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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; 91-7173
Case No. 49576	)	
	)	TRIBE'S POST-HEARING BRIEF
_____	)	

COMES NOW, Objector, the Coeur d'Alene Tribe ("Tribe") and offers the Court this supplemental memorandum of law.

ARGUMENT

Void vs. voidable applies in many legal contexts. This Court highlighted, "[c]ontracts to do acts forbidden by law are void" *Kunz v. Lobo Lodge, Inc.*, 133 Idaho 608, 611 (Ct. App. 1999). However, less dramatic situations exist where legal transactions are void. Judgments beyond a tribunal's jurisdiction, including administrative tribunals, are void. *Andre v. Morrow*, 106 Idaho 455, 459 (1984) ("a judgment by a tribunal without authority, or which exceeds . . . its authority, is necessarily void, and may be shown to be so in collateral proceedings . . .").¹ Finally, property law transactions such as deeds, easements, or water rights may be void.²

¹ This rule arises most often in the context of contracts, family law, and administrative law. *Meyer v. Meyer*, 135 Idaho 460 (Idaho Ct. App. 2001); *Mossman v. Mathison*, 90 Idaho 76 (1965).

² *New Phase Investments, LLC v. Jarvis*, 153 Idaho 207 (2012) (encumbrance on community property not signed by both spouses is void); *Barron v. Idaho Bank & Trust Co.*, 97 Idaho 305 (1975) (real estate agreement may be void for indefiniteness); *Callies v. O'Neal*, 147 Idaho 841

The Tribe's objection is rooted in the basic but foundational principle of Idaho water law that a water right may not be initiated in trespass and "[a]ny claim of right thus initiated is void." *Bassett v. Swenson*, 51 Idaho 256, 5 P.2d 722, 723-24 (1931). This rule fits squarely within the category of situations where the Idaho Supreme Court has found property law transactions to be void. In response, the State and Claimants (hereinafter referred to as "Opposing parties") cite SRBA precedent to argue via the administrative law context, that this Court should ignore this bedrock rule of the Idaho Supreme Court and find that since the Tribe missed a *ten day* protest window it should now be precluded from "collaterally attacking" Claimants' water licenses.

It is important to note that this is a *completely different theory* of the case that does not refute or address the clear Idaho Supreme Court precedent that specifically addresses how water rights initiated in trespass should be disposed of. **Opposing parties attempt to cure a fatal flaw of these water rights—that they were initiated in trespass making them void—by shifting to a separate theory of the case, their agency law theory.** This theory applies similar language ("void" or "voidable") but does not operate to overrule the Idaho Supreme Court's specific rule against water rights initiated in trespass.

We now have two competing theories of the case and three potential paths forward. First, this Court could find the specific rule of the Idaho Supreme Court applicable and the general rule regarding collateral attack inapplicable. Second, this Court could ignore Idaho Supreme Court precedent in favor of SRBA precedent and analyze whether Claimants' licenses are subject to collateral attack. Third, this Court could apply both rules, finding a water license is not subject to collateral attack unless it is void and one way it can be void is if it were initiated in trespass.

Under any of these theories the Court should find for the Tribe.

(2009) (insufficient property description is void on its face); *Marshall v. Niagara Springs Orchard Co.*, 22 Idaho 144, 125 P. 208, 212 (1912) (water right initiated in trespass is void).

1. THE BLACK LETTER LAW OF THE IDAHO SUPREME COURT AND THE WATER COURT IS THAT A WATER RIGHT INITIATED IN TRESPASS IS VOID

The Tribe's overarching argument is that regardless of the extent of IDWR's jurisdiction, a water right initiated in trespass is void.³ In *Marshall v. Niagara Springs Orchard Co.* the Supreme Court of Idaho summarized the law as follows:

Mr. Weil, in his third edition of *Water Rights in Western States* . . . discusses this question generally, and the decisions of the courts of several states and the federal courts passing upon this question have been collected. . . . [I]t clearly appears that the weight of authority and better reasoning is with the proposition that an appropriation of water at a point upon private land cannot be made by trespass, and 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 as against the owner of the land.

22 Idaho 144, 125 P. at 212 (emphasis added). The Court's use of the term "void" was not a mistake. It was made after careful consideration of a primary treatise on water rights as well as the precedent of both state and federal courts.

Since *Niagara* the Idaho Supreme Court has consistently reaffirmed that a water right initiated in trespass is void. It has *never* suggested that a water right so initiated is merely voidable. The Court in *Bassett v. Swenson* held that "[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 right thus initiated is void." 51 Idaho 256, 5 P.2d 722, 723-24 (1931) (emphasis added). This exact quote was reaffirmed once again by the Court in 1974. *Lemmon*, 95 Idaho at 780. In 1984 the Court found that "[i]t is established that a valid water right cannot be initiated in trespass onto another's property."

³ *Marshall v. Niagara Springs Orchard Co.*, 22 Idaho 144, 125 P. 208, 212 (1912); *Bassett v. Swenson*, 51 Idaho 256, 259 (1931); *Lemmon v. Hardy*, 95 Idaho 778, 780 (1974); *Bachman v. Reynolds Irr. Dist.*, 56 Idaho 507 (1936); *Short v. Praisewater*, 35 Idaho 691, 208 P. 844, 847 (1922); *Branson v. Miracle*, 107 Idaho 221 (1984); *Jones v. McIntire*, 60 Idaho 338, 91 P.2d 373 (1939); *Joyce Livestock Co. v. United States*, 144 Idaho 1 (2006); *Lu Ranching Co. v. United States*, 144 Idaho 89 (2007).

Branson v. Miracle, 107 Idaho 221, 226 (1984).⁴ As recently as 2007 the Court has reaffirmed that “a water right cannot be initiated by trespass upon private property.” *Joyce Livestock*, 144 Idaho at 18. The Court cited *Lemmon* for this proposition, which held that “[a]ny claim of a right . . . initiated [in trespass] is void.” *Lemmon*, 95 Idaho at 780.

This Court has acknowledged the rule against trespass in the SRBA, repeatedly finding that “[t]he rule as to trespass and water rights in Idaho appears to be that . . . a water right initiated by trespass on private property is invalid.” *Mem. Dec. and Order on Challenge*, In Re SRBA Case No. 39576, subcase 36-02708 at 33-34 (1998).⁵ The Court affirmed that, “[a] person cannot initiate a water right on the land of another through trespass.”⁶

The Idaho Supreme Court has never ruled a water right initiated in trespass is nonetheless valid because a party failed to protest during the permitting process. The Court has considered whether a water permit may be initiated in trespass at least three different times. *Niagara*, 22 Idaho at 144; *Swenson*, 51 Idaho at 256; *Lemmon*, 95 Idaho at 780. Importantly, in two of those cases the defendant was collaterally attacking a permit. *Niagara*, 22 Idaho at 144; *Swenson*, 51 Idaho at 256. Both *Niagara* and *Swenson* involved plaintiffs that had acquired a water permit and subsequently moved in district court to condemn land to perfect their permits. In both cases, the defendants argued the permits were not valid because they were initiated in trespass. Although the

⁴ Importantly, legal scholars have pointed out that courts use the terms “void” and “invalid” interchangeably. 33 Campbell Law Review 193, 194 (2010).

⁵ See also, *Order on Part. Summ. J.*, subcase 57-11124 *et al* at 4; *Mem. Dec. and Order Re: BWI* 9 at 4, n. 3 (1996); *Order on Summ. J. et al*, subcase 57-11124 *et al* at 11; *Order on Mot. and Cross-Mot. for Summ. J.*, subcase 72-15929C at 21; *Order Denying Mot. to Alter or Amend*, subcase 72-15929C at 8; *Order Denying Challenges and Adopting Special Master’s Reports and Recommendations*, In Re SRBA Case No. 39576, subcase 57-0402B *et al* at 9.

⁶ *Mem. Dec. and Order on Challenge*, In Re SRBA Case No. 39576, subcase 55-10288B at 11 (1998) (citing *Branson*, 107 Idaho at 221).

outcome of the cases was different,⁷ the issue of collateral attack never came up. Instead, the Court reaffirmed that, regardless of the permit, “[i]t is quite generally held that a water right initiated by trespass is void” *Swenson*, 51 Idaho 256, 5 P.2d at 723-24.

The Court has never focused on the jurisdiction of IDWR but instead focuses on the actions of the appropriator. Regardless of an issued license or whether IDWR knew the water right was initiated in trespass,⁸ it is illegal to initiate a water right in trespass. “[A]ny claim of right thus initiated,” whether through beneficial use or the statutory procedures, “is void.” *Swenson*, 51 Idaho 256, 5 P.2d at 723-24 (1931); *Lemmon*, 95 Idaho at 780.

⁷ The Court in *Niagara* found that Marshall had trespassed upon Niagara’s property for the purpose of making inspection and surveys of the property. As a result, the Court found that the permit was initiated in trespass, making it void. *Niagara*, 22 Idaho 144, 125 P. at 212. In contrast, the Court in *Swenson* found that “the evidence discloses that the plaintiff made inspection and survey . . . without any physical trespass upon the defendants’ property.” *Swenson*, 51 Idaho 256, 5 P.2d at 724. As a result, the Court found that the permit was not initiated in trespass and was therefore valid. *Id.* Bassett then initiated condemnation proceedings to gain legal access to the property for the purpose of perfecting his right. Accordingly, *Swenson* stands for the proposition that you may initiate a water permit before initiating condemnation proceedings **but if you subsequently fail to gain legal access to the land at your point of diversion and instead perfect your water right by trespass then that water right is void.**

This exposes a critical point in this case. It is not clear whether Claimants trespassed *before* receiving their permit. However, the beneficial use field exam demonstrates that upon receiving their permit they trespassed upon tribal submerged lands to construct their diversion works. The only protest period allowed under the statutes is after the permit is issued but it expires before the license is issued. I.C. § 42-203A. As such, **had the Tribe filed a protest on the basis that the permit was in trespass, that protest would not have been ripe for review.** Claimants at that point still could have received authorization from the Tribe before perfecting their right. A condition of both permits were that they did not authorize a right-of-way across the land of another—which Claimants violated—rendering the permit and subsequent license void. In any case, the trespass did not occur until *after* the protest window had expired but before the water license was initiated. Unlike the plaintiff in *Swenson* who sought a legal right of access *before* perfecting their permit into a license, Claimants here proceeded to perfect their permit by trespass. They initiated their license in trespass, making it void.

⁸ It seems highly unlikely that the state engineer that issued the permits in *Niagara* or *Swenson* knew they were initiated in trespass.

2. UNDER OPPOSING PARTIES' AGENCY LAW THEORY LICENSE NOS. 91-7173 AND 91-7102 ARE VOID AND SUBJECT TO COLLATERAL ATTACK

Opposing parties have acknowledged the rule against initiating water rights in trespass. However, they ignore the effect of this on point rule and instead argue that water licenses are somehow exempt from the rule because they are not subject to collateral attack. Opposing parties can cite to no Idaho Supreme Court precedent to support this assertion. Even assuming Opposing Parties argument, these licenses are still void because (1) water permit no. 91-7102 is void for lack of notice; (2) claim 91-7173 is void because IDWR failed to follow its statutory procedures; and (3) they are both void because it is beyond IDWR's jurisdiction to bind the Tribe to its licenses.

A. Water permit and license no. 91-7102 is void for lack of proper notice

The license for claim 91-7102 is void for lack of proper notice because the notice published in the St. Maries Gazette incorrectly stated the point of diversion was located in government lot 1 rather than correctly as government lot 7. *Hartman*, 141 Idaho at 197; *Aff. Mihara*, Ex. 18.⁹ This is not a mere mistake, it is faulty notice. As a result of this error, the Tribe was not afforded the opportunity to be heard, which is a violation of due process making the license void. *Id.*¹⁰

B. IDWR did not follow the statutes or appropriation rules in issuing license no. 91-7173

I.C. § 42-219 requires IDWR to "carefully examine" a water permit application to ensure "the law has been fully complied with" As part of the examination, IDWR's water

⁹ The State insinuates the notice refers to *platted* lot 1, which is adjacent to the lagoon. The notice describes government lots not platted lots. The entire lagoon is adjacent to *government* lot 7. *Government lot 1* is located far to the west of both PODs. *Aff. Semanko*, Ex. D; *cf* Exs. E, F, H.

¹⁰ Idaho suggests that this Court should reject the Tribe's notice argument because there is no evidence that the Tribe would have protested had proper notice been given. Idaho's argument turns the notice requirement on its head and injects a new self-serving element into the due process analysis of the Idaho Supreme Court. However, as Idaho points out, the rule is that due process requires that notice be "reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action and *afford* them an opportunity to present their objections." *Farrell v. Brown*, 111 Idaho 1027, 1032 (Ct. App. 1986) (emphasis added). We will never know if the Tribe would have protested had it been given proper notice **because, as a result of faulty notice, the Tribe was never afforded that opportunity.**

appropriation rules require it to cause the applicant to “document a possessory interest in the lands necessary for all facilities.” IDAPA 37.03.08.040.05.e.i. Specifically for “a project diverting water from . . . land in state or federal ownership,” the appropriation rules require IDWR to cause an applicant to show they have “filed all applications for a right-of-way.” *Id.* IDWR failed to cause the Claimants to demonstrate any of these requirements.¹¹

This is not harmless error; it is beyond IDWR’s jurisdiction to ignore its own rules as well as a violation of I.C. § 42-219 and procedural due process. Likewise, this was not a simple mistake. IDWR was on notice from the highest Court in the land that the Tribe was the owner of the submerged lands at Claimants’ point of diversion in 2008, seven years after *Idaho II*. In any case, a “careful examination” would have shown that the Claimants’ could not have owned these lands, which are located over fifty feet into the St. Joe River, a navigable water body not subject to private ownership. IDWR should have required the Claimants to establish their legal right of access to the Tribe’s submerged lands. IDWR failed to do this, thereby acting outside of their statutory authority.

C. IDWR does not have jurisdiction to bind the Tribe to its orders issuing licenses

The Tribe is not bound by an order or judgment of any tribunal without its consent or the consent of Congress.¹² The issuance of a water permit and/or license is a preliminary and then final *agency order* pursuant to I.C. §§ 67-5243, 67-5245, and 67-5246. According to Black’s Law

¹¹ Idaho argues that it is acceptable and common practice for IDWR to rely upon an appropriator to take the necessary steps to acquire legal access to the location of a water right *after a permit is issued*. This is directly contrary to the holding of *Lemmon*, which held that “[l]ack of a possessory interest in the property designated as the place of use is speculation. Persons may not file an application for a water right and then seek a place of use thereof.” 95 Idaho at 781.

¹² *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.

Dictionary, an “administrative order” is “[a]n order issued by a government agency after an adjudicatory hearing.” It defines a “final order” as “[a]n order that is dispositive of the entire case” and cross-references “final order” with the term “final judgment.”¹³ Idaho law waives the hearing requirement and issues a final agency order if no one protests. I.C. § 67-5245. However, regardless of whether a hearing is conducted, the adjudicatory nature of the proceeding remains and the outcome is that IDWR issues an administrative order (the license) that affects property rights is arguably designed to be binding upon everyone. The Tribe is not bound by these adjudicatory orders unless it waives its sovereign immunity and failure to protest is not a waiver. *United States v. U. S. Fidelity & Guar. Co.*, 309 U.S. 506, 513 (1940). Accordingly, IDWR lacks jurisdiction to bind the Tribe to its orders, making them void as against the Tribe. *Id.*

3. COMBINING THE IDAHO SUPREME COURT RULE WITH THE AGENCY LAW THEORY—A WATER LICENSE INITIATED IN TRESPASS IS VOID AND SUBJECT TO COLLATERAL ATTACK

The SRBA Court has said that an “invalid license may also constitute an exception to the collateral attack prohibition.” Streamflow Maintenance Case at 15. A water license is one of two ways an appropriator can acquire a “water right” in Idaho. *In re SRBA*, 157 Idaho 385, 389 (2014). In order words, a “water license” is a “water right.” The Supreme Court intended for its rule against

¹³ Idaho asserts that tribal sovereign immunity only extends to judgments entered against the Tribe that act to adjudicate tribal property rights. However, the Tribe has sovereign immunity from “lawsuits and other court process,” not just judgments, and its sovereign immunity “applies to suits for damages as well as those for declaratory and injunctive relief.” COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 7.05[1][a] (2012 ed.) (citing *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991); *Wilbur v. Locke*, 423 F.3d 1101, 1114 (9th Cir. 2005)). In any case, an agency order is a judgment, which is defined by Black’s Law Dictionary as “a court’s final determination of the rights and obligations of the parties in a case.” The Idaho Supreme Court applies the same rules to agency judgments as judicial judgments. *Wernecke*, 147 Idaho at 286. In this case, the State simultaneously argues that the Tribe is bound by these licenses but they are not a judgment against the Tribe. However, the State cannot have it both ways. The fact of the matter is that these licenses are a quasi-judicial agency orders that establish the rights of the Claimants relative to all other water users in the State of Idaho, including the landowner Tribe. The Tribe has sovereign immunity from these orders, which precludes IDWR’s jurisdiction to issue a license that would be binding upon the Tribe.

initiating water rights in trespass to apply to all water rights, including licenses. From this flows the conclusion that if a water license was initiated in trespass then it is void. If it is void then it is subject to collateral attack. As such, if this Court finds these water rights were initiated in trespass then it should likewise find they are subject to collateral attack.

4. CSRBA WATER RIGHTS DECREED BY THIS COURT ARE VALID EVEN IF THOSE RIGHTS WERE INITIATED IN TRESPASS

During oral argument, the Court expressed concern that if a water right initiated in trespass were void, it could not be saved, even by stipulation of the parties. Although there does not appear to be any Idaho precedent on point, the Restatement of the Law on Judgments states in its section entitled "Valid Judgments in Action on Void Judgment" that "[w]here an action is brought upon a[n invalid] judgment in a court having jurisdiction over the parties and a judgment is rendered for the plaintiff, the second judgment is not open to collateral attack on the ground that the original judgment was void." RESTATEMENT (FIRST) OF JUDGMENTS § 13 (June 2016 update). The Restatement goes on to note that "[w]here . . . the defendant is subject to the jurisdiction in the second action and does not set up the invalidity of [a prior] judgment . . . this [second] judgment is valid and is not open to collateral attack." *Id.* at cmt. a.

Applying this rule to the trespass objections filed by the Tribe in the CSRBA, if the Tribe stipulates to the existence of a water right, then the resulting decree would be valid and not open to collateral attack. The report of the director is presumed correct and is *prima facie* evidence as to the existence of the right. I.C. § 42-1411(5). If no one objects or if the objecting parties stipulate to the water right's existence then the presumption remains intact and the Court would be authorized to enter a decree consistent with the director's report. I.C. 42-1412 (7).

The CSRBA is a general adjudication; its jurisdiction covers all claimants in the Coeur d'Alene-Spokane River Basin, including the United States. Further, the Tribe has waived its

sovereign immunity and entered the CSRBA for the limited purpose of resolving the nature, extent, and priority of its water rights as well as certain state-law claims to which it has filed objections. As a result, this court has jurisdiction over all the relevant parties necessary to resolve these trespass objections.¹⁴ Accordingly, if the Tribe stipulates to a water right or fails to prove its invalidity, the CSRBA decrees affirming the existence of these rights would be valid and no longer open to collateral attack in the future.

CONCLUSION

Ultimately, Opposing Parties ask this Court to ignore the fact that these water rights were initiated in trespass, as well as over one-hundred years of Idaho Supreme Court precedent, because the Tribe did not waive its sovereign immunity and file a protest within a *ten day window*.

However, the Tribe respectfully asks this Court to review the admitted facts of this case: (1) the points of diversion are located upon submerged lands that; (2) underlie navigable waters; (3) the waters are within the Tribe's reservation; and, (4) permission was never given to Claimants for the initiation of the water rights. Based on the foregoing, the water rights were initiated in trespass, are void, and should be disallowed.¹⁵

Respectfully submitted this 7th day of September, 2016.

HOWARD FUNKE & ASSOCIATES, P.C.



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¹⁴ The Tribe continues to assert the Court does not have jurisdiction to determine title to submerged lands. Title has already been determined via litigation in *Idaho II*. The Tribe has only waived its sovereign immunity in this matter as to whether these claims were initiated via trespass.

¹⁵ Section II(B) of Claimants' post summary judgment hearing brief is beyond the scope of this Court's requested supplemental briefing and should not be considered by the Court. If the Court does consider it, the Tribe respectfully reminds the Court that it has amply refuted each of the arguments found in section II(B) in its briefing already submitted. In particular, please see sections 2(A), (B), and (D), as well as section 3 of the Tribes reply brief.

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of September, 2016, a copy of the TRIBE'S POST-HEARING BRIEF was served on the following counsel of record and other entities via the method indicated below:

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DATED this 7th day of September, 2016.


Marcella Harrison