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

In re CSRBA

Case No. 49576

Subcase Nos. 91-7102; 91-7173

**CLAIMANTS STEVE AND DEANNE
HAWKS' POST SUMMARY
JUDGMENT HEARING BRIEF**

Steve and Deanne Hawks,

Claimants,

vs.

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

Objector.

I. INTRODUCTION

Claimants Steve and Deanne Hawks ("Claimants"), pursuant to the direction received from the Special Master at the Hearing on Summary Judgment on August 24, 2016, hereby file this Post Summary Judgment Hearing Brief. The factual background contained in Claimants' Memorandum in Support of Claimants Steve and Deanne Hawks' Motion for Summary Judgment, July 26, 2016 ("Claimants' Memo in Support"), and Claimants' Memorandum in Opposition of Objector's Motion for Summary Judgment for Subcase Nos. 91-7102 and 91-7173, August 10, 2016 ("Claimants' Memo in Opposition"), and the affidavits filed with them, are incorporated herein.

II. ARGUMENT

A. **The Action of the Department in Issuing Claimants' Licenses Was Not Void and, Therefore, Claimants' Licenses Are Not Subject to Collateral Attack.**

One of the threshold questions in this case is whether or not the Coeur d'Alene Tribe ("Objector") can collaterally attack the two licenses, nos. 91-7102 and 91-7173, issued to Claimants by the Idaho Department of Water Resources (the "Department"). This Court, in precedent in the Snake River Basin Adjudication ("SRBA"), has repeatedly held that a party cannot collaterally attack a license in an adjudication if the party did not appeal the license when issued. Order Adopting Special Master's Report and Recommendation, Subcase No. 36-07092A (Dec. 10, 1997) ("The SRBA is not a case authorized to revive lost challenges to licensing decisions."); Supplemental Findings of Fact and Conclusions of Law (Facility Volume), Subcase Nos. 36-02048 et al. (July 31, 1998) ("If the license is not appealed when issued, any attempt to appeal the license in a subsequent judicial proceeding, like the SRBA, would constitute a collateral attack on the license."); Order Granting Motion to Alter or Amend; Amended Findings of Fact and Conclusions of Law and Recommendation, Subcase No. 36-08099 (Aug. 20, 1999)

(“If the licensee failed to appeal the condition of a license when the license was issued, then the licensee has no judicial remedy.”); Order Conditional Granting Motion to Set Aside Partial Decrees, Subcase Nos. 37-07454 and 37-07602 (Dec. 3, 2003) (“[A]ttempting to amend a licensed water right in the SRBA proceedings based on circumstances existing prior to the issuance of the license constitutes an impermissible collateral attack on a license.”); and Memorandum Decision and Order on Cross-Motions for Summary Judgment Re: Bureau of Reclamation Streamflow Maintenance Claims, Subcase No. 63-03618 (Sept. 23, 2008) (“[T]he SRBA Court has consistently prohibited licenses from being collaterally attacked in the SRBA.”). A license issued by IDWR shall be prima facie evidence as to such right and “any attempt to redefine a license would be ‘tantamount’ to altering a real property right.” Supplemental Findings of Fact and Conclusions of Law (Facility Volume), Subcase Nos. 36-02048 et al. (July 31, 1998) at 11.

Although all parties agree this is the well-established rule, Objector claims that this rule does not apply in this case. Objector claims Claimants’ licenses were void when issued because the Department did not have jurisdiction to issue the licenses in trespass. Objector Tribe’s Reply to the State of Idaho and Claimants Steve and Deanne Hawks, August 17, 2016 (“Objector’s Reply”), at 13-16. Objector claims that the agency action was “void ab initio” and, therefore, the licenses are subject to collateral attack by exception. *Id.* at 7. However, it is clear from Idaho case law that Objector has improperly expanded the definition of “void” to include action by the Department within the confines of its authority under Idaho statute. Therefore, the Department’s action in issuing Claimants’ licenses allegedly in trespass was not void and, thus, Claimants’ licenses are not subject to collateral attack.

1. At most, the Department's action in issuing Claimants' licenses was voidable because it acted within its statutory authority.

The Idaho Supreme Court has distinguished "void" and "voidable" in the following manner:

[T]he question is whether the judgment or sentence which was rendered and pronounced was a mere erroneous exercise of power, and therefore voidable only, or is in excess of, and without, its jurisdiction, and therefore absolutely void.

Ex parte Cox, 3 Idaho 530, 532, 32 P. 197, 198 (1893). The distinction is between improper action and illegal action.

"Administrative agencies are 'creature[s] of statute' and, therefore, are 'limited to the power and authority granted [them] by the Legislature.'" *Henderson v. Eclipse Traffic Control*, 147 Idaho 628, 632, 213 P.3d 718, 722 (2009). An agency's jurisdiction is "dependent entirely upon the statutes reposing power in them and they cannot confer it upon themselves." *Wash. Water Power Co. v. Kootenai Envtl. Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979). An agency action is void when it falls beyond the purview of the statutes that confer authority upon it. *See Arrow Transp. Co. v. Idaho Pub. Utils. Comm'n*, 85 Idaho 307, 315, 379 P.2d 422, 426 (1963). If the agency had authority to act in regard to a matter but simply acted improperly, its action is not void but voidable. *See Harrison v. Bd. of Cnty. Comm'rs*, 68 Idaho 463, 468, 198 P.2d 1013, 1015 (1948). If an action is void, the action would be subject to collateral attack. *Mosman v. Mathison*, 90 Idaho 76, 86, 408 P.2d 450, 456 (1965). However, if the action is voidable only, it would not be subject to collateral attack and the only remedy would be by way of direct attack under the applicable statute. *Id.*

In issuing licenses to citizens of Idaho, the Department is bound by Title 42 of the Idaho Code. Chapter 2, Title 42, Idaho Code gives the Department the authority and procedure to issue a license upon completion of the statutory procedures provided. Since the Department

has clear jurisdiction and authority to issue licenses under these statutory provisions, this Court can only find that the Department's action to issue Claimants' licenses is void if the Department acted outside of the purview of the statutory procedure in issuing those licenses. *See* Memorandum Decision and Order on Cross-Motions for Summary Judgment Re: Bureau of Reclamation Streamflow Maintenance Claims, Subcase No. 63-03618 (Sept. 23, 2008) at 19 (the Court found that the license was not void and consequently not subject to collateral attack because the Department followed proper procedures in issuing the licenses). Therefore, at most, the Department's action was voidable because it acted within its statutory authority.

2. The Department followed statutory procedure for issuing a license and, therefore, Claimants' licenses are not subject to collateral attack.

A water right does not vest until the statutory procedures for obtaining a license are completed. *Idaho Power Co. v. Idaho Dep't of Water Res. (In re Licensed Water Right No. 03-7018)*, 151 Idaho 266, 255 P.3d 1152 (2011). These statutory procedures are described in Chapter 2, Title 42, Idaho Code. Contrary to Objector's contention, these procedures do not require the Department to verify that the licensee owns the property it claims under the point of diversion ("POD"). Instead, Idaho Code Section 42-203A provides for a publication and protest period. This protest period provides the opportunity for other parties, who may claim ownership to the land the licensee claims, to protest the license as a voidable action by the Department. The protest is the avenue for a "direct attack" on action by the Department through statutory procedure in order to verify whether or not the licensee actually owns the land it claims. *See Mosman*, 90 Idaho at 86, 408 P.2d at 456. "[T]he binding effect of a license extends beyond the parties to the administrative proceedings and their privies" because "[p]ublication notice is given and any affected person can initiate a contested case." Memorandum Decision and Order on Challenge and Order Disallowing Water Rights based on Federal Law, Subcase No. 29-11609

(Oct. 6, 2006), at 13. If no protest is filed and “if the department is satisfied that the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the department shall issue to such user or users a license confirming such use.” IDAHO CODE § 42-219.

Objector had ample opportunity to participate in the statutory procedures for the issuance of License Nos. 91-7102 and 91-7173 and to protest the location of the PODs. However, it failed to do so, thereby waiving any challenge to the issuance of the licenses. *See* Order Adopting Special Master’s Report and Recommendation, Subcase No. 36-07092A (Dec. 10, 1997). The Coeur d’Alene Spokane River Basin Adjudication (“CSRBA”) does not provide a venue to revive lost challenges to licensing decisions by the Department, particularly when statutory procedure was followed. Objector cannot override this lawful and well-worn process because it failed to participate in the provided statutory procedures. The Department acted well within the jurisdiction and authority to issue a license given it by Idaho statute and, therefore, its act to issue Claimants’ licenses was not void. Therefore, Claimants’ licenses are not subject to collateral attack by Objector.

In an effort to cast doubt on the action of the Department in issuing Claimants’ licenses, Objector claims that it was not properly noticed under the publication and protest period for License No. 91-7102. Objector’s Reply at 52-53. However, even if this is true, the action is mere error and, therefore, voidable. The Department still acted within its authority to issue licenses. The protest was still published in a manner and location in which Objector should have been aware and on notice. Mere improper action within the authority granted to an agency is considered voidable only. *See Harrison*, 68 Idaho at 468, 198 P.2d at 1015. Therefore, this changes nothing and Claimants’ licenses are still not subject to collateral attack by Objector.

B. Objector Cannot Prove It Owns the Land at Claimants' PODs and, Therefore, Its Objections Should Be Dismissed.

The other threshold issue in this case is whether or not Claimants' PODs are located on submerged lands owned by Objector, in order to establish whether or not Claimants are trespassing. Claimants have provided ample evidence to show Objector does not own the land at Claimants' PODs and, therefore, have shown that there is no genuine issue of material fact regarding Objector's trespass claims.

First, there is absolutely no way that Objector owns the submerged lands at the POD for water right claim no. 91-7102 in the privately-held, man-made lagoon. The lands that are licensed and claimed for the POD were and are within the private land purchased and developed by the original owner, Cyril Chase, designated by the original Block 2 of the subdivision, Sylvia's Haven. Before the lagoon was built over Block 2, the location for the POD was on dry land. This is the exact issue with which Claimants are most concerned in this case. Just because the lagoon was built and water filled the area does not mean that Objector suddenly owned the land. If this were the case, it would greatly expand the jurisdiction of Objector every time more land becomes submerged, which this Court cannot allow. The implications of allowing Objector to expand its jurisdiction and ownership of submerged lands that become submerged at any time would not only affect Claimants, but also severely affect hundreds of water users around Lake Coeur d'Alene and the St. Joe River with licensed and permitted water rights.

Second, the submerged lands at the POD for water right claim no. 91-7173 are not submerged lands quieted to the United States for the benefit of Objector. The case law is clear; the submerged lands that became submerged subsequent to statehood are beyond those recognized in *Idaho v. United States*, 533 U.S. 262 (2001), and were not quieted to the United

States for the benefit of Objector. The United States only reserved those submerged lands that existed prior to Statehood. They did not—could not—reserve lands that would not become submerged until after the dams were built. The diversion works for water right claim no. 91-7173 are shallow and flexible and do not encroach on land owned by Objector.

In addition, Objector, for years, failed to take any action against Claimants, despite their alleged trespass prior to the initiation of the CSRBA. Objector did not protest at the time of the permit application. *See* Claimants' Memo in Support at 6. Objector did not create or enforce any tribal rules against water right diversion prior to its objections to Claimants' water right claims. *See* Claimants' Memo in Opposition at 7. In addition, Objector took no action to express to Claimants the need for permission to divert water prior to its objections to Claimants' water right claims in the CSRBA. *See* Claimants' Memo in Opposition at 11. Objector gives no rational or legitimate reason for its inaction and simply asks the court to overlook it. Objector's years of inaction is completely inconsistent with its current position and provides clear evidence that Objector is now attempting to make up for its inaction by collaterally attacking the conditions of the licenses at the time they were issued. This is not permitted.

It is Objector's burden to bring evidence to rebut the Director's Report and it is Objector's burden to prove it owns the land in order to show that Claimants' are trespassing. Objector has not met either burden in this case. Objector cannot prove it owns the land at Claimants' PODs or show any reason that the water right claims should not be decreed as described in the Director's Reports. Therefore, Objector's objections should be dismissed.

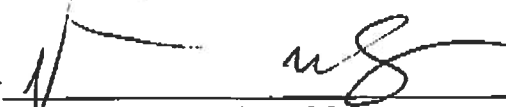
III. CONCLUSION

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

DATED this 7 day of September, 2016.

MOFFATT, THOMAS, BARRETT, ROCK &
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By


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7 day of September, 2016, I caused a true and correct copy of the foregoing **CLAIMANTS STEVE AND DEANNE HAWKS' POST SUMMARY JUDGMENT HEARING BRIEF** to be served by the method indicated below, and addressed to the following:

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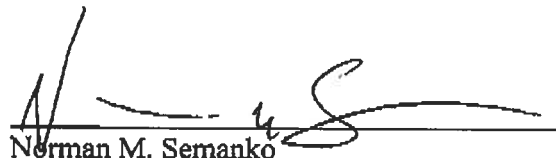
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