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

In re CSRBA	)	Subcase Nos. 91-7102; 91-07173
	)	
Case No. 49576	)	STATE OF IDAHO'S POST-HEARING
	)	BRIEF
_____	)	
	)	
Steve and Deanne Hawks,	)	
	)	
Claimants,	)	
	)	
v.	)	
	)	
Coeur d'Alene Tribe, a federally-recognized	)	
Indian Tribe,	)	
	)	
Objector.	)	
_____	)	

At the summary judgment hearing held August 24, 2016, the Special Master asked the parties to submit supplemental briefing on the issue of whether a water right license is void or simply voidable, if it is later discovered that that the water rights was “initiated in trespass,” as

such term is used in court decisions such as *Lemmon v. Hardy*, 95 Idaho 778, 519 P.2d 1168 (1974). While, for the reasons stated at the hearing, the State does not concur with the Coeur d'Alene Tribe's assertion that the water rights at issue in these subcases were initiated in trespass, it files the following brief in response to the Special Master's request.

Generally speaking, there are three circumstances that justify declaring a prior judgment void: the court lacked jurisdiction of the subject matter; the court lacked jurisdiction over the parties to the proceeding; or the court acted in a manner inconsistent with the due process of law. 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2862. A judgment, however, "is not void merely because it is erroneous." *Brown's Tie & Lumber Co. v. Kirk*, 109 Idaho 589, 591, 710 P.2d 18, 20 (Ct. App. 1985) (citing Wright & Miller § 2862). "If a court has jurisdiction of the parties, jurisdiction of the subject-matter, and jurisdiction of an issue of law or fact presented, then its judgment upon that issue is not void whether erroneous or not." *Baldwin v. Anderson*, 50 Idaho 606, 299 P. 341, 343 (1931).

Idaho courts apply the same principles to administrative agencies, though in the case of agencies it is more typical to speak in terms of the agency's statutory authority, rather than jurisdiction. "An administrative agency is limited to the power and authority granted it by the legislature [and] [o]rders by an administrative agency which authorize something prohibited by the statute are not merely erroneous, but are void." *Wernecke v. St. Maries Joint Sch. Dist. No. 401*, 147 Idaho 277, 286, 207 P.3d 1008, 1017 (2009)

Here, there is no assertion that IDWR lacked statutory authority to issue water rights Licenses 91-7102 and 91-7173. IDWR is authorized to issue licenses under the terms of title 42, chapter 2, Idaho Code, and IDWR did not violate any statutory prohibition in issuing the Licenses. And, it must be acknowledged that IDWR did not exceed its jurisdiction by purporting

to authorize the use of submerged lands: the record verifies that the applicant was informed explicitly that it was the responsibility of the applicant to acquire any rights of way or easements necessary to divert and convey the water to the place of use.¹ IDWR's reliance on the water right applicant to take the steps necessary after issuance of the permit to acquire all necessary rights-of-way is a common and acceptable practice. In *Bassett v. Swenson*, 51 Idaho 256, 5 P.2d 772 (1931), the Court held that a water appropriation permit issued before the applicant had taken the steps necessary to condemn the necessary rights-of-way was not initiated in trespass because the applicant had not entered the property prior to applying for the permit. The fact that IDWR issued the permit without requiring proof that the applicant possessed all necessary rights-of-way did not render the water right permit invalid. See *Lemmon v. Hardy*, 95 Idaho 778, 780-81, 519 P.2d 1168, 1170-71 (1974) (“[*Bassett*] held that filing an application without land ownership did not invalidate the application as long as the description of the diversion works was not obtained through trespass”).

In short, IDWR acted within its jurisdiction in issuing permits and licenses based on the presumption that the applicant would acquire all necessary rights-of-way. And, there is no assertion that IDWR lacked jurisdiction over Steve and Deane Hawks, who were the only parties to the proceedings that led to the issuance of water right Licenses 91-7102 and 91-7173. The Tribe has asserted, however, that IDWR lacks jurisdiction over the Tribe because it enjoys sovereign immunity—therefore, the Tribe posits, because IDWR could not have determined the

¹ Water Right License 91-7173 provides that “[t]his right does not grant any right-of-way or easement across the land of another.” A copy of Water Right License 91-7173 is included as Exhibit B to the Affidavit of Norman M. Semanko in Support of Claimants Steve and Deane Hawk’s Memorandum in Support of Motion for Summary Judgment, (filed July 27, 2016, in CSRBA Subcases 9107102 and 91-7173). The Application for Permit for 91-7102 includes, in the section labeled “Action of the Director,” the statement that “[t]he issuance of this permit in no way grants any right-of-way or easement across the land of another.” A copy of Application for Permit No. 91-7102 is included as Exhibit 6 to the Affidavit of Counsel in Support of Objector’s Motions for Summary Judgment (filed July 27, 2016, in CSRBA Subcase 91-7102).

Tribe's protest of the then-proposed water rights absent a waiver of the Tribe's sovereign immunity, the Tribe is not bound by the license terms, and may attack them collaterally at any time.

The Tribe's position, which relies for support on *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506 (1940), is unsustainable. *U.S. Fidelity* stands narrowly for the proposition that a judgment is void if it is rendered upon a sovereign government without waiver of sovereign immunity. *U.S. Fidelity* provides no support for the proposition that a permit or license issued to a private individual is void if a sovereign government could have successfully protested its issuance in prior proceedings, but chose not to waive its sovereign immunity to do so.

In *U.S. Fidelity* the United States, as trustee for two Indian Nations, filed a claim for \$2,000 in the bankruptcy of the Central Coal & Coke Company, the amount the company owed the Nations for royalties under a coal mining lease. The coal company responded with a cross-claim for some \$11,000, which it asserted as a credit against the Nations. The referee in bankruptcy allowed the credit and entered judgment against the United States. When the coal company attempted to enforce the judgment, the United States asserted that the judgment was void as to the company's cross claims because the court lacked jurisdiction to enter a judgment against the United States absent a waiver of sovereign immunity. 309 U.S. at 511. The Supreme Court agreed that the "judgment is void in so far as it undertakes to fix a credit against the Indian Nations," for "[c]onsent alone gives jurisdiction to adjudge against a sovereign." *Id.* at 512-14.

In short, *U.S. Fidelity* stands only for the proposition that a judgment entered against a sovereign without the sovereign's consent is void for lack of jurisdiction. Such principle holds true whether the sovereign appears in the prior case and refuses to waive immunity to a specific

claim, or whether the sovereign refuses to appear altogether. In the latter case, the sovereign retains the right to contest in later proceedings the judgment previously entered against it on the basis that “the first tribunal lacked jurisdiction—though jurisdiction is the only issue thus preserved, and if the first court had jurisdiction then the judgment must be enforced.” *U.S. v. County of Cook*, 167 F.3d 381, 388 (7th Cir. 1999). Such principle is not limited to sovereigns, however: “want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced, or where any benefit is claimed under it, as the want of jurisdiction makes it utterly void and unavailable for any purpose.” *Earle v. McVeigh*, 91 U.S. 503, 507 (1875).

Here, no rights of the Tribe were “adjudged” in the prior license proceedings. The Licenses do not purport to adjudicate any property rights of the Tribe, nor do the Licenses require the Tribe to take any action or refrain from any action. Most importantly, the Licenses do not purport to authorize any use of tribal lands, or the use of any property other than that owned by the Licensees. In fact, IDWR specifically disclaimed any authority to permit the use of lands not owned by the water right applicant. *See* footnote 1, *supra*. That being the case, nothing in the Licenses prevents, or in the least impairs, the ability of the Tribe, in a proper forum, to protect its property interests or to prevent trespass upon tribal lands, if such trespass were to occur. That being the case, any assertion that the Licenses are void because IDWR lacked jurisdiction over the Tribe must be rejected: IDWR’s lack of jurisdiction over the Tribe is simply irrelevant, because no rights of the Tribe were adjudicated, impaired, or restricted.

Finally, there is no basis to conclude that either License is void for lack of due process. In the SRBA, the Court held that “unlike a prior decree, the binding effect of a license extends beyond the parties to the administrative proceedings and their privies,” in part because, as the Court explained in a footnote, “[p]ublication notice is given and any affected person can initiate

a contested case.” SRBA Court, *Memorandum Decision and Order on Challenge and Order Disallowing Water Rights based on Federal Law*, Subcase 29-11609 at 13 (Oct. 6, 2006).

Here, it is undisputed that publication notice was given for both water right applications. See Affidavit of Steven W. Strack, Exhibits 1 & 2 (Affidavits of Publication for 91-7102 and 91-7173). The Tribe, however, asserts that it was not given proper notice of the application for 91-7102 because the Notice of Application lists the diversion point as Lot 1, when the actual point of diversion is adjacent to Lot 7.

The Tribe’s assertion that the misidentification of the lot number denied it due process must be rejected. There is no evidence to suggest that the Tribe would have protested the water right application but-for the misidentified lot number. Indeed, the Tribe has presented no evidence that at the time of publication (1988), it was protesting water right applications in order to protect its interest in the beds and banks of navigable waterways within the Reservation. Absent evidence that the Tribe would have protested the License but-for the misidentified lot, the Court cannot conclude that the License is void due to a violation of due process.

Due process requires that notice be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Farrell v. Brown*, 111 Idaho 1027, 1032, 729 P.2d 1090, 1095 (Ct. App. 1986) (quoting *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950). “[M]ere irregularities or immaterial defects do not nullify notice so long as they do not mislead.” *Id.* “[W]hatever is notice enough to excite the attention of a man of ordinary prudence and prompt him to further inquiry, amounts to notice of all such facts as a reasonable investigation would disclose.” *Id.* at 1033, 729 P.2d at 1096 (quoting *Hill v. Federal Land Bank*, 59 Idaho 136, 141, 80 P.2d 789, 791 (1938)).

While the Notice of Application for Water Right 91-7102 (“Notice”) misidentified Lot 1 as the point of diversion, the Notice was legally sufficient to put the Tribe on notice of a potential encroachment on the lagoon in the Sylvia’s Haven Subdivision (regardless of whether such lagoon is artificially constructed or, as the Tribe asserts, a pre-existing side channel of the St. Joe River). First, the Notice identified the water source as the St. Joe River. If, as the Tribe asserts, the lagoon is a natural side-channel of the St. Joe River, the published Notice was sufficient to notify the Tribe of a potential encroachment on submerged lands of the St. Joe River. Second, both Lot 1 and Lot 7 are adjacent to the lagoon. *See* Affidavit of Norman M. Semanko in Support of Claimants Steve and Deane Hawk’s Memorandum in Support of Motion for Summary Judgment, Exhibit H (CSRBA Subcases 9107102 and 91-7173). Thus, to the extent the Tribe asserts ownership of the lagoon, and seeks to prevent encroachments thereon, the notice was sufficient to make them aware of such potential encroachment. That being the case, the Tribe cannot demonstrate that it was prejudiced by the misidentification of the lot number. *See Rapp v. U.S. Dep’t of Treasury, Office of Thrift Supervision*, 52 F.3d 1510, 1520 (10th Cir. 1995) (“In order to establish a due process violation, petitioners must demonstrate that they have sustained prejudice as a result of the allegedly insufficient notice”).

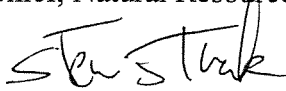
CONCLUSION

Given that IDWR acted within the bounds of its statutory authority, and did not adjudicate any rights of the Tribe or otherwise infringe upon the right of the Tribe to protect its property from encroachments, there is no question that, regardless of the merits of the Tribe’s trespass allegations, the Licenses for water rights 91-7102 and 91-7173 are not void *ab initio*, and are therefore insulated from collateral attack in the CSRBA.

Respectfully submitted this 6th day of September, 2016.

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CERTIFICATE OF SERVICE

I certify that on the 6th day of September, 2016, I caused to be served a true and correct copy of the foregoing STATE OF IDAHO'S POST-HEARING BRIEF upon the following parties by the method listed below:

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