quiet title to those lands as well. 210 F.3d at 1079-81. Like its position in *Idaho I*, rather than litigate the issue before the federal courts, the State claimed sovereign immunity and sought to avoid litigating the issue. *Id.* Ultimately, the district court found the State had not put the question at issue and the Ninth Circuit affirmed. *Id.*

d'Alene River, from its mouth to the Sacred Heart Mission, the St. Joe River, from its mouth to the present-day site of St. Maries, and a tract of land lying to the south of the Spokane River. *The precise boundaries* of the expanded reservation were identified by reference to a legal description. Under the agreement, the eastern boundary of the reservation was to head north “in a direct line, to the Coeur d'Alene Mission, on the Coeur d'Alene river (but not to include the lands of said Mission),” with the northern boundary heading “thence in a Westerly direction, in a direct line, to the point where the Spokane River heads in or leaves the Coeur d'Alene lake; thence down along the center of the channel of said Spokane River to the dividing line between the Territories of Idaho, and Washington.” In addition to expanding the boundaries of the reservation to include the Lake and rivers, the agreement also guaranteed “that the water running into said reservation shall not be turned from their natural channel where they enter said reservation.”

Id. at 1105 (emphasis added). The Court also cited to the official government survey, which “fixed the reservation’s total area at 598,499.85 acres, a calculation that included submerged lands under the Lake and rivers within the boundaries of the reservation.” *Id.* at 1106; *Idaho II*, 262 U.S. at 267. That calculation also included all of the uplands within that exterior boundary.

Although the Tribe later ceded portions of its reservation in 1889 and 1894, *Lodge Opinion*, 95 F.Supp.2d at 1097, the United States unquestionably owned all land within its current boundary in trust for the Tribe until 1910, when the Reservation was allotted and opened to homesteading. 36 Stat. 2494. *See also Confederated Salish and Kootenai Tribes of Flathead Reservation, Montana v. Namen*, 665 F.2d 951, 953 (9th Cir. 1982). Accordingly, even assuming Claimants’ argument that “additional lands within the reservation boundary . . . became submerged only after the construction of [the Post Falls dam] in 1907,” **those lands were and continue to be owned by the United States in trust for the Tribe.** When Claimants’ predecessor in interest took title to the property in question in 1912, his property boundary was the ordinary high water mark at that time. *Jefferis v. East Omaha Land Co.*, 134 U.S. 178, 196

(1890) (when a patent is issued by the United States, “the water-course, and not the meander line, as actually run on the land, is the boundary.”); *Erickson v. State*, 132 Idaho 208, 212 (1998) ([i]t is well established that ‘meander lines established by surveys of public lands bordering on navigable rivers are not boundary lines, rather the river or stream forms the boundary line.’”).¹⁰ Claimants’ acknowledge the ordinary high water mark after 1907 was 2128 feet. Hawks’ Response 91-7102 at 5; Hawks’ Response 91-7173 at 5. Both of their points of diversion are below that elevation and were therefore initiated in trespass.

Claimants continue to assert that “[a]t the very least, the submerged lands beneath Claimants’ point of diversion is owned by the State of Idaho.” Hawks’ Response 91-7102 at 6.¹¹ Idaho, on the other hand, has been deafeningly silent on this point. Instead, it has admitted it is “enjoined from asserting ownership of the submerged lands of the St. Joe River lying below the natural ordinary high water mark within the exterior boundaries of the Coeur d’Alene Indian Reservation” Aff. D. Hedden-Nicely, Ex. 9, p. 4 (91-7173 RFA 22); Aff. K. Mihara, Ex. 8, p. 4 (91-7102 RFA 22). Further, the only source of Idaho’s claim to title would be the equal footing doctrine. We know that the equal footing doctrine did not operate to cause the

¹⁰ In opposition to *Jefferis*, Claimants cite to *Roark v. Caldwell* for the proposition that “[i]t is fundamental that [the Idaho Constitution] prohibit the taking of private property for public use without just compensation.” 87 Idaho 557, 561 (1964). Claimants fail to describe how a decision of the Idaho Supreme Court could operate to overrule the Supreme Court of the United States. *James v. City of Boise*, 136 S. Ct. 685, 686 (2016) (“The Idaho Supreme Court, like any other state or federal court, is bound by this Court’s interpretation of federal law.”). Furthermore, Claimants fail to explain how the Tribe would be “expand[ing] the land to which they are entitled,” by asserting that *at the time the land was patented* by the United States, the original non-Indian owner only took to the ordinary high water mark at that time. This is particularly true when the record contains a survey of their property boundaries. Aff. Rasor, Exs 1-2. It is Claimants, not the Tribe, that is “attempting to expand the land to which they are entitled.” Hawks’ Response at 6.

¹¹ Claimants’ fail to assert in their briefing the State of Idaho owns the submerged lands at issue in 91-7173.

submerged lands within the Reservation to pass to the Idaho at statehood. *Idaho II*, 262 U.S. at 281. Further, upon Idaho's admission to the Union, "the force of [the equal footing doctrine] was spent; it did not operate after that date to determine what effect on titles the movement of the river might have." *Oregon ex. rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 371 (1977). Accordingly, Claimants' unsupported assertion that the State has magically acquired an ownership interest to certain unidentified submerged lands within the Reservation after statehood in 1907 is without any basis in the law.

In conclusion, Claimants conflate the lands at issue in *Idaho II* with the legal analysis necessary to determine title to those lands. The test in a submerged lands case is "whether Congress clearly intended to defeat the State's title to submerged lands." *Ninth Circuit Op. Idaho II*, 210 F.3d at 1077. This necessarily requires an analysis of the history at the time of the creation of the Reservation. However, despite Claimants' unsubstantiated assertions to the contrary, nothing in the opinions at any phase of *Idaho II* could be construed as to limit the geographic scope of the lands at issue. That case unquestionably quieted title to "the bed and banks of *all of the navigable waters* lying within the current boundaries of the Coeur d'Alene Indian Reservation" Aff. of D. Hedden-Nicely, Ex. 8; Aff. K. Mihara, Ex. 7 (*Judgment & Decree from Lodge Opinion*) (emphasis added).

B. Claimants Continue to Misconstrue the Idaho Supreme Court Cases Addressing the Physical Behavior of Lake Coeur d'Alene and its Related Waterways

The Tribe's primary argument continues to be that determination of the "natural" or "historic" ordinary high water mark is irrelevant to the outcome of this case.¹² Foremost, this is because the Tribe owns all lands underlying navigable waters within the Reservation and Claimants have admitted their points of diversion are located within the Reservation upon navigable waters. Aff. K. 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). As such, they are unquestionably upon tribal property.

Furthermore, determination of the boundary between tribal submerged lands and adjacent uplands is a matter of federal law, which proscribes that the boundary is the present ordinary high water mark of 2128 feet. *Montana Power Co. v. Rochester*, 127 F.2d 189, 191 (9th Cir. 1942); *Bonelli Cattle Co v. Arizona*, 414 U.S. 313, 318 (1973). Federal law proscribes that a riparian patentee receives only to the ordinary high water mark, *at the time of the patent*. *Jefferis*, 134 U.S. at 196. Claimants' property was patented in 1912, well after 1907 when Claimants have admitted the ordinary high water mark was 2128 feet. More generally, all land within the Reservation—submerged lands and uplands—were owned by the United States in trust for the Tribe until 1910. *See Lodge Opinion*, 95 F. Supp.2d at 1096 (describing the boundaries of the 1873 Reservation); 26 Stat. 989, 1027 (Mar. 3, 1891); 36 Stat. 2494. *See also Namen*, 665 F.2d

¹² In fact, Claimants have not even bothered to define the term "historic" ordinary high water mark or explain its legal basis as applied to this case. Claimants have provided no precedent that has applied or sanctioned an "historic" high water mark in the place of the "ordinary high water mark." Instead, it seems clear that Claimants have simply made this term up in an effort to confuse the issues and manufacture a way to win. The Tribe notes that under the Idaho Code the term "natural high water mark" is synonymous with the term "ordinary high water mark. I.C. § 58-1302(c); I.C. § 58-104(9). Claimants' have not explained their basis for implying that Idaho law treats a "natural" high water mark different than an "ordinary" high water mark.

at 953. Accordingly, if any lands within the Reservation were flooded in 1907, those lands were owned by the United States in trust for the Tribe. Finally, as applied to 91-7173, Claimants' diversion works are located upon submerged lands at an elevation of 2112.94 feet, well below Claimants' alleged natural ordinary high water mark of 2120 or 2121.5 feet. *See Objector's Memorandum in Support of its Motion For Summary Judgment*, In Re CSRBA Case No. 49576, subcase nos. 91-07173 at § 3 (July 27, 2016) (hereinafter "Tribe's Opening Brief 91-7173").¹³

Neither Claimants nor the State have rebutted or, aside from a half-hearted attempt to cast doubt upon *Idaho II*, even denied any of these arguments. Instead, Claimants rehash the exact argument they made in support of their motion for summary judgment that the Post Falls dam has somehow altered the ordinary high water mark of the St. Joe River. Notwithstanding the absolute unquestioned inapplicability of this argument, the Tribe responds here to clarify to the Court why even this argument is a loser for Claimants.

Despite initially declaring the "historic" ordinary high water mark is 2120 feet, Claimants—for the very first time in a response brief—now assert the ordinary high water mark is 2121.5 feet. *Compare* Aff. D. Hedden-Nicely, Ex. 2, p. 13-14 (91-7173 Interrog. No 20); Aff. K. Mihara, Ex. 23 (91-7102 Interrog. No. 20) *with* Hawks' Response 91-7102 at 6; Hawks' Response 91-7173 at 6.

Claimants ignore that the Idaho Supreme Court dismissed this exact argument in *Erickson*. At issue there was ownership of 2.5 acres of land in Kidd Island Bay, Lake Coeur

¹³ Despite its inapplicability, the Tribe has also shown this Court why state law supports the Tribe's position. Namely, the ordinary high water mark of the St. Joe River should be presumed to be at least 2128 feet pursuant to *Erickson* and *Sanders Beach*. *See*, Tribe's Opening Brief 91-7173 at 24-24, n. 9.

d'Alene, that was almost entirely below 2128 feet. *Erickson*, 132 Idaho at 209. The Ericksons sued the State to quiet title to this land. Both parties acknowledged that the "the State . . . owns the bed of the Lake below the OHWM as it existed at the time of statehood." *Id.* The case, in other words, turned on where the ordinary high water mark was *at statehood*, which, according to Claimants is the operative time to determine the proper scope of the Tribe's submerged lands. Hawks' Response 91-7102 at 6; Hawks' Response 91-7173 at 5.¹⁴

Like Claimants here, "the Ericksons claim[ed] that dams owned by Washington Water Power Company (WWP) have artificially raised the summer level of the Lake, and that the OHWM of the Lake at the time of statehood was 2121 feet." *Erickson*, 132 Idaho at 209. The State asserted the OHWM *at statehood* was 2128 feet. Aff. K. Mihara, Ex. 28, pp. 13-19 (State's trial memorandum *Erickson*). The Idaho Supreme Court found that "[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." *Id.* at 211. In furtherance of their claim, the Ericksons:

presented evidence from various sources. These sources included: a survey completed in 1892 by an original surveyor for the federal government survey; evidence from proceedings before the United States Department of the Interior during the 1940s and 1950s

¹⁴ This is an important point. Claimants repeatedly use both *Erickson* and *Sanders Beach* to imply that the ordinary high water mark was not 2128 feet at statehood but was instead some lower elevation. Claimants cite these cases as precedent that the ordinary high water mark did not become 2128 feet until 1907. Hawks' Response 91-7102 at 5; Hawks' Response 91-7173 at 5. This argument is **exactly the opposite** of the actual holding in those cases. In fact, as stated in *Sanders Beach*, "the State of Idaho owns, in trust for the public, title to the bed of navigable water lying below the OHWM *as it existed at the time Idaho was admitted to the Union*. We have previously ruled that the OHWM of Lake Coeur d'Alene *at the time of statehood* was presumed to be *2128 feet above sea level*." 143 Idaho at 446.

which found that Kidd Island was not an omitted island from the survey but had been connected to the mainland at the time of the government survey; evidence of homesteaders who had sworn that they resided upon and cultivated significant portions of their land, some of which is currently submerged under water, in order to “prove up” the homestead; evidence about easements purchased by WWP for perpetual easements to flood; evidence that the Ericksons have always been assessed by the county for taxes on the entire property, even the portion below 2128 feet; evidence of newspaper reports regarding the flooding of homesteads due to the dams; and evidence of tree stumps located in the various bays at elevations below 2128 feet.

Id. at 210. The Court found that none of this evidence was clear and convincing enough for the Ericksons to overcome their burden of establishing the ordinary high water mark at statehood was not 2128 feet. Although it did not have the burden of proof, the State on the other hand:

presented affirmative expert testimony of lines on the soil present in 1890. The State's expert, when asked what he believed the high level of the Lake to be, responded “from what the soils tell us or . . . the [] high lake level [] is . . . at pretty much 2128 to 29, right in there.” The expert then stated that he believed that the Lake level was **between 2128 to 2129 feet “certainly prior to 1890.”** This opinion was based upon scientific analysis of the soil as to how the soil had developed, how ash from a volcano which erupted around **1800** had cooled, and evidence of various shorelines.

Id. at 212 (emphasis added); Aff. K. Mihara, Ex. 28, pp. 18-21 (State's trial memorandum *Erickson*). In other words, the State established that the ordinary high water mark had been between 2128 feet and 2129 feet since at least **1800**, well before the Coeur d'Alene Reservation was established in 1873. *Id.* Aff. K. Mihara, Ex. 28, pp. 18-21 (State's trial memorandum *Erickson*).

In this case, Claimants provide *no evidence* to substantiate their claim that the ordinary high water mark was 2121.5 feet at the time of statehood. Instead, Claimants cobble together an assortment of statements from Idaho Supreme Court cases to argue

[w]hile the ordinary high water mark (“OHWM”) is currently 2128 feet and has been at that level since 1907, this higher level is the result of “the dam [that] raised the water level. . .in both the lake and in the Coeur d’Alene and St. Joe rivers that feed into the lake.” The dam has been recognized as “raising the elevation of the water . . . approximately 6 1/2 feet This increased height in the dam naturally resulted in submerging the lands adjacent to Coeur d’Alene Lake and the streams flowing into the lake to an elevation of at least 2126.5 feet.” Hawks’ Response 91-7102 at 5-6; Hawks’ Response 91-7173 at 5-6 (quoting *In re Sanders Beach*, 143 Idaho 443 (2006) (emphasis in original) (internal citations omitted).

In the face of the overwhelming amount of evidence provided by the Ericksons—which was ultimately found insufficient by the Idaho Supreme Court—Claimants assert here that determination of the “historic” ordinary high water mark is a matter of simple arithmetic: “[i]f the current OHWM is 2128 . . . and we subtract the approximate 6 1/2 feet from 2128 to determine the elevation of the water at the time of Statehood, then the historic OHWM is about 2121.5 feet.” Hawks’ Response 91-7102 at 6; Hawks’ Response 91-7173 at 6.

Once again, Claimants misguide the Court regarding the applicable historical facts and law, as well as purposely omitting operative language from those cases to support their position. When Claimants’ omissions are revealed, the actual meaning of the Idaho Supreme Court’s statement in *Sanders Beach* comes into focus:

Because the Spokane River is the outlet of Lake Coeur d’Alene, the dam raised the water 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.

In re Sanders Beach, 143 Idaho at 449 (emphasis added). The Court went on:

By means of thus raising the dam at Post Falls and accordingly raising the elevation of the water in the Coeur d’Alene Lake approximately 6 1/2 feet, the appellant is enabled in seasons of low water to increase the capacity of its two plants. *Id.* at 450 (emphasis added).

The language omitted by Claimants is crucial to understanding what the Court is saying in *Sanders Beach*. The Court is not making any comment regarding whether the Post Falls Dam altered the ordinary high water mark but instead is acknowledging that the dam affected the seasonal variability of the Lake and St. Joe River levels. Specifically, the Court is observing that the Post Falls dam “raised” the elevation above the Lake’s summertime ordinary *low water* mark.¹⁵

This is wholly consistent with Avista’s operations as found by the Federal Energy Regulatory Commission (“FERC”). There, FERC found:

The Post Falls development typically controls water levels in the Spokane River and Coeur d’Alene Lake approximately six months a year starting in late June or July *after the spring runoff flows*

¹⁵ Claimants’ own evidence also supports the Tribe’s position that the ordinary high water mark is 2128 feet. Claimants provide a bathymetric map developed by the United States Geological Survey (“USGS”). Aff. S. McCormack, Ex. D. Therein is a table entitled “Characteristics” under which the USGS notes that the Lake’s surface elevation “[a]t full-pool capacity is 648.7 meters or 2128.3 feet. *Id.* Furthermore, under the Bathymetry section, the USGS notes that the elevation at “the limit of its usable capacity,” is 646.2 meters or 2120.1 feet. *Id.*

In 1921, the USGS completed a report entitled “Coeur d’Alene Lake, Idaho, and the overflow Lands.” Aff. K. Mihara, Ex. 27 (Davenport Report). That report concluded that “[t]he natural low-water elevation of the lake 2,120 feet above the sea. *Id.* at 3 *see also id.* at 18 (finding that 2,120 feet was the “extreme lower-water level of the lake prior to the construction of the dam.”). The highest level that the lake has been known to reach was 2,137.6 feet, in the spring flood of 1894. *Id.* That report also includes a cross-section of the Spokane River at the outlet of Lake Coeur d’Alene. *Id.* at after 24 (cross-section A). That cross-section shows that the elevation at the very bottom of this outlet is approximately 2,117 feet. *Id.* However, the banks of the River rise to an elevation of over 2,130 feet. *Id.* It makes little sense that these banks would raise this high if the ordinary high water mark were only 2121.5 or 2120 feet. Furthermore, this cross-section indicates that if the ordinary high water mark in the Lake were only 2120 or 2121.5 feet, then the Spokane River should only be three or four feet deep, at its ordinary highest flow, an absurdity to anyone who actually understands the nature of the Spokane River. Ultimately, the USGS concluded that “the operation of the Post Falls dam has not appreciably affected the natural level of Coeur d’Alene Lake above an elevation of 2,128 feet.” *Id.* at 17-18.

have peaked and largely subsided. Throughout the summer recreation season, Coeur d'Alene Lake is maintained at or near elevation 2,128 feet. Generally during the week after Labor Day, Avista begins to release stored water at the Post Falls development, resulting in a gradual drawdown of lake levels

Aff. K. Mihara, Ex. 26, p. 10 (Avista FERC License). Avista's license clarifies that Avista only controls lake elevation *after peak runoff has occurred* and largely subsided. During the time at which the ordinary high water mark would be reached Avista is asserting absolutely no control over the elevation of the Lake or St. Joe River.¹⁶ It is contrary to common sense that a dam that does not control lake elevation during high water could alter the ordinary high water mark in Lake Coeur d'Alene and, in turn, the St. Joe River.

With the single exception that the Lake is now managed during the summertime at an elevation of 2128 feet rather than 2126.5 feet, Avista has always operated the dam in this exact manner. USGS described operation of the Post Falls dam in 1921 as follows:

[w]hen the spring rise commences all the gates at the dam are opened wide to give the maximum discharge capacity. As soon as the lake *falls* to an elevation of 2,126 feet or thereabout the bear-trap is raised . . . to *maintain* the water level as near 2,126.5 feet as possible.

Aff. K. Mihara Ex. 27, p. 12 (Davenport Report) (emphasis added). The USGS stated that

¹⁶ The USGS has been recording the daily elevation of Lake Coeur d'Alene since 1903. United States Geological Survey, USGS 12415500 Coeur d Alene Lake at Coeur d Alene, ID, http://waterdata.usgs.gov/id/nwis/uv/?site_no=12415500&PARAMeter_cd=00065,00060,00010 (last visited August 13, 2016). The Tribe notes that the Lake's recorded peak elevation has never been lower than 2,125.2 feet in any year since 1903, a full two and half feet higher than Claimants' alleged ordinary high water mark of 2121.5 feet. In fact the Lake's peak elevation has only dropped below 2,127.99 feet on three occasions: in 1905 (2,125.2 feet), 1904 (2,127.12 feet), and 1930 (2,127.18 feet). Every other year on record since 1903 the peak elevation has been 2,128 feet or higher with the highest elevation occurring in 1933 (2,139 feet).

[t]he purpose of using Coeur d'Alene Lake for storage is to equalize the flow of *low-water* periods and to increase the mean flow during such periods by the release of flood water stored in the spring, thereby assuring a greater output of power from the Washington Water Power Co.'s hydroelectric plants on Spokane River. The use of the lake for storage, *although it has not increased the maximum water level or the maximum area of lands that may occasionally be flooded*, involves the maintenance of a higher water level *during low-water periods* than would naturally exist *Id.* at 1 (emphasis added).

The problem with Avista's operations was not that it caused former uplands to become "submerged" but instead that it prevented the summer-time reemergence of lowland meadows and grassland used for grazing and caused "the consequent retarding of *drainage* [on lands higher up, which] is detrimental to the interests of the landowners." *Id.* More specifically, the USGS found:

[t]he effect of holding the water of the lake at a certain level is not confined to the lands below that level. As the lake falls the lands that are exposed are left saturated with water. In order to drain off from the soil, the water must overcome a certain amount of resistance from the soil particles and therefore must have some fall to create a flow. Consequently, the water table or surface of the saturate soil will slope upward from the water surface of the lake. . . . Although evaporation helps to dry the soil, conditions are very favorable for keeping the main part of the bottom lands well saturated with water throughout July. . . . The foregoing deductions point to the conclusion that the use of the lake for storage has introduced factors that would cause a serious water-logging of the overflow lands. . . . [U]nless the water-logged lands were drained and diked to protect them against spring overflow, they would not be valuable for agriculture because they could not be worked before the later part of June in Average years. *Id.* at 19-20.

These lands were, by definition, "overflow lands," which is to say they were "lands which are subject to such periodical or frequent overflows as to require levees or embankments to keep out the water, and render them suitable for cultivation." *San Francisco Savings Union, et al v. Irwin*, 28 F. 708 (C.C.D.CA 1886), *aff. Irwin v. San Francisco Savings Union, et al.*, 136

U.S. 578 (1890). Before Washington Water Power began to hold the Lake at 2126.5 feet (later 2128 feet), these overflow lands were able to drain naturally to a sufficient degree that they could be reclaimed with minimal artificial drainage. After 1907, however, the USGS found “[r]elief from water-logging of the lands can be obtained only by proper drainage, and the lands must be diked before they can be drained successfully.” Aff. K. Mihara Ex. 27, p. 26 (Davenport Report).

Claimants nonetheless cite to *Washington Water Power Co. v. Waters*, *Petajaniemi v. Washington Water Power Co.*, and *Deffenbaugh v. Washington Water Power Co.* for the proposition that “[i]t is well known that 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.” Hawks’ Response 91-7102 at 6; Hawks’ Response 91-7173 at 6. Claimants point to no specific language in *any* of these cases to support their position. Nor could they, since, when put in their proper context, these cases actually *undermine* Claimants’ argument.¹⁷ The Court in *Washington Water Power Co. v. Waters* explained the actual situation:

The Coeur d’Alene Lake is a body of water about 25 miles in length, by an average of about 2 miles in width. This lake is supplied and fed by the waters of the Coeur d’Alene and St. Joe rivers. . . . Along these rivers and the small lakes and bodies of water tributary thereto . . . there are large areas of low meadow lands *which drain into these rivers at times of low water*. . . . Late in the summer and early autumn the waters recede, and the Coeur d’Alene Lake itself is *several feet lower than it is during what is commonly known as the high-water period*. The appellant company, by closing its headgates at Post Falls and raising the bear trap, is enabled to raise and *hold the level* of the waters of Coeur d’Alene Lake and the Coeur d’Alene and St. Joe Rivers about 6 1/2 feet higher than their natural level, and the waters when so held overflow and cover . . . the low meadow and grass lands along and

¹⁷ Indeed, none of these cases purport to determine the ordinary high water mark or address the question of ownership of submerged lands.

contiguous to these streams By means of thus raising the dam at Post Falls and accordingly raising the elevation of the water in the Coeur d'Alene Lake approximately 6 1/2 feet, the appellant is enabled *in seasons of low water* to increase the capacity in its two plants.

19 Idaho 595, 683 (1911) (emphasis added). The lands overflowed in *Waters* were “low meadow[s] and grass lands along and contiguous to those streams.” *Id.*¹⁸ These lands were *not above the ordinary high water mark* but were instead naturally inundated every year. Aff. K. Mihara, Ex. 27 (Davenport Report). The cause of the complaint was that by holding the water level at the ordinary high water mark, Washington Water Power prevented these lands from reemerging and draining during the low flow season. *Waters*, 19 Idaho at 683.

The Idaho Supreme Court provided more detail in *Petajaniemi v. Washington Water Power Co.*:

Prior to the improvement and reconstruction of the dams at Post Falls, *the low-water elevation in Coeur d'Alene Lake was 2,120 feet* above mean sea level. The Appellant so improved and constructed the dams as to enable it to raise what are called “bear traps” at the top of the dam, whereby the water could be raised and held at an elevation of **2,126.5 feet** above sea level.¹⁹ The chief

¹⁸ Nothing in *Waters* would indicate, one way or another, whether the low meadows and grass lands at issue were “valuable for agricultural purposes” or if the land was capable of cultivation. *Heckman Ranches, Inc. v. Dept. of Public Lands*, 99 Idaho 793, 799 (1979).

¹⁹ This statement also exposes another problem with Claimants arithmetic as well as their understanding of the history of Avista’s operation of the Post Falls Dam. From 1907 until 1941 Avista maintained the Lake and Rivers at a summer-time elevation of 2126.5 feet instead of 2128 feet. *See Notice of Claim Avista Corporation Nos. 95-9115*, In Re CSRBA Case No. 49576, (Jan. 27, 2014). Only thereafter did Avista begin to maintain the Lake and Rivers at 2128 feet during the summer months. *See Notice of Claim Avista Corporation Nos. 95-9119*, In Re CSRBA Case No. 49576, (Jan. 27, 2014). This is where the 6 1/2 feet of water comes from; during the summer low water season Avista would maintain the Lake at an elevation of 6 1/2 feet higher than the ordinary low water elevation of 2120 feet. Claimants incorrectly assume that the Lake was raised 6 1/2 feet from its former high water mark. Based upon this false assumption, Claimants proceed to erroneously conclude that the “historic” high water mark is 2121.5 feet by subtracting

purpose of these devices is to convert the Coeur d'Alene Lake into a storage reservoir, and *hold the water during the low-water season at a higher elevation than the ordinary and natural condition of the lake . . .* and thereby give a greater power capacity at Post Falls than could otherwise be obtained during the low-water season.

22 Idaho 20, 124 P. 783, 784 (1912) (emphasis added). The dam had the effect of temporarily “submerging a great portion of the lowlands along the stream.” *Id.* The complaint in *Petajaniemi* was not that the dam had submerged lands above the ordinary high water mark but that “[t]he water is held back by reason of these dams until so late in the summer that crops cannot be grown on the lands submerged.” *Id.*²⁰

6 1/2 feet from 2128 feet, an elevation that Avista would not operate at for another twenty-nine years after the Supreme Court’s decision in *Petajaniemi*. Unfortunately for Claimants, the 6 1/2 foot figure has no relation to the ordinary high water mark.

²⁰ The language in *Petajaniemi* indicates that the lands at issue were capable of cultivation and therefore were arguably above the ordinary high water mark. *Heckman*, 99 Idaho at 799. One must understand the unique nature of these lands, as well as their history, in order to properly put this case into context. Once again, the lands at issue were “overflow lands,” meaning “lands which are subject to such periodical or frequent overflows as to require levees or embankments to keep out the water, and render them suitable for cultivation.” *San Francisco Savings Union*, 28 F. at 708. The Tribe has already explained the USGS found just a few years later that the cause for concern regarding maintenance of Lake Coeur d’Alene during the low flow summer months was that:

the use of the lake for storage has introduced factors that would cause a serious water-logging of the overflow lands. . . . [U]nless the water-logged lands were drained and diked to protect them against spring overflow, they would not be valuable for agriculture because they could not be worked before the later part of June in average years. Aff. K. Mihara Ex. 27, p. 19-20 (Davenport Report).

This is exactly the issue that was occurring in *Petajaniemi* where the Court found “we can readily understand why this flooding might so cut up a tract of land into small tracts and the water might so filter back under the soil of the remaining land as to do an immense lot of damage, and render the remaining tract of land but little value.” 22 Idaho at 20, 124 P. at 784. *See also Waters*, 19 Idaho at 683 (“there are large areas of low meadow lands *which drain* into

The lands at issue in *Deffenbaugh v. Washington Water Power Co.* were actually a bathing beach. This beach would be submerged each spring but would reemerge in the summer as water receded, which “offered an excellent bathing beach during the months of June, July and August of each year.” 24 Idaho 514, 135 P. 247, 249 (1913).²¹ The plaintiff’s complaint was that the dam would “caus[e] the water of said Lake Coeur d’Alene to raise, *back up*, and flow over and upon . . . [the] bathing beach lands . . . to a depth, to wit, of from one to five feet.” *Id.* As a result the Court found that “[t]his is one of those cases of *periodic* flooding.” *Id.* The Court further explained the effect of the Post Falls dam:

The dam and structure which holds the water and causes the overflow complained of was erected in 1906, and has been used in operation for the purposes of impounding and holding the water in Lake Coeur d’Alene *each season* since 1907. The effect of this dam is stated by appellant in its brief as follows: “The dam *does not raise the water in Lake Coeur d’Alene, but simply retards its waters in their run-off.* In the spring during the high-water season the water is much higher. *It simply tends to prevent the water*

these rivers at times of low water.”). The Court also indicated that the jury found 11.2 acres of formerly cultivated land were “totally submerged.” *Id.* However upon close inspection, it seems more accurate to say that the jury found 11.2 acres were condemned that were located below an elevation of 2128 feet. *Id.* This distinction is important. According to the Court, Washington Water Power’s engineers stated that the dam could hold water to a “maximum elevation” of 2128 feet. *Id.* However, the Court also recognized that the dam was only being operated to hold the water at 2126.5 feet. *Id.* The reason the jury was asked to find the acreage below 2128 feet was that was the elevation below which Water Power was condemning so that they would not have to reinstitute new proceedings in the event they began holding the Lake at 2128 feet rather than 2126.5 feet. Aff. K. Mihara, Ex. 27, pp. 10-11 (Davenport Report). Accordingly, it is more accurate to say that the jury found these lands were *capable* of being totally submerged rather than they were in fact submerged. The Court acknowledges this by noting that “[e]ven though the water was not at high stage at the time the jury inspected the premises . . .” *Id.* Further, there is no information in the record regarding whether plaintiffs had taken steps to drain this land in order to make it available for cultivation before Washington Water began to control lake elevation. In short, we do not know if these lands were capable of cultivation naturally or only by artificial means.

²¹ There was no allegation in this case that the lands at issue were capable of cultivation.

from falling as rapidly as it did prior to the construction of the present dam.” The water collects in Lake Coeur d’Alene from various streams emptying into it during the winter and spring until the elevation is raised six or eight feet above the ordinary elevation of the water *in the summer and fall*. The purpose of this dam is to *hold the water back from running off in the spring and summer so rapidly*, and to hold the level thereof at an elevation of 2,128 feet, whereas, if the flow was not so retarded by this dam and bear trap, it would runoff much more rapidly, and *by the middle of the summer would be reduced to an elevation of 2,121.5*. 24 Idaho at 514.

In sum, these cases clearly show that the lands that Claimants allege were “submerged” were bottomlands and sandbars that were naturally inundated every year only to reemerge and drain once the lake dropped down to its **ordinary low elevation** of around 2,120 to 2,121.5 feet. When the Idaho Supreme Court said that the dam had the affect “raising the elevation of the water, at least during parts of the year,” it was not suggesting that the dam operated to change the ordinary high water mark of the Lake or St. Joe River. Instead, these cases clearly show that the dam has the effect of “raising” the water above *the ordinary low water mark* of 2,120 feet during the water-short summer season.

Having thoroughly debunked Claimants’ argument regarding the yet-to-be-defined “historic” high water mark, the Tribe would like to circle-back and respectfully remind the Court that it need not make *any* determination regarding the ordinary high water mark in this case. Chief among these reasons is that both of Claimants’ points of diversion are unquestionably on submerged lands underlying navigable waters within the current exterior boundaries of the Coeur d’Alene Reservation. Title to these lands was clearly and unambiguously quieted in favor of the Tribe in *Idaho II*. Section 2(B), ¶ 1, *supra*; *Objector’s Memorandum in Support of its Motion For*

Summary Judgment, In Re CSRBA Case No. 49576, subcase nos. 91-07173 at § 3 (July 27, 2016). Claimants' initiated their water rights upon these lands in trespass, making them void.

C. The Tribe May Rely Upon the Tribal Court Judgment Between the Parties as Evidence that Claimants' Water Right Claims Were Initiated Via Trespass and are Therefore Void.

The Hawks allege the Tribal Court judgment finding them in trespass on the St. Joe River within the Reservation is not recognized by the CSRBA. Aff. D. Hedden-Nicely, Ex. 11 (Tribal Court Judgment). The Hawks fail to allege they were not properly served or that they did not have a full and fair opportunity to litigate the trespass issue before the Tribal Court, rather, they argue that because it is a foreign judgment it has no bearing on the proceedings. Hawks' Response 91-7102 at 3; Hawks' Response 91-7173 at 7.

The Hawks' argument is misplaced.²² The Idaho Supreme Court expressly recognizes Tribal Court judgments as being entitled to full faith and credit under Idaho law. *Sheppard v. Sheppard*, 104 Idaho 1, 7(1982). This was the conclusion of the District Court in and for Benewah County when it recognized the Tribal Court judgment finding trespass against the Johnsons in the St. Joe River. Aff. Hedden-Nicely, Ex. 13, p. 6 (Memorandum Op., Case No. CV-2016-25, Benewah Co. Dist. Ct.). Like the Johnsons in the foregoing case, the Hawks contend that *Wilson v. Marchington* supplanted *Shepard*., Aff. Hedden-Nicely Ex. 13, p.6, *cf.*

²² Claimants seem to think the Tribe is seeking to enforce the state court opinion drafted by Judge Wayman against Claimants. Hawks' Response 91-7173 at 7-8. That is not the Tribe's argument. Instead, the Tribe provides Judge Wayman's opinion as persuasive precedent to this Court regarding how another district court, the local court in Benewah County, has treated the findings of the Coeur d'Alene Tribal Court regarding these same trespass issues.

Hawks' Response 91-7102 at 3, n. 1; Hawks' Response 91-7173 at 7, n. 1.²³ As noted by Judge Wayman in the *Johnson* matter:

Sheppard has not been overturned or modified by a later opinion by the Idaho appellate courts. The district courts are bound to follow the pronouncements of the appellate courts. *Sheppard* is controlling precedent in Idaho and the rule of stare decisis dictates that lower courts follow it, unless it is manifestly wrong, unless it has been proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice. *Houghland Farms, Inc. v. Johnson*, 119 Idaho 97, 803 P.2d 978 (1990). The Idaho Supreme Court, not the district court, is the only court that can decide whether or not the *Sheppard* case is manifestly wrong, has proven to be unjust or unwise over time, or must be overruled to remedy an injustice.

Aff. Hedden-Nicely, Ex. 13, pp. 7-8.

However, in this instance, the Tribe is not seeking to enforce the Tribal Court judgment in the CSRBA. The Tribal Court judgment is merely evidence of the Hawks' trespasses upon Coeur d'Alene Tribal property. The Tribal Court judgment holds the Hawks in trespass upon the very tribally owned and controlled properties where their points of diversion are located; i.e., the mainstem and side-channel dockage lagoon of the St. Joe River. *Id.* Again, Claimants do not dispute this in their opposition. Contrary to the Hawks' assertion that the judgment has "no bearing on these proceedings in the CSRBA," it goes to the heart of the issue in this case: whether the Hawks' points of diversion were initiated in trespass upon tribal lands.

The Hawks' points of diversion are located on tribally owned submerged lands underlying navigable waters within the Tribe's reservation. The Hawks never obtained permission from either the Tribe or the United States prior, during, or after construction of their

²³ Counsel for the Johnsons in that case are the same counsel for the Hawks in this case. The only thing that has changed in counsels' argument is the name of their clients.

diversionary works which makes the Hawks trespassers. Because the Hawks' water rights were initiated via trespass, they are void, and their claims should be disallowed in these proceedings.

D. For 91-7102, Claimants Have Provided No Factual or Legal Support for their Claim that the Tribe Does Not Own the Submerged Lands at Claimants' Point of Diversion

The Hawks assert that, "the submerged lands beneath Claimants' point of diversion were and are privately owned land." Hawks' Response 91-7102 at 7. They go on to allege that such lands were deeded to them. *Id.* ("the land beneath the point of diversion is privately owned land that was deeded to Claimants."). In support of their claim to title via deed, the Hawks supply the Court and parties with the affidavit of their counsel, Ms. McCormack. No portion of Ms. McCormack's affidavit establishes the precise location of where the Hawks' points of diversion are for either claim Nos. 91-7102 or 91-7173 in relation to the property they assert they own.

Exhibit A of Ms. McCormack's affidavit purports to be a copy of the IDWR water right license for claim No. 91-7102.²⁴ Aff. McCormack, Ex. A. Exhibit B of Ms. McCormack's affidavit purports to be an amended application for water right claim No. 91-7102. Aff. McCormack, Ex. B. In no portion of the license does the Director make any findings as to whether the claim was initiated via trespass. *Id.*, Exs. A, B. Both of these documents describe Claimants' point of diversion down to the quarter/quarter section of Government Lot 7 but

²⁴ Note that the Hawks fail to offer the License for claim No. 91-7173. The Tribe has offered the license for claim No. 91-7173. Aff. Hedden-Nicely, Ex. 7. The license states on its face that, "[t]his right does not grant any right-of-way or easement across the land of another." *Id.* (Conditions of Approval, n. 2). Mr. Hawks has acknowledged that IDWR could not authorize his use of anyone else's property, including the Tribe, for water right claim No. 91-7102. Aff. K. Mihara, Ex. 12, p. 39, l.20 to p.40, l.25 (Dep. S. Hawks).

neither purport to identify the precise location of the Hawks' points of diversion.²⁵ *Id.* The Hawks do not claim to own 40 acres within the entirety of Government Lot 7 within the boundaries of the Sylvia's Haven Subdivision. The Hawks' claim much less land within Sylvia's Haven. Aff. K. Mihara, Ex. 12, pp. 17-29, 31-32 (Dep. S. Hawks); Aff. K. Mihara, Exs. 13-15, 19-20 (maps of Sylvia's Haven). Thus, there is nothing in either of these documents that demonstrates Claimants own the property at the point of diversion noted thereon.

Exhibit C of Ms. McCormack's affidavit is the director's report for 91-7102, which notes that the point of diversion is located: T46N R02W S7 NESE Lot 7 Within BENEWAH County. *Id.* In the explanatory material, Parcel No. RP005300200061A is listed as being the point of diversion. *Id.* That Parcel corresponds to Lot 6, Block 2, of Sylvia's Haven, not the lagoon. Aff. K. Mihara, Exs. 15, 20 (maps with tax identification information). The Dockage Lagoon contains no tax parcel identification number, and while the Hawks' can affirm they pay property taxes on lots 4, 5, 6, and 13 of Block 2, Sylvia's Haven, they cannot affirm they pay any property taxes for the lagoon. Aff. K. Mihara, Exs. 12 (p. 31, l. 25; p. 32, l. 1-13) (Dep. S. Hawks). Such evidence is hardly indicia of private ownership of any portion of the lagoon.

A review of Ms. McCormack's affidavit provides absolutely no evidence that the submerged lands at the Hawks' points of diversion were ever conveyed to them via deed. The Hawks engage in quite a lengthy recitation of their chain of title. Note however, not a single one of the deeds provided by the Hawks purports to transfer any property in the lagoon to Claimants. Hawks' Response 91-7102 at 7; *see also* Aff. McCormack, Exs. D-H. In fact, the evidence the Hawks do provide cuts contrary to their assertion. Aff. McCormack, Ex. K (Exhibit A thereto).

²⁵ Pursuant to IRE 201, the Tribe asks the Court to take judicial notice of the fact that a quarter, quarter of a section of land contains 40 acres.

The deed the Hawks provide sets forth they own lots 4, 5, and 6 of Block 2, and a portion of lot 9 of Block 1, Sylvia's Haven. *Id.* While the deed does purport to also grant them "water rights," it does so pursuant to a "Water Agreement and Easement" dated April 29, 1982. *Id.* Upon review of the "Water Agreement and Easement" dated April 29, 1982, no portion of that document purports to grant any easement or right of way into the dockage lagoon of Sylvia's Haven. *Aff. K. Mihara, Ex. 16 (Water Agreement and Easement).* That document only purports to grant water rights from an upland private well. *Id.*

Exhibit D of Ms. McCormack's affidavit purports to be a plat map of Castlio's Tracts. *Aff. McCormack, Ex. D.* This map is not a survey but is instead a hand-drawn map based upon "field notes executed on January 1 and 2, 1914. This is during the time of year when Avista (then Washington Water Power) lets water out of the Lake and River. *See* section 2(B), *supra.* Claimants have acknowledged that when the water is let out of the dam at post falls the lagoon goes dry, and does so every year. *Aff. K. Mihara, Ex. 12 (p. 121, l. 2 to l.20) (Dep. S. Hawks).* We also know the lagoon was deepened in the 1990s. *Id., Ex. 25 (encroachment permit to Cy Chase).* Field surveyors routinely failed to record such side-channels in their notes. *See Heckman, 99 Idaho at 796 (citing eight cases in Idaho alone dealing with disputes regarding stream meanders by government surveys. Also noting that "meanders . . . are not boundary lines, rather the river or stream forms the boundary line.")*. As such, it is likely that the side-channel lagoon was dry during the time these field notes were taken (January), which resulted in the lagoon not being noted in the plat map. In any case, this map hardly establishes that the lagoon either did or did not exist at the time it was drawn.

Exhibit F of Ms. McCormack's affidavit purports to be a deed from Mr. and Mrs. Reichelt to Cy Chase. *Id.*, Ex. F.²⁶ The Hawks were not transferees of any property under this deed. It is interesting to note that when Cy Chase sought to enlarge the dockage lagoon in question in 1995, he applied for, and was granted an encroachment permit from the State of Idaho. *Aff. K. Mihara*, Ex. 25 (Encroachment Permit No. L-95-S-4172). Further, the permit Mr. Chase obtained from Idaho states, "[t]his permit does not convey the State's title to or jurisdiction or management of lands lying below the natural or ordinary high water mark." *Id.* Claimants have not explained why Mr. Chase would seek an encroachment permit from the State to deepen the dockage lagoon if the property was private land as alleged by the Hawks.

Mr. Hawks likewise applied for and received an encroachment permit from the state of Idaho for another lot they own directly adjacent to their riverfront lot (lot 12, Block 2 of Sylvia's Haven). This property is clearly adjacent to the dockage lagoon.²⁷ *Aff. K. Mihara*, Ex. 24 (Encroachment Permit No. L-95-S-4339), *cf.* *Aff. K. Mihara*, Exs. 13, 14, and 15 (mapping of Sylvia's Haven). Mr. Hawks' encroachment permit for Lot 12, like Mr. Chase's encroachment permit, stated, "[t]his permit does not convey the State's title to or jurisdiction or management of lands lying below the natural or ordinary high water mark." *Id.* Normally, it is well known, that work on private property is permitted through the county or city in which the property is located.

²⁶ Likewise, Exhibit E of Ms. McCormack's affidavit purports to be a deed from Mr. and Mrs. Corb to Cy Chase. *Aff. McCormack*, Ex. E. Again, no recitals transferring anything to Mr. and Mrs. Hawks. The exhibit does not show or describe where the Hawks' points of diversion are for water claim Nos. 91-7102 and 91-7173.

²⁷ The same deed which Mr. and Mrs. Hawks took title to lot 13 also granted them certain riparian rights to lot 12 as well. In Idaho, riparian rights do not purport to grant title to lands below the OHWM. *Erickson*, 132 Idaho at 208; *Sanders Beach* 143 Idaho at 443.

Claimants have not explained why they sought encroachment permits from the State to conduct work and construct encroachments in the lagoon if they believed it was private.²⁸

Exhibit G of Ms. McCormack's affidavit is actually a portion of the original plat of Sylvia's Haven. *Id.*, Ex. G; *cf.* Aff. K. Mihara, Ex. 13 (Plat map of Sylvia's Haven). No portion of the plat transferred anything to Mr. and Mrs. Hawks. It is interesting to note, however, that while all the lots denote both lot and block numbers, three features do not have any lot or block number: (1) the St. Joe River, (2) the Dockage Lagoon, and (3) State of Idaho Highway No. 3. Aff. McCormack, Ex. G. Each of these features, by their denotation on the plat map, do not evidence any indicia of private ownership. *Id.* Indeed, there is no line separating the dockage lagoon from the St. Joe River and vice versa. *Id.* The plat shows both as being one contiguous body of water. *Id.* When asked to identify the property he owned on the plat, Mr. Hawks alleged Lot 6 as being the location of the claim's point of diversion for water claim No. 91-7102. *Id.* Mr. Hawks did the same thing for Exhibits 3 and 4 of his deposition; however, he placed the point of diversion out into the dockage lagoon. Aff. K. Mihara, Exs. 14, 15 (Record of Survey and aerial photo with tax parcel information). IDWR also placed the point of diversion for claim No. 91-7102 well into the lagoon during beneficial use field report investigation. Aff. K. Mihara, Ex. 21 (Beneficial Use Field Report and Supplement). Mr. Hawks confirms that the "orange thingy"

²⁸ Mr. Hawks' permit was issued in 1997 and Mr. Chase's permit was issued in 1995. Aff. K. Mihara, Exs. 24, 25 (Encroachment Permits Nos. L-95-S-4339 and L-95-S-4172, respectively). This was prior to the federal district court decision in 1998 which quieted title in favor of the Tribe to the bed and banks underlying navigable waters within the Tribe's reservation and the U.S. Supreme Court decision in 2001 which affirmed that *Judgment & Decree*. Prior to 2001, the State of Idaho asserted it owned the submerged lands at issue in that litigation. Upon the decision in *Idaho II* it became apparent that all state-issued encroachment permits within the Reservation were rendered void for lack of jurisdiction. Accordingly, these permits do not indicate Claimants' received proper permission for their point of diversion. However, it is evidence indicative of their mindset that they did not believe they owned the property at the point of diversion and needed to secure proper permission to be there.

depicted on bates CDAT OBJ-7102 0008 is indeed a foot valve. Aff. K. Mihara, Ex. 12 (p. 55, 1.25 to p.56, 1.3) (Dep. S. Hawks). Mr. Hawks confirmed Exhibit 12 to his deposition depicted the point of diversion. Aff. K. Mihara, Ex. 12 (p. 55, 1.8 to 1.16) (Dep. S. Hawks). Mr. Hawks confirmed that the waters depicted on Exhibit 4 of his deposition, the same water shown on Exhibit 12 of his deposition, were navigable when the water was located at its ordinary high water mark. *Id.*, Ex. 12 (p. 53, 1.25 to p.54, 1.18) (Dep. S. Hawks).

Exhibit H of Ms. McCormack's affidavit appears to be an aerial photo, allegedly taken in 1965. Aff. McCormack, Ex. H. Like Mr. Semanko, Ms. McCormack does not set forth in her affidavit any foundation or how she has personal knowledge of the photo, or what it depicts. At best the photo constitutes second-hand hearsay from what Mr. Semanko and Ms. McCormack were told by some person at the "public records of Benewah County." Taking the photo at face value, it is not clear during which year the photo was taken, or—more importantly—the time of the year the photo was taken. Claimants have argued when the water is let out of the dam at post falls the lagoon goes dry, and does so every year. Aff. K. Mihara, Ex. 12 (p. 121, 1. 2 to 1.20) (Dep. S. Hawks). Accordingly, without establishing the time of year this photo was taken it is impossible to tell whether the lagoon is there or not.

Exhibit I of Ms. McCormack's affidavit purports to be a bathymetric map of Coeur d'Alene Lake produced by the USGS. Aff. McCormack, Ex. I. This evidence supports the Tribe. There is a table entitled "Characteristics" under which the USGS notes that the Lake's surface elevation "[a]t full-pool capacity is 648.7 meters or 2128.3 feet. *Id.* Furthermore, under the Bathymetry section, the USGS notes that the elevation at "the limit of its usable capacity," is 646.2 meters or 2120.1 feet. *Id.*

Exhibit J of Ms. McCormack's affidavit is the affidavit of Scott Rasor, with exhibits. This exhibit shows the precise location of the Hawks points of diversion in relation to their properties. As noted in the exhibits, neither point of diversion is on property owned by the Hawks. The points of diversion on Mr. Rasor's affidavit are consistent with Mr. Hawks' deposition and the beneficial field investigation by IDWR, which place the points of diversion off Claimants' property and in the side-channel lagoon of the St. Joe River for claim 91-7102. Aff. Rasor, ¶ 6, Exs. 1-2; cf. Aff. K. Mihara, Exs. 13, 14, 15, 19, 20, 21, and 22 (mapping of Sylvia's Haven).

Exhibit K of Ms. McCormack's affidavit are copies of some of the Hawks' amended discovery responses to the Tribe's discovery requests. Aff. McCormack, Ex. K. Aside from containing various self-serving statements and allegations, attached thereto is a copy of the Hawks' deed to their respective properties; (1) Lot 4, Block 2, Sylvia's Haven; (2) Lot 5, Block 2, Sylvia's Haven; (3) Lot 6, Block 2, Sylvia's Haven; and (4) a portion of Lot 9, Block 1, Sylvia's Haven.²⁹ No portion of the Hawks' deed purports to transfer any portion whatsoever of the "dockage lagoon" noted elsewhere. Further, compared to the affidavit of Mr. Rasor, the points of diversion are very precisely located as not being on any property listed on the Hawks' actual deed. Aff. Rasor, ¶ 6, Exs. 1-2.³⁰

²⁹ *Cates v. Albertson's Inc.*, 126 Idaho 1030, 895 P.2d 1223 (1995). ("In order to create a genuine issue of material fact, the party opposing the motion must present more than a conclusory assertion that an issue of fact exists.")

³⁰ Likewise, exhibit L of Ms. McCormack's affidavit are copies of some of the Hawks amended and supplemented discovery responses. Again, the document contains several self-serving statements and allegations. Exhibit M of Ms. McCormack's affidavit is a portion of a deposition of Mr. Hawks. In the deposition, Mr. Hawks alleges that the Tribe does not own the property at the point of diversion. Without citation to any evidentiary support, the Hawks' allege, "[t]he

The Hawks assert that, "Claimants are entitled to challenge Objector's ownership in order to prove they are not trespassing." Hawks' Response 91-7102 at 4; Hawks' Response 91-7173 at 4. However, the Tribe owns "the bed and banks of *all of the navigable waters* lying within the current boundaries of the Coeur d'Alene Indian Reservation" Aff. of D. Hedden-Nicely, Ex. 8; Aff. K. Mihara, Ex. 7 (Judgment & Decree from Lodge Opinion) (emphasis added). Accordingly, to challenge the Tribe's ownership, the Hawks would have to prove their points of diversion either (1) *were not* on the beds and banks; (2) if they were on submerged lands, such submerged lands *were not* underlying navigable waters; or (3) if such submerged lands underlie navigable waters, such navigable waters *were not* within the Tribe's reservation, or were within Heyburn Park. As set forth in the Tribe's opening brief on summary judgment, all three elements of Tribal ownership are admitted by the Hawks. The Hawks provide no evidence which negate any of the description of ownership as set forth by the federal courts.

The Hawks never obtained permission from either the Tribe or the United States prior, during, or after construction of their diversionary works which makes the Hawks trespassers. Because the Hawks' water rights were initiated via trespass, they are void, and their claims should be disallowed in these proceedings.

dockage lagoon was built in the 1960s and provide a private access point to water for owners of land in Sylvia's Haven." Hawks Response 91-7102 at 7-8. As noted, the Hawks support these statements with no citation to the affidavits of their counsel nor any exhibits thereto. *Cates v. Albertson's Inc.*, 126 Idaho 1030, 895 P.2d 1223 (1995). ("In order to create a genuine issue of material fact, the party opposing the motion must present more than a conclusory assertion that an issue of fact exists.").

3. CLAIMANTS' EQUITABLE DEFENSES ARE IMMATERIAL TO THIS CASE

The Hawks argue that:

Objector had ample opportunity to protest the water use at the time of the application. However, it did not. In addition, Objector failed to bring any trespass claims against Claimants until the commencement of the CSRBA, even though Claimants have been obtaining and using their license for water since the 1990s. To allow Objector to benefit from the current position it is just now, years after the licensing of these water right claims, asserting in the CSRBA for the first time is inequitable. Objector voluntarily and intentionally acquiesced to Claimants' use of water for years and delayed pursuing an action until Claimants were forced to participate in the CSRBA. This prejudices Claimants and puts Objector in an unfair advantage. Objector cannot be allowed to collaterally attack Claimants' license in this matter and, therefore, this Court should deny Objector's Motion for Summary Judgment.

Hawks' Response 91-7102 at 10-11. The Hawks' argument fail because the Tribe has sovereign immunity against a laches defense and the Claimants' other equitable defenses do not apply to enforce documents which are void. Claimants' arguments also fail to properly support their argument with citation to a factual foundation that would suggest the Tribe has done anything inequitable in this case.

A. The Tribe has Sovereign Immunity Against Claimants' Laches Argument and Claimants other Equitable Defenses Do Not Apply to Enforce Documents Which are Void.

It is axiomatic that "laches is not a defense against the sovereign" *Costello v. United States*, 365 U.S. 265, 281 (1961). As a result, it is well settled that a sovereign "is not bound by state statute of limitations or subject to the defense of laches in enforcing its rights." *United States v. Summerlin*, 310 U.S. 414, 416 (1940). As applied to Indian tribes, the United States Supreme Court has found "state notations of laches and state statutes of limitations have no applicability to suits by the government, whether on behalf of Indians or otherwise." *Board of Com'rs of Jackson County v. United States*, 308 U.S. 343, 350 (1939). The Court there found

that “[t]he State will not be allowed to invade the immunities of Indians, no matter how skillful its legal manipulations.” *Id.* The Court concluded, “[t]his is so because the immunity of the sovereign from these defenses is historic. Unless expressly waived, it is implied in all federal enactments.” *Id.* Claimants cannot proceed on a theory of laches.³¹

Claimants’ other equitable arguments likewise fail because they rest upon a water license that is void. In the case of *Wernecke v. St. Maries Joint School District No. 401*, the Supreme Court of Idaho set forth that the equitable doctrines of estoppel and waiver would not operate to enforce a document which was void. 147 Idaho at 277. At issue in *Wernecke* was whether an injured worker could waive claims to damages for future injuries. *Id.* at 280-81, 1011-12. The Idaho State Insurance Fund argued that the worker’s decision to enter into the agreement was tantamount to waiver of any claims arising from future injuries and the worker should be estopped from taking a position inconsistent with the agreement. *Id.* at 287, 1018. The injured worker argued that the equitable doctrines did not apply to her because the agreement was void.

³¹ The lone exception to this general rule is *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005) (*Oneida III*). At issue there was the Tribe’s suit in equity to eject “approximately 20,000 private landowners” from a parcel of land the Oneidas “had not occupied since the 1795-1846 conveyances.” *Id.* at 210. The Court had previously determined the lands at issue were unlawfully conveyed in 1795 and had awarded money damages. *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226 (1985) (*Oneida II*). However, when the Tribe sued to eject the current landowners the Supreme Court refused, citing the doctrines of laches, and more importantly, impossibility. *Oneida III* at 221. It is important to note that the Tribe was seeking equitable, rather than legal, relief in the case. Where money damages were sought, the Supreme Court readily upheld the suit and did not affirm any equitable defenses. *See Oneida II*, 470 U.S. at 226. The Tribe’s objection in this subcase is not a suit in equity; the CSRBA is a legal proceeding. Furthermore, *Oneida* shows the extent of inequity required for the federal courts to make a finding of laches against an Indian tribe. It must go hand-in-hand with the doctrine of impossibility. Claimants argument that the Tribe waited a few years (and, in the case of 91-7173, a few months) to invalidate their water rights is a far cry from a 200-plus year-old ejectment action of over 20,000 people.

Id. The Supreme Court of Idaho began its analysis of whether the equitable doctrines applied by stating the law:

Waiver is a voluntary, intentional relinquishment of a known right or advantage. *Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778, 782, 839 P.2d 1192, 1196 (1992). The doctrine of quasi-estoppel precludes a party from asserting to another's disadvantage a right inconsistent with a position previously taken by him or her. *Mitchell v. Zilog, Inc.*, 125 Idaho 709, 715, 874 P.2d 520, 526 (1994).

Id. However, the Court observed that:

... neither of these doctrines applies in the case of a contract that violates the law. If a contract is illegal and void, the court will leave the parties as it finds them and refuse to enforce the contract. The contract cannot be treated as valid by invoking waiver or estoppel. *Whitney v. Cont'l Life & Accident Co.*, 89 Idaho 96, 105, 403 P.2d 573, 579 (1965). Therefore, because the Agreement was illegal and violative of the Act, ISIF cannot rely on the doctrines of waiver and estoppel to enforce the Agreement against Wernecke. Absent limited circumstances not present here, this Court will not enforce an illegal contract, regardless of the fact that the parties knowingly entered into that contract.

Id. at 287-88.

The Tribe has already demonstrated that these licenses are void, making them subject to collateral attack. *See* section 1, *supra*. That same rationale applies to Claimants' equitable arguments as well. Simply put, Claimants "cannot rely on the doctrines of waiver and estoppel to enforce [the license]." *Wernecke*, 147 Idaho at 287. The Idaho Supreme Court has clearly stated it will not enforce legal documents that are void, illegal, and violative of Idaho law. *Id.*

The Hawks and the Tribe did not enter into any agreements. The Hawks cannot point to any action upon which the Tribe "knowingly and intentionally" relinquished its right to claim trespass. As noted above, the Hawks fail to point to any affirmative action of the Tribe taking

any position in relation to their water rights. Not taking *any* action is a far cry from being estopped from taking an inconsistent position contrary to a prior affirmative action. There was no Tribal action upon which the Hawks could rely upon to seek equitable relief.

In essence, the Court should insert the word “license” for that of “agreement” in the language cited in the *Wernecke* for its decision in this case. The Hawks should not be able to legitimize a license which is illegal and void against the Tribe merely because the Tribe found out about the trespass through the CSRBA process. As noted above, the published notice for claim No. 91-7102 incorrectly states the point of diversion, and Mr. Hawks erroneously certified that he owned the property at the point of diversion for 91-7173. The simple reality in Idaho is that equity will not operate to legitimize documents which are *void ab initio*. It did not do so in *Wernecke* and it should not do so here.

B. The Hawks’ Fail to Properly Support Their Argument With Citation to a Factual Foundation Pursuant to Rule 56(c)(1)(A) or Otherwise Establish How Equity Applies in this Case.

It is well established that a party claiming an equitable defense has the burden of proving such a defense. *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). Rule 56(c) sets forth that:

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, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for the purposes of the motion only), admissions, interrogatory answers, or other materials...

I.R.C.P. 56(c)(1)(A).

In its response to the Hawks' motion for summary judgment, the Tribe set forth the fact that the Hawks fail to provide concrete allegations as to why their equitable defenses should prevail. *Tribe's Response Opposing Hawks' Motion for Summary Judgment*, In Re CSRBA Case No. 49576, subcase nos. 91-7102; 91-7173 at 20-28 (Aug. 10, 2016). Such discussion is quite lengthy and will not be recited again here, however, the Tribe provides limited further discussion below.

The Hawks fail to note for the Court that their water licenses were premised upon the idea that either the Hawks owned the point of diversion (91-7173), or they had a right of access to the property at their point of diversion (91-7102). As shown above, both premises rely on faulty facts.

The Hawks can point to no evidence which supports their assertion that "Objector voluntarily and intentionally acquiesced to Claimants' use of water for years and delayed pursuing an action until Claimants were forced to participate in the CSRBA"

Claimants ignore the fact that there are *thousands* of encroachments located upon tribal submerged lands. Since the decision in *Idaho II*, the Tribe has been working diligently to bring everyone into compliance with tribal code. However, as a result of the magnitude of encroachments, this process has been completed in phases over the course of several years.³²

³² Briefly, the first phase of this process involves the identification of docks and other large encroachments that need to come into compliance. The Tribe started with this "low-hanging fruit" because they are the easiest to identify and have the largest impact upon navigation and water quality. The Tribe is just now completing this phase and is starting the second phase, which is to identify various smaller encroachments such as diversion works. This phase is admittedly more difficult because these encroachments are harder to locate, particularly without the cooperation of the riparian landowners. The CSRBA interrupted this phase. However, it is not accurate to say that the Tribe "delayed pursuing an action until Claimants were forced to participate in the CSRBA" The unrefuted evidence is that the Tribe repeatedly sent compliance notices to the Hawks regarding their encroachments, to no avail. Further the

The Tribe has almost universal compliance with its encroachment code. However, a handful of upland owners, located primarily on the St. Joe River, refuse to come into compliance. Rather than immediately suing these individuals in tribal court, the Tribe has spent the last *fifteen plus years* attempting to use alternative dispute resolution to bring these people into compliance and is just now beginning the process of ejecting these few remaining intransigent landowners. The Tribe took this approach with the Hawks. The unrefuted facts are that the Tribe has been attempting to get the Hawks to bring their encroachments into compliance since at least 2003. Aff. D. Hedden-Nicely, Ex. 12, p. 2 (Findings of Fact and Conclusions of Law). The Hawks now try to turn the Tribe's anti-litigious approach against them and say that since the Tribe didn't immediately sue them it should now be barred from objecting to their water right claim in the CSRBA.

Claimants' bare assertion that "Objector voluntarily and intentionally acquiesced to Claimants' use of water for years" must also be contrasted with the actual notice given and the application for permit submitted by the Hawks for water claim Nos. 91-7102 and 91-7173.

The actual notice published for claim No. 91-7102 purports to put the point of diversion at: "Diversion Pt. [Government] Lot 1 (NENESE) Sec 7 T 46N R 02W." Aff. K. Mihara, Ex. 18 (publication, re: notice of water right). Thus, the published notice did not apprise *ANYONE* of the true location of the point of diversion for claim No. 91-7102. However, the permit and license place the point of diversion at: "[Government] Lot 7 (NESE), Sec. 7, Township 46N, Range 02W, BENEWAH County." Aff. McCormack, Ex. A (emphasis added). Government Lots 1 and 7 are two totally distinct and separate parcels of land. The Hawks do not allege to own any land

evidence clearly demonstrates that the Hawks were on notice that water diversion works are an encroachment. Aff. K. Mihara, Ex. 9 (Dept. of Lands Letter re Hawks' pump (91-7102)).

within Government Lot 1 – the lot which was reported as being the point of diversion for the claimed water right.

Further, the Director's Report clarifies that the Hawks' point of diversion for claim No. 91-7102 is located on Lot 6, Block 2, of Sylvia's Haven. Aff. McCormack, Ex. C ("EXPLANATORY MATERIAL: ... Parcel No. RP00530020061A for point of diversion"); cf. Aff. K. Mihara, Exs. 15, 20 (aerial photos with parcel tax identification). In other words, since Claimants first attempted to initiate this water right, the location of their point of diversion has been placed in *three* different locations. The location of the point of diversion at issue was not definitively located until the Tribe took the affirmative step of hiring a surveyor to go out and locate them as part of this objection process. It is hard to imagine a scenario where the Tribe could be accused of knowingly *and* purposely acquiescing to the locating of this water right.

Likewise, in their application for permit for claim No. 91-7173, the point of diversion is noted as being, "[Government] L7 (NE1/4SE1/4) Sec. 7, Twp 46N, Rge 02W, B.M. BENEWAH County." Aff. Hedden-Nicely, Ex. 1, p. 1. Under item 9a. of the permit application, Mr. Hawks erroneously certifies he owns the property at the point of diversion. *Id.* at 2. Mr. Hawks' certification took place in 2008, well after the U.S. Supreme Court openly and publically upheld Tribal ownership to the properties at the actual points of diversion. *Id.*

Thus, under the Hawks' theory, if the Tribe owns the property at the point of diversion it should be equitably precluded from claiming trespass, despite an incorrectly reported point of

diversion for claim No. 91-7102 and an erroneous certification by Mr. Hawks for claim No. 91-7173.³³ Neither of those events can be attributed to any prior position the Tribe has taken.

Apparently the Hawks' real argument is that regardless of whether a claim was reported correctly or whether an applicant was accurate in their certifications it is inequitable to assert trespass once the true location of the point of diversion becomes known. As shown by the affidavit of Scott Rasor, the Hawks cannot maintain they hold this property under a colorable claim of right. Aff. Rasor, ¶ 6, Exs. 1-2. None of the deeds the Hawks have offered purport to establish their ownership at their points of diversion for either claim.

As noted above, the Hawks fail to allege the Tribe actually knew of the correct points of diversion until such were reported in the CSRBA. The Hawks fail to allege how the Tribe benefits from a prior inconsistent position, or even what such prior position was. The Hawks fail to set forth how the Tribe, in any way, benefits from the Hawks' water right claims or by the Tribe having to litigate the trespass issue in the CSRBA. The Hawks fail to set forth how they are prejudiced by the Tribe claiming trespass at this point in time. To the contrary, the Hawks have actually benefitted from years of illegal encroachments to divert water for their personal uses. The Hawks were not the only ones who were forced to participate in the CSRBA: so was the Tribe. In doing so, the Tribe timely brought its objections to the Hawks water claims.

What would be inequitable would be to allow a party to falsely notice their point of diversion, falsely certify ownership at their point of diversion, and then preclude another party from claiming trespass when the actual location of the true point of diversion becomes known. The inequity is compounded by the fact the Hawks required the Tribe to engage in lengthy and

³³ Even if Mr. Hawks claims he made a good faith mistake as to the true ownership, Idaho law sets forth that a good faith mistake of fact or law is no defense to a trespass action. *State v. Camp*, 134 Idaho 662, 668, 8 P.3d 657, 668 (Ct. App. 2000).

costly litigation to defend its ownership of the submerged lands at their points of diversion in these proceedings and to eject them in tribal court. Equity does not bend the law so far as to sanction a trespass.³⁴ While the Hawks are quick to assert, “Idaho’s fundamental policy of protecting private property[,]” they fail to give the same consideration to the Tribe’s property rights. Hawks’ Response 91-7102 at 8; Hawks’ Response 91-7173 at 6 (citing *Roark v. Caldwell*, 87 Idaho 557, 561, 394 P.2d 641, 642-43 (1964)). The Tribe, as the lawful owner of the property at the points of diversion for claim Nos. 91-7102 and 91-7173 has every right to assert trespass of encroachments upon its lands to which it did not consent – this is especially true in light of the fact the Tribe spent decades litigating to establish its ownership thereof, including two trips to the Supreme Court of the United States of America.

For the foregoing reasons, and for the reasons set forth in the Tribe’s opposition to the Hawks’ motion for summary judgment, the Hawks’ pleas in equity fail.

³⁴ In Idaho, trespass to real property is a crime, I.C. § 18-7008, or a tort sounding in damages. The Hawks ask this Court to apply equity to sanction the trespass. The Tribe asserts this Court does not have jurisdiction to equitably quiet title to its lands, but points out *arguendo*, that the Hawks do not plea before this Court to equitably quiet title in them for their encroachments to lawfully remain where they are pursuant to prescriptive easement or easement by prior use, nor could they. *United States v. Ahtanum Irr. Dist.* 236 F.2d 321 (9th Cir. 1956) (no adverse possession of Indian lands); *Schilling v. Wisconsin Dept. of Natural Resources*, 298 F.Supp.2d 800, 802 (W.D. Wis. 2003) (no prescriptive easement over Indian lands). What is left is their plea in equity to sanction an on-going straight trespass and equity will not sanction an on-going trespass.

CONCLUSION

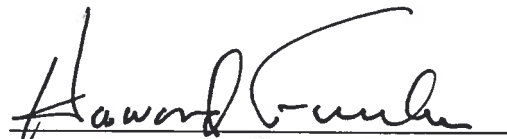
As shown above there are no disputes as to material facts.

Neither the State's nor the Claimants' misguided legal and factual analysis change the fundamental and ultimate outcome in this case. The undisputed and admitted material facts conclusively determine that the United States and Tribe own the bed and banks underlying navigable waters within the Tribe's reservation. Those facts also establish that the waters overlying Claimants' points of diversion are navigable and are within the Tribe's reservation. Accordingly, those submerged lands are owned by the United States in trust for the benefit of the Coeur d'Alene Tribe. Claimants have never received permission for their water diversionary works to be placed at their points of diversion. Therefore, these claims were initiated via trespass and are void.

For the foregoing reasons, this Court should deny the State's motion for summary judgment and disallow claim Nos. 91-7102 and 91-7173 and deny partial decrees therefor.

Respectfully submitted this 17th day of August, 2016.

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Certificate of Service

I hereby certify that on the 17th day of August, 2016, a copy of the foregoing document was served on the following counsel of record and other entities via the method indicated below:

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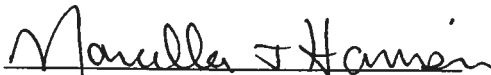
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