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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - CSRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

OCT 11 2016

By _____

Clerk

Deputy Clerk

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

) ORDER ON SUMMARY JUDGMENT

Case No. 49576

) SUBCASE NOS: 91-7102 and 91-7173

I. INTRODUCTION

This *Order* resolves cross *Motions for Summary Judgment* in two subcases, 91-7102 and 91-7173. Steve and Deanne Hawks filed claims for 91-7102 and 91-7173 in the CSRBA. Both rights were previously licensed by the Idaho Department of Water Resources. IDWR's recommendations for both rights were filed with the *Director's Report* for Basin 91. The *Director's Report* recommended the rights consistent with the elements in the licenses. The Coeur d'Alene Tribe filed *Objections* to the *Director's Report* for both rights. The *Objections* dispute the source and points of diversion and assert that the water rights should not exist. The State of Idaho filed *Responses*.

The Tribe filed a *Motion for Summary Judgment* asserting that the rights were initiated in trespass and are therefore void. The trespass assertion relies on *Idaho v. United States*, 533 U.S. 262 (2001). That case held that the lands underlying Lake Coeur d'Alene and its tributaries within the boundaries of the Coeur d'Alene Reservation are owned by the United States for the benefit of the Tribe. The *Objections* allege that the points of diversion for both rights are located on Tribal land because they are on submerged land within the reservation. Thus, Objectors argue the water rights were initiated in trespass. The Objectors assert that water rights initiated in trespass are void. Accordingly, they ask that summary judgment be entered holding that these water rights do not exist.

The Hawkses filed a *Motion for Summary Judgment* arguing that both claims are based on existing licenses issued by IDWR. The Claimants argue that licenses cannot be collaterally attacked in the CSRBA. Licenses may only be attacked based on forfeiture, abandonment, or other facts occurring after the licenses issued. Therefore, Claimants ask that summary judgment be entered that the rights stand as licensed.

The State of Idaho filed *State of Idaho's Motion for Summary Judgment*. The State argues that the seminal issue is whether the licenses are void if claimants lack permission to place the points of diversion on submerged lands. The State asserts the licenses are valid independent of alleged encroachment issues. The State argues that even if the water rights were initiated in trespass, the trespass issue could only successfully bar the permit or the license prior to issuance. Years later, trespass may not be raised to collaterally attack a validly issued license.

II. STANDARD OF REVIEW

The Idaho Rules of Civil Procedure provide that summary judgment may be granted where there are no genuine issues of material fact where the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(a) To determine whether genuine issues of material fact exist, the Court construes all facts and inferences in the pleadings, depositions, admissions, and affidavits in the light most favorable to the non-moving party. *Sewell v. Neilson, Monroe Inc.*, 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct.App. 1985). Summary judgment will normally 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).

In cases tried to the court rather than a jury, the trial judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment, but 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).

III. FACTS

There is a factual dispute as to whether the points of diversion for these licensed rights are located on submerged lands owned by the Tribe pursuant to *United States v. Idaho*. It is undisputed that the points of diversion are not located on lots owned by Claimants.

Both claims 91-7102 and 91-7173 were filed by Steve and Deanne Hawks. Both are based on past licenses issued by the Idaho Department of Water Resources. There is no dispute that the legal descriptions in the licenses are correct. Land adjacent to the points of diversion is owned by the Hawkses. The land is located in Sylvia's Haven Subdivision, on the Coeur d'Alene Reservation.

Subcase 91-7102 relates to Block 2, Lot 6 of Sylvia's Haven Subdivision. The point of diversion for 91-7102 is located in a lagoon abutting Lot 6. Subcase 91-7102 is referred to as the Lagoon Right.

Subcase 91-7173 is located in Block 2, Lot 13 of Sylvia's Haven Subdivision. The point of diversion for 91-7173 is located in the St. Joe River. Subcase 91-7173 is referred to as the River Right.

All of Sylvia's Haven Subdivision, including Lots 6 and 13, are located within the Coeur d'Alene Indian Reservation. Sylvia's Haven was part of an area called Castillo's Tract which was first subdivided in 1914. (*Memorandum in Support of Claimants' Motion for Summary Judgment* at 7); (*Affidavit of Norm Semanko* at 5 – 6, Ex E-G).

A survey of Lots 6 and 13 was conducted by a professional surveyor to determine the location of the points of diversion for 91-7102 and 91-7173. The surveyor concluded that the diversionary works are located outside the boundaries of Lots 6 and 13. (*Affidavit of Scott Rasor* at 2-3). Claimants concede that the points of diversion are not located on Lots 6 and 13. (*Affidavit of Counsel in Support of Motion*, Exhibit 2, Request for Admission No. 23).

The Claimants agree that they lacked permission from the Coeur d'Alene Tribe or the United States to encroach on submerged lands of the St. Joe River at the time the diversion works were constructed for these water rights. (*Affidavit of Counsel in Support of Motion*, Exhibit 1, Request for Admission No. 10 and Request for Admission No. 5).

The Coeur d'Alene Tribe filed Objections to both rights, disputing the St. Joe River as the source and disputing the points of diversion. In addition, the Tribe asserted that both rights should not exist.

IV. DISCUSSION

This *Order* addresses whether genuine issues of material fact remain to be resolved at trial. Critical to answering that question is whether these licensed water rights may be collaterally attacked. Objector's primary argument is that Claimants initiated these water rights in trespass. The argument is that the points of diversion lie on submerged lands on the Coeur d'Alene Reservation. The term submerged land refers to land beneath the ordinary high water mark of navigable lakes and rivers as established in *Idaho v. United States*, 521 U.S. 261, 284 (1997) (*Idaho I*) and *Idaho v. United States*, 533 U.S. 262 (2001) (*Idaho II*). Those cases held that the Coeur d'Alene Tribe has title to submerged lands on the Reservation. Therefore, if points of diversion (PODs) are located on submerged lands and Claimants lack permission to be there, the PODs are trespassing on Tribal land.

The ownership of submerged lands is significant to the parties. In the 1990s, the U.S. and Coeur d'Alene Tribe sued over ownership of the beds and banks of Lake Coeur d'Alene and the St. Joe River within Reservation boundaries. The federal district court determined that:

Title is quieted in favor of the United States, as trustee, and the Coeur d'Alene Tribe as the beneficially interested party of the trusteeship, to the bed and banks of all navigable waters lying within the current boundaries of the Coeur d'Alene Indian Reservation

United States v. Idaho, Case No. CIV-94-0327 (D. Idaho 1998) *affirmed*, *Idaho v. United States*, 533 U.S. 262 (2001).

After the case was resolved by the U.S. Supreme Court, the Coeur d'Alene Tribe required land owners to obtain permits for encroachments on submerged lands. The Claimants do not have permits for encroachment. Thus, the Tribe objected to subcases 91-7102 and 91-7173, asserting that the points of diversion are on submerged lands owned by the Tribe. The Tribe argues that Claimants must have a Tribal permit in order for the PODs to encroach. In

addition, the Tribe argues that these water rights should not exist because they were initiated in trespass.

The State of Idaho filed *Responses* asserting the validity of IDWR's licenses. The State argues that Tribal ownership of submerged lands does not invalidate these licenses. The State argues that licenses are valid regardless of alleged encroachments. Therefore, the State argues that these subcases should not allow re-litigation of the elements decided during licensing.

A. Collateral Attack

The Claimants argue that Tribal *Objections* regarding trespass are untimely because the issue was not raised during licensing proceedings. Claimants explain raising trespass issues that could have been raised during the licensing process is an improper collateral attack on the licenses. The SRBA District Court has consistently ruled that the water court is not a place to re-litigate issues arising from licensing proceedings. For example, in the Facility Volume case, the Court held, "If a party is aggrieved by any aspect of a license, that party's remedy is to seek an administrative review and then, if necessary, a judicial review of the license. I.C. §§ 42-1701(A) and 67-5270; *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993). 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." *Supplemental Findings of Fact and Conclusions of Law* (Facility Volume) (SRBA Subcases 36-02048 *et al.*)(July 31, 1998) at 11-12.

In other words, the District Court has consistently held that "attempting 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." *Order Conditionally Granting Motion to Set Aside Partial Decrees* (SRBA Subcase nos. 37-7454, 37-7602) (Dec. 3, 2003) at 11. The District Court has also explained that it is not just the licensees who are bound by the license, stating, "The binding effect of a license extends beyond the parties to the administrative proceedings and their privies." *Memorandum Decision and Order on Challenge and Order Disallowing Water Rights based on Federal Law*, (SRBA Subcase 29-11609)(Oct. 6, 2006) at 13.

The Tribe asserts that the ban on collateral attacks does not apply here. They argue for an exception to the collateral attack rule based on trespass. They argue that licenses initiated

in trespass may be collaterally attacked. The Tribe argues that these licenses were initiated in trespass and are therefore void. Trespass is alleged because the Tribe asserts ownership of the submerged land on which the points of diversion are located.

B. Ownership of Submerged Land

The trespass issue relates to the location of the Hawkses' points of diversion. Points of diversion for these rights are located in the St. Joe River (91-7173) and in a lagoon off the St. Joe River (91-7102). The Tribe asserts both PODs are located on submerged land which is owned by the Tribe.

The Hawkses argue that the PODs are not located on Tribal land. They argue that the POD for the lagoon right is not on Tribal submerged land. The lagoon was built on land which was private and later filled with water. Therefore, they argue the POD for 91-7102 is not on Tribal land and not located in trespass. The Hawkses concede that the POD for 91-7173 is located in the St. Joe River. However, Claimants assert the POD is located above the submerged lands delineated as Tribal.

This argument regarding trespass is based on litigation between the State of Idaho and the Coeur d'Alene Tribe over submerged land within the Reservation. The litigation included *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 284 (1997) (hereafter "*Idaho I*"), and *Idaho v. United States*, 533 U.S. 262, 266-67 (2001) (hereafter "*Idaho II*"). Ownership of submerged lands involves important sovereignty issues for the parties. This Court is not the ordinary venue for revisiting those issues. However, a review of the arguments is instructive here.

The case began in federal district court. U.S. District Judge Ed Lodge entered a judgment in the case, determining the following:

Title is quieted in favor of the United States, as trustee, and the Coeur d'Alene Tribe, as the beneficially interested party of the trusteeship, to the bed and banks of all of the navigable waters lying within the current boundaries of the Coeur d'Alene Indian Reservation as those boundaries are described by the Act of March 3, 1891, Stat. at 1027 and the Act of August 15, 1894, 28 Stat. at 322, which includes portions of Lake Coeur d'Alene and the St. Joe River, but which exclude those bed and banks of the navigable waters claimed by Idaho to be within Heyburn State Park.

Judgment and Decree, *United States v. Idaho*, Case No. CIV-94-0327 (D. Idaho 1998). The U.S. District Court's judgment was affirmed in *Idaho I* and *Idaho II*.

After the United States Supreme Court affirmed Tribal ownership of the beds and banks within the Reservation, the Tribe began requiring permits for any encroachments. The Claimants have not entered into permits relating to these rights. The Tribe asserts that the Claimants' pumps and water lines are on submerged lands and require an encroachment permit. The Tribe asserts that without such permits, the licenses were initiated in trespass and are void.

The State of Idaho argues that even if the Claimants' PODs encroach on Tribal land that does not invalidate the licenses. The State argues that the Court need not determine whether the PODs are located on submerged land since the licenses are valid.

C. Trespass

The Tribe argues that the ban on collateral attacks does not apply to water rights initiated in trespass. The argument is that rights initiated in trespass, are void. The Tribe asserts that they may raise the trespass issue after licensing decisions are made because rights initiated in trespass are an exception to the collateral attack rule.

The Tribe cites *Mosman v. Mathison*, 90 Idaho 76, 408 P.2d 450 (1965), in support of its argument. In *Mosman*, the Idaho Supreme Court stated that the answer depends on whether the action taken by the agency was "actually void or merely voidable" 90 Idaho at 86. The Court held where the action was "void and such invalidity was self-evident [the administrative action] would have been subject to collateral attack." *Id.* On the other hand, if the action was merely voidable, the *Mosman* court said "it would not be subject to collateral attack" *Id.* *Mosman* involved an action by county commissioners abandoning a public road. One party attempted to collaterally attack the abandonment on the grounds that one of the commissioners had a financial interest in the decision. The Court upheld the ban on collateral attacks. "The determination of an administrative board, such as this one, is not subject to collateral attack in cases where the determination is not void on its face, not tainted with fraud, and is within the power of such board." *Id.* at 85 (emphasis added). The Court went on to say that "if the action was void, and such invalidity was self-evident, the abandonment would have been subject to collateral attack. If the abandonment was voidable only, it would not be subject to collateral attack, and the only remedy would be by the way of direct attack" *Id.* at 86. Thus, the Court concluded that despite serious claims that one

commissioner could have been disqualified to vote, “no appeal was taken from the action of such board, and any defects in the proceedings or disqualification of the board members cannot now be raised by a collateral attack” *Id.* at 87.

The Tribe cites an SRBA decision recognizing that there could be limits to the prohibition against collateral attacks. In *Memorandum Decision and Order on Cross-Motions for Summary Judgment Re: Bureau of Reclamation Streamflow Maintenance Claim*, (SRBA Subcase 63-3618)(Sept. 23, 2008), Judge Melanson found the license at issue was not void and could not be collaterally attacked. However, he recognized there might be other situations where a license could be void.

The 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 constitute an exception to the collateral attack prohibition.

Id.

The Tribe argues that these subcases raise the very situation anticipated by Judge Melanson. They argue that these rights were “initiated in trespass” because the points of diversion are not on the land of the Claimants. Therefore, these licenses are void and may be collaterally attacked.

The State argues that even if these licenses involved a possible trespass, that does not render them void. The State cites *Lemmon v. Hardy*, 95 Idaho 9778, 780 (1974), which held that a water right permit must be made in good faith and not for “delay or speculative purposes.” The State understands the policy against water rights in trespass as part of Idaho’s abhorrence for speculative water rights. Therefore, the licensing process has been carefully crafted to avoid speculation. Accordingly, water right permits are issued only when construction and application of water to full beneficial use is completed within a period of five years. I.C. § 42-204. If the applicant lacks a legal right to access the land described for the point of diversion, then the application is for speculative purposes. Consequently, a water right would not be recognized.

For example, IDWR’s Water Appropriation Rules intentionally require a showing that a) the applicant has legal access to the property needed for the project, b) the applicant is in the process of obtaining the permits needed for the project, and c) there are no obvious

impediments preventing the completion of the project. IDAPA 37.03.045.01.c. In short, the application and permit process requires the applicant to obtain the necessary rights-of-way or permits needed to build the project and use the water.

Both the licensing process and Idaho case law recognize that a valid water right does not imply a right to the use of the land of another. A water right allows the use of water for a beneficial purpose, but does not grant a right-of-way. Consequently, the Idaho Supreme Court held that a permit issued by the state engineer “confers no right to enter upon private land for the purpose of initiating an appropriation of water.” *Marshall v. Niagara Springs Orchard Co.*, 22 Idaho 144, 157 (1912). In *Bassett v. Swenson*, 51 Idaho 256, 5 P.2d 772 (1931), the Court held that a permit issued before the applicant had condemned the necessary rights-of-way was not initiated in trespass since the applicant did not enter the property prior to applying for the permit. The fact that IDWR issued the permit and license without requiring proof of rights-of-way did not render the permit invalid.

D. Void v. Voidable

The Tribe argues that the licenses for these water rights are void. The Claimants and the State argue even if the rights were initiated in trespass, the licenses would be voidable, but not void. The distinction is critical. If the licenses were merely voidable, they would not be subject to collateral attack. If the licenses are upheld, they are open to challenge only as to events occurring after the licenses issued. If the licenses are void, however, they may be collaterally attacked. The question of whether licenses 91-7102 and 91-7173 are void or voidable is central to the analysis. It is therefore important to take a close look at the licensing process.

Water use ripens into licenses through administrative action of the Idaho Department of Water Resources. Agency action, such as licensing, is generally void only when it goes beyond the authority conveyed by statute. *Arrow Transp. Co. v. Idaho Publ. Utils. Comm’n*, 85 Idaho 307, 315 (1963). If an agency has authority to act in a matter but acted improperly, the action may be voidable, but is usually not void. *Harrison v. Bd. Of Cnty. Comm’rs*, 68 Idaho 463, 468 (1948). If an action is void, only then is it subject to collateral attack. *Mosman v. Mathison*, 90 Idaho 76, 86 (1965). If an action is merely voidable, then it is not

subject to collateral attack and can only be disputed by direct appeal under applicable statute. *Id.*

When analyzing the distinction between void and voidable, courts often compare agency actions to court judgments. Agency actions, like judgments, may be void based on three circumstances that justify such a finding: 1) If the court lacked jurisdiction the subject matter of the case, the judgment may be void; 2) If the court acted in a manner inconsistent with due process of law, the judgment may be void; 3) Finally, if the court lacked jurisdiction over the parties to the proceedings, the judgment may be void.

The Tribe's argument generally follows this analysis. First, they argue IDWR's action is void if it goes beyond the agency's jurisdiction. The Tribe did not argue that IDWR lacked statutory authority to issue licenses. They argue that IDWR lacked jurisdiction to issue a license initiated in trespass. Second, the Tribe argues that the published notice provided for 91-7102 failed to follow due process because it contained an incorrect legal description. Thus, they argue the notice was ineffective. Finally, the Tribe argues it did not waive its sovereign immunity in the licensing proceedings. The lack of waiver of Tribal sovereign immunity makes the license void.

1. Jurisdiction/statutory authority

When analyzing agency actions such as licensing, the preliminary question is whether the agency had statutory authority. IDWR has clear statutory authority to issue water right licenses. It is the agency authorized by statute to issue licenses under Title 42, of the Idaho Code. Therefore, IDWR had statutory authority to issue licenses 91-7102 and 91-7173.

The next question is whether IDWR exceeded its authority by authorizing licenses for water rights which arguably included submerged lands. The Court looks to the application and licensing process to determine whether IDWR exceeded its statutory authority. The Applications for Permit expressly state that applicants must acquire rights-of-way or easements necessary for the water rights. In addition, the Applications for Permit for 91-7102 and 91-7173 state that a permit "in no way grants any right-of-way or easement across the land of another." (*Affidavit of Counsel in Support of Objector's Motions for Summary Judgment* Ex. 6). IDWR clearly notified applicants that they must have access to the place of use and the points of diversion.

During the licensing process, IDWR explained that applicants needed legal access to the points of diversion and places of use. The Applications for Permit asked whether claimants had access to the points of diversion and the places of use. In addition, the Applications for Permit state that permits and licenses do not grant rights of way or easements. The applicants indicated that they had access to the PODs. IDWR acted within its statutory authority when it presumed that the applicants accurately reported about access. It appears that the Department relied on the Applications for Permit and decided these were valid water rights. In doing so, IDWR impliedly determined there was no trespass since it issued the licenses. Had IDWR determined there was a trespass, it would have denied the licenses. The decision regarding trespass may have ultimately been incorrect. However, the decision was based on a sound process which correctly inquired about the applicants' ability to access PODs and POUs. Even if the Applications for Permit contained incorrect information, it was reasonable for the Department to accept the representations contained therein. That reliance was appropriate where, as here, IDWR followed the Application for Permit with published notice of the proposed water rights. Thus IDWR relied on a sound process which inquired about access and then published the information about the proposed water rights. No one protested these licenses. Consequently, this Court finds that IDWR acted within its statutory authority when issuing these licenses.

2. Jurisdiction over the parties

The next issue is whether IDWR's licensing process lacked jurisdiction over the Tribe. The Tribe argues that IDWR's licensing process lacked jurisdiction over the Tribe due to its sovereign immunity. They argue that IDWR could not decide a Tribal protest of a license without a waiver of the Tribe's sovereign immunity. The Tribe says it did not waive sovereign immunity during licensing procedures and is therefore not bound by the license.

The Tribe relies on *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506 (1940). The *U.S. Fidelity* case held that a judgment may be void if it is rendered against a sovereign government without waiver of sovereign immunity. (The Court notes that IDWR had jurisdiction over the Claimants Steve and Deanne Hawks. The Hawkses were the only parties who entered the licensing proceedings for 91-7102 and 91-7173.)

The question is whether IDWR lacked jurisdiction to render a licensing decision against the Tribe. The Court looks at the precedent from *Fidelity*. The issue in *Fidelity* was whether a judgment against the United States on a cross-claim was entered without statutory authority. The *Fidelity* Court looked at whether such judgment against the United States was *res judicata* in the litigation. The United States had leased Tribal lands for coal mining. The lessee company went into receivership. The United States filed a claim for royalties. In return, the lessee counter-claimed for \$11,000, and the United States neglected to assert its sovereign immunity. The Court explained:

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.

Id.

A close reading of *Fidelity* gives context to the holding. In *Fidelity*, the United States was trustee for two Indian Nations, which filed claims for \$2,000 in the bankruptcy of a coal company. That was the amount the company owed the Nations for royalties. In response, the coal company filed a cross-claim for \$11,000 as a credit against the Nations. The referee in bankruptcy allowed the credit. However, when the coal company tried to enforce the judgment, the U.S. asserted that the judgment was void as to the cross-claim since the court lacked jurisdiction to enter a judgment against the U.S. absent a waiver of sovereign immunity. 309 U.S. at 511.

Fidelity is somewhat narrow in application. The case held that a judgment entered against a sovereign without the sovereign's consent is void for lack of jurisdiction. Other federal cases give context to the holding. If a judgment previously entered against a sovereign is later contested on the basis of jurisdiction, it will be upheld if the first court had jurisdiction. *U.S. v. County of Cook*, 167 F.3rd 381, 388 (7th Cir. 1999)

The question here is whether the licenses are comparable to judgments against a sovereign. In other words, the inquiry is whether the licensing decisions were decisions

against the Coeur d'Alene Tribe. The licenses here determined water rights of the Hawkses, not water rights of the Tribe. Furthermore, the licenses did not authorize use of Tribal land. The licenses actually disclaimed authority for Claimants to go onto land they did not own.

Therefore, these licenses did not determine Tribal water rights and they did not grant easements on or use of Tribal land. If the points of diversion are located on Tribal land, the licenses do not grant Claimants authority to be there. If the points of diversion are located on State land, the licenses do grant authority to be on State land. The licenses do not alter land ownership. The licenses do not grant easements or rights-of-way. If the licenses had determined water rights of the Tribe, or granted easements over Tribal land, they could be read to be decisions against the Tribe. However, the licenses do neither. Thus, the licenses for 91-7102 and 91-7173 are not decisions against the Coeur d'Alene Tribe. Accordingly, the licenses are not void for lack of jurisdiction over the Tribe.

3. Due Process/Notice

The final query is whether the licenses are void for lack of due process. Because publication notice is given, licenses are generally binding on others, not merely the parties to the administrative licensing proceedings. Consequently, the administrative process allows any affected person to initiate a contested case. *Memorandum Decision and Order on Challenge and Order Disallowing Water Rights Based on Federal Law* (SRBA Subcase 29-11609) (Oct. 6, 2006) at 13. Anyone affected by a licensing decision may thus object to the issuance of a license or to its elements.

Here, publication notice was provided for both Applications for Permit. (*Affidavit of Steven W. Strack*, Ex. 1 & 2) The Tribe asserts that the notice for 91-7102 was insufficient because the description of the point of diversion was incorrectly listed as Lot 1. The correct description for the point of diversion is Lot 7. The question is whether this incorrect description amounts to a violation of due process.

Notice that provides due process must 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 (Ct.App. 1986) A mistake is not enough to invalidate a notice. “[M]ere irregularities or immaterial defects do not nullify notice so long as they do not mislead.” *Id.*

The Notice of Application for 91-7102 misidentified the point of diversion as Lot 1. However, both Lot 1 and Lot 7 (the correct location) are located in the Sylvia's Haven Subdivision on the Coeur d'Alene Reservation. The Notice of Application correctly identified the water source as the St. Joe River. Therefore, identification of either Lot 1 or Lot 7 provided notice of a potential encroachment on submerged lands. Had the incorrect description identified the source or the POD off the Coeur d'Alene Reservation, that may have created a due process issue. Here, both the incorrect and the correct locations were located on the Coeur d'Alene Reservation. Identification of either Lot 1 or Lot 7 provided notice that the PODs were allegedly on Tribal land. Consequently, the Court finds that the Notice of Application provided notice "reasonably calculated under the circumstances" to afford the Tribe opportunity to object. Accordingly the notice complied with due process requirements.

4. Collateral Attack of Licenses

The general rule is that licenses may not be collaterally attacked. In *Order Adopting Special Master's Report and Recommendation* (SRBA Subcase no. 36-7092A)(Dec. 10, 1997), the District Court held that "The SRBA is not a case authorized to revive lost challenges to licensing decisions." The District Court reiterated that holding in *Supplemental Findings of Fact and Conclusions of Law* (SRBA Subcase 36-2048 et al.) (July 31, 1998). The Court held that parties who are aggrieved by a license must look to administrative review and not attempt to attack licensed rights in the SRBA process. "[T]hat party's remedy is to seek an administrative review and then, if necessary, a judicial review of the license." I.C. §§ 42-1701(A) and 67-5270; *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993). If the license is not appealed when issued, any attempt to appeal the license in a subsequent judicial proceeding would constitute a collateral attack on the license.

Void actions by agencies may be subject to collateral attack. *Wernecke v. St. Maries School Dist. No. 401*, 147 Idaho 277, 286 (2009). The *Wernecke* Court said, "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.* The question here is whether the licenses would be void if the PODs are in trespass.

The Tribe cites *Marshall v. Niagara Springs Orchard Co.*, 22 Idaho 144 (1912), which held 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 void as against the owner of the land.” *Id.* at 155. In that case, Marshall filed suit to condemn the land of Niagara Springs, which was needed for a ditch and powerhouse for the water right. Marshall had filed an application and subsequently tried to condemn land of Niagara Springs to perfect the water right. The Idaho Supreme court denied Marshall’s attempt to condemn the land on the basis that Marshall had not yet acquired a water right.

However, the *Niagra Springs* case was factually distinct from the case at bar. The water use at issue was merely at the permit stage; a license had not issued. “[I]t is clear that the trial court erred in its finding of fact that the respondent is the owner and in possession of a water right for power purposes, granted to him under the permit of the state engineer of the state of Idaho from Smalley springs.” *Id.* at 157 (emphasis added). Thus, the facts in *Niagra Springs* involved Marshall’s permit, not a perfected license. The legal distinction is clear from a water case the Supreme Court decided in the same year as *Niagra Springs*.

In *Tobey v. Bridgewood*, 22 Idaho 566 (1912), Tobey sued Bridgewood for a restraining order preventing Bridgewood from entering Tobey’s land. Bridgewood had applied to the state engineer for a permit. In preparing the application, Bridgewood crossed land that was then owned by the state. Bridgewood’s application said that she intended to develop water by finishing a project to irrigate 80 acres of land. The state engineer approved the application, indicating the diversion works must be completed before 1910.

Bridgewood then entered the land with a well-drilling machine and began sinking a well. Before Bridgewood entered the land, Tobey applied to the state land board to lease the land. The state land board declined to lease the land to Tobey. The state land board offered to sell the property and later did sell it to Tobey.

The Court considered the Idaho statutes which provided that anyone who used or occupied state land without a lease were trespassers. Accordingly, the Court recognized that the granting of a water permit did not convey a right to go on state land. The Court found the permit was merely a contingent right which could ripen into a water right or could be defeated

by failure to comply with the water statutes. *Id.* at 574. The Court recognized that to initiate the right to appropriate water, the applicant needed to enter land owned by the State to survey and prepare plans for the application. In order to do so, the applicant would be a trespasser on state land. The Court recognized the *Niagra Springs* case holding that initiating a right in trespass could make such entry void. *Id.* at 576.

The Court noted that the State had not objected to the application based on trespass. The Court declined to determine the rights as between the applicant and the State. The Court found that Tobey did not have a right to the land at the time Bridgewood was said to have trespassed. The Court held that the application of Bridgewood was not void, even though she did not have a right-of-way to the land. The holding of *Bridgewood* is instructive regarding the limits to which an alleged trespass can impact a water permit or license. In the same year *Niagra Springs* was decided, the Supreme Court declined to void a permit even though the applicant lacked authority to go on the land. *Niagra Spings* holds a permit may be declared void if it was initiated in trespass. However, the *Bridgewood* court indicates that water rights are not always void if there is a trespass. In cases such as *Niagra Springs* and *Bridgewood*, the trespass occurred during the permit stages. Clearly, issues of trespass may impact the permit or licensing decision. However, issues of trespass are not properly raised once a water right is ripened.

V. CONCLUSION

The validity of water rights 91-7102 and 91-7173 were at issue at the time these licenses came before the Department. IDWR decided that the water rights were valid and issued the licenses. This very same issue, the validity of these water rights, is what the Tribe is attempting to raise again before this Court. Certainly, questions of trespass at the initiation of these rights could have impacted the licensing decision. However, that issue was not raised at the time of licensing.

The Tribe makes a cogent argument that some issues can be challenged after a license issues if it was initiated in trespass. However, the issue of validity, and thus trespass, was impliedly decided at the time of licensing. IDWR must have decided, at least by implication,

that there was no trespass. Otherwise the licenses would not have issued. Any party who disagreed with the decision of validity of a water right is required to bring the issue, exhaust administrative remedies, and seek judicial review at the time of licensing. That was not done.

Where the Tribe seeks to raise the issue now, the better reasoning is that such a challenge amounts to a collateral attack on the validity of a license. The appropriate time to raise issues regarding validity of these water rights is at the time of licensing. That time has passed. If there were concerns that these rights were initiated in trespass, those issues were required to be raised at the time of licensing. Raising those issues now is an improper collateral attack on the licenses.

In general, the CSRBA does not provide a venue to re-litigate challenges to licensing decisions. Licenses are evidence of the validity and elements of a water right, and those decisions cannot be collaterally attacked during the adjudication process. Evidence of events which occur after licenses have issued can be brought before the court. For example, it is proper to bring arguments that these rights were forfeited or abandoned after the licenses issued. Such arguments, if proven, can result in changes to these water rights.

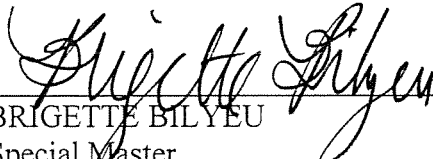
It should be remembered, that just because a water right is valid, that in no way authorizes a continued use of Objector's land. If the location of a point of diversion or place of use is in trespass, the mere existence of a water right does not grant an easement or right of way.

VI. ORDER

- 1) The Court denies the Tribe's *Motion for Summary Judgment* in that it holds that the licenses for these water rights are valid. The licenses are not void.
- 2) The Court denies the Claimants' *Motion for Summary Judgment* in that it cannot determine as a matter of law the Ordinary High Water Mark for Lake Coeur d'Alene. Genuine issues of material fact remain as to the Ordinary High Water Mark for Lake Coeur d'Alene and the St. Joe River at the time of the Reservation.

- 3) The Court grants the State of Idaho's *Motion for Summary Judgment* in part. The Court holds that these water rights may properly be decreed as licensed with a notation that the water rights do not grant a right of way or easement across the land of another.

Dated October 11, 2016.


BRIGETTE BILYEU
Special Master
Coeur d'Alene-Spokane River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON SUMMARY JUDGMENT was mailed on October 12, 2016, with sufficient first-class postage to the following:

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