

DEPARTMENT OF
WATER RESOURCES

COPY

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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 No.: 91-7136

Case No. 49576

Donald Vail and Martha Vail,

Claimant(s),

OBJECTOR'S FIRST REQUESTS FOR DISCOVERY TO CLAIMANT(S)

V.

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

Objector.

To: Claimant(s), Donald Vail and Martha Vail, and their attorney of record, Norman Semanko, Esq., of the firm, Moffatt, Thomas, Barrett, Rock & Fields, Chtd., 101 S. Capitol Blvd., 10th Floor, P.O. Box 829, Boise, Idaho 83701-0829.

OBJECTOR'S FIRST REQUESTS
FOR DISCOVERY TO CLAIMANT(S) - 1

Please respond and answer these discovery requests in the time periods allowed under Idaho law.

GENERAL INSTRUCTIONS

1. Scope of Discovery. These discovery requests are directed to the above-named CSRBA Claimant(s) and cover all information in its possession, custody and control, including information in the possession of officers, employees, agents, servants, representatives, attorneys, or other persons directly or indirectly employed or retained by them, or anyone else acting on their behalf or otherwise subject to their control, and any merged, consolidated, or acquired predecessor or successor, parent, subsidiary, division, or affiliate.

2. Time Period. Unless otherwise indicated, these discovery requests apply to the time period from the priority date of the claim at issue in this litigation to the present.

3. Supplemental Responses. These document requests are continuing; supplemental documents must be provided pursuant to applicable civil discovery rules.

4. Deletions from Documents. Where anything has been deleted from a document produced in response to a document request:

- a. specify the nature of the material deleted;
- b. specify the reason for the deletion; and
- c. identify the person responsible for the deletion.

5. Organization of Documents in Response. Documents submitted pursuant to a document request should be produced in the manner in which they are kept in the ordinary course of business and/or grouped and labeled according to the individual paragraph(s) of the document request. Within each group, the documents should be arranged, to the extent possible, in chronological order. If any document is responsive to more than one document request, you may provide a single copy indicating the requests to which it is responsive.

6. Document No Longer in Possession. If any document requested is no longer in the possession, custody, or control of the Claimant(s), state:

- a. what was done with the document;
- b. when such document was made;
- c. the identify and address of the current custodian of the document;
- d. the person who made the decision to transfer or dispose of the document; and
- e. the reasons for the transfer or disposition.

7. Privilege as Applied to Document Production. If objection is made to producing any document, or any portion thereof, or to disclosing any information contained therein, on the basis of any claim of privilege, the Claimant(s) is requested to specify in writing the nature of such

information and documents, and the nature of the claim of privilege, so that the Court may rule on the propriety of the objection. In the case of documents, the Claimant(s) should state:

- a. the title of the document;
- b. the nature of the document (e.g., interoffice memorandum, correspondence, report, etc.);
- c. the author or sender;
- d. the addressee;
- e. the date of the document;
- f. the name of each person to whom the original or a copy was shown or circulated;
- g. the names appearing on any circulation list relating to the document;
- h. the basis on which privilege is claimed; and
- i. a summary statement of the subject matter of the document in sufficient detail to permit the Court to rule on the propriety of the objection.

Upon the agreement of counsel, certain documents may be excluded from these requirements.

8. Singular/Plural. Words used in the plural shall also be taken to mean and include the singular. Words used in the singular shall also be taken to mean and include the plural.

9. “And” and “Or.” The words “and” and “or” shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive.

10. Reservation of Rights. The Coeur d’Alene Tribe (“Tribe”) reserves all rights, including its sovereign immunity from suit. No part of this discovery request should be interpreted or construed as a waiver of tribal sovereign immunity or as an acknowledgement by the Tribe that any particular issue will be litigated in this subcase.

DEFINITIONS

Unless otherwise indicated, the following definitions shall apply to these discovery requests:

1. “Court” or “CSRBA Court” shall mean the Coeur d’Alene-Spokane River Basin Adjudication Court, District Court in and for Twin Falls County, Idaho, Hon. Eric Wildman, or his successor, presiding.
2. “Coeur d’Alene Lake” or “Lake Coeur d’Alene” means the lake identified by the U.S. Supreme Court in the case *Idaho v. United States*, 533 U.S. 262 (2001) to which title was quieted in favor of the United States and Coeur d’Alene Tribe.
3. “Document” means all writings of any kind, including, without limitation, the originals and all non-identical copies, whether different from the originals by reason of any notation made on such copies or otherwise including, without limitation, correspondence, memoranda, notes, diaries, statistics, letters, telegrams, minutes, contracts, bills of lading, reports, studies, checks, statements, receipts, returns, summaries, pamphlets, books,

governmental records, interoffice and intra-office communications, notations of any conversations (including, without limitation, telephone calls, meetings, and other communications), bulletins, printed matter, computer printouts, teletypes, telefax, invoices, worksheets, graphic or oral records or representations of any kind (including, without limitation, photographs, charts, graphs, microfiche, microfilm, videotapes, recordings, and motion pictures), electronic, mechanical, or electric records or representations of any kind (including, without limitation, tapes, cassettes, discs, recordings and computer memories), and all drafts, alterations, modifications, changes and amendments of any of the foregoing.

3. "Elevation" means the elevation in feet above mean sea level.
4. "Legal basis" means any source of law you assert supports your legal position including, but not limited to, case law, common law, the Constitution, statutes, executive orders, executive actions, and regulations.
5. "Objection" means the objection filed by the Tribe against Claimant(s) water rights in the above-encaptioned matter. If this term is used in any other context, it will be specifically noted where set forth herein.
6. "Ordinary High Water Mark" or "OHWM" means the presumed Ordinary High Water Mark of Coeur d'Alene Lake and the St. Joe River of 2128 feet elevation consistent with the holding of *In re Sanders Beach*, 143 Idaho 443 (2008).
7. "Response to Objection" means the Standard Form 2 – Response to Objection filed by you, or your attorney on your behalf, and the language contained therein. If this term is used in any other context, it will be specifically noted where set forth herein.
8. "Relate to," "relating to," or "relates to" means constituting, defining, concerning, embodying, reflecting, identifying, stating, referring to, dealing with, or in any way pertaining to.
9. "Saint Joseph River" or "St. Joe River" means the river identified by the U.S. Supreme Court in the case *Idaho v. United States*, 533 U.S. 262 (2001) to which title was quieted in favor of the United States and Coeur d'Alene Tribe.
10. "Subject matter of this action" shall mean the facts and legal doctrines at issue and/or disputed in the Objection and Response(s) to Objection filed in the above-encaptioned matter.
11. "Submerged lands" and/or "bed and banks" shall mean the lands underlying the navigable waters of either Coeur d'Alene Lake or the St. Joe River.
12. "Tribe" and/or "Objector" shall mean the Coeur d'Alene Tribe.

13. "You" and "your," unless otherwise indicated, means the Claimant(s) and every past or present employee, agent, and authorized representative.

You are requested to file within thirty (30) days a written response to the following and to produce those documents for inspection and/or copying.

(a) Your written response shall state with respect to each item or category, that inspection-related activities will be permitted as requested, unless request is refused, in which event the reasons for refusal shall be stated. If the refusal relates to part of an item or category, that part shall be specified.

(b) In accordance, the documents shall be produced as they are covered in the usual course of business or you shall organize and label them to correspond with the categories in the request.

(c) These requests shall encompass all items within your possession, custody or control.

(d) These requests are continuing in character so as to require you to promptly amend or supplement your response if you obtain further material information.

(e) If in responding to these requests you encounter any ambiguity in construing any request, instruction or definition, set forth the matter deemed ambiguous in the construction used, in responding.

REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO. 1: Please admit that the United States of America is the legal owner, and the Coeur d'Alene Tribe is the beneficial owner of the submerged bed and banks of Coeur d'Alene Lake and the St. Joe River within the exterior boundaries of the Coeur d'Alene Indian Reservation.

ANSWER:

REQUEST FOR ADMISSION NO. 2: Please admit that the United States of America, as the trustee, and the Coeur d'Alene Tribe, as the beneficially interested party of the trusteeship, is entitled to the exclusive use, occupancy, and right to the quiet enjoyment of the bed and banks of the Coeur d'Alene Lake and the St. Joe River within the current boundaries of the Coeur d'Alene Indian Reservation.

ANSWER:

REQUEST FOR ADMISSION NO. 3: Please admit that the State of Idaho is permanently enjoined from asserting any right, title or otherwise interest in or to the bed and banks of the Coeur d'Alene Lake and the St. Joe River within the current boundaries of the Coeur d'Alene Indian Reservation.

ANSWER:

REQUEST FOR ADMISSION NO. 4: Please admit that the Coeur d'Alene Tribe has the inherent right to exclude non-members of the Coeur d'Alene Tribe from tribally owned lands within the Coeur d'Alene Reservation.

ANSWER:

REQUEST FOR ADMISSION NO. 5: Please admit that the point of diversion for this claim is located within the exterior boundary of the Coeur d'Alene Indian Reservation.

ANSWER:

REQUEST FOR ADMISSION NO. 6: Please admit that the presumed OHWM for Coeur d'Alene Lake and the St. Joe River is 2128 feet above sea level.

ANSWER:

REQUEST FOR ADMISSION NO. 7: Please admit that the point of diversion and/or some or all of the diversion works at issue in the above-captioned matter is below the presumed OHWM of the St. Joe River.

ANSWER:

REQUEST FOR ADMISSION NO. 8: Please admit that the waters overlying the bed and banks at the location of Claimant(s) water diversion point are navigable.

ANSWER:

REQUEST FOR ADMISSION NO. 9: Please admit that under Idaho law the point of diversion for a water right is the point at which water is diverted from a natural water channel and put to beneficial use.

ANSWER:

REQUEST FOR ADMISSION NO. 10: Please admit that Claimant(s) did not have permission to encroach upon the submerged lands of the St. Joe River from either the United States or the Coeur d'Alene Tribe at the time the diversion works were constructed for this claim.

ANSWER:

REQUEST FOR ADMISSION NO. 11: Please admit that since the time Claimant(s) began diverting water from the St. Joe River he/she has never received permission to encroach upon the submerged lands of the St. Joe River from either the United States or the Coeur d'Alene Tribe for Claimant(s) diversionary works.

ANSWER:

REQUEST FOR ADMISSION NO. 12: Please admit that under Idaho law a water right may not be initiated or maintained in trespass.

ANSWER:

REQUEST FOR ADMISSION NO. 13: Please admit that the Claimant(s) does not have the right to enter the lands of the Coeur d'Alene Tribe for the purposes of maintaining his/her diversion works.

ANSWER:

REQUEST FOR ADMISSION NO. 14: Please admit that a decreed water right and/or an IDWR water permit or license does not authorize the holder of said right, permit, or license to trespass on the land of another for any purpose.

ANSWER:

OBJECTOR'S FIRST REQUESTS
FOR DISCOVERY TO CLAIMANT(S) - 7

REQUEST FOR ADMISSION NO. 15: Please admit that under Idaho law riparian rights are limited to the right to maintain adjacency to navigable waters and to build or use aids to navigation but does not provide for any right to make any consumptive use of water or right of access for the appropriation of water.

ANSWER:

INTERROGATORIES

INTERROGATORY NO. 1: If you deny any of the Requests for Admissions 1-15 above, please state the legal and/or factual basis of each denial, if any.

ANSWER:

INTERROGATORY NO. 2: Please identify the legal basis which you intend to rely upon for support of your statements in your response to the Tribe's objection:

"The U.S. did not reserve any other littoral or riparian rights in regard to the subject lands which are ordinarily attendant to waterfront property, including the right to access water, to wharfage, or to use the adjacent water. These rights are therefore appurtenant to and including [sic] with those waterfront lands sold by the U.S. and are subject only to State law regulation as provided by the Acts of Congress enabling the alienation of those lands."

ANSWER:

INTERROGATORY NO. 3: Does the Claimant(s) hold an encroachment permit from the Coeur d'Alene Tribe for any purpose? If so, what is the encroachment type and Tribal permit number?

ANSWER:

INTERROGATORY NO. 4: Before installing the diversionary works in the St. Joe River, did Claimant(s), or Claimant(s) predecessors in title request the permission of either the United States or Tribe to encroach upon the submerged lands of the St. Joe River?

ANSWER:

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FOR DISCOVERY TO CLAIMANT(S) - 8

INTERROGATORY NO. 5: Please state the name, address, telephone number, and type of testimony, lay or expert, for any witnesses you may call at trial of this matter.

ANSWER:

INTERROGATORY NO. 6: For each person listed as an expert witness above, please:

- (a) State the subject matter on which the expert is expected to testify;
- (b) Provide a complete statement of all opinions to be expressed and the basis and reasons therefore;
- (c) Provide the facts, data or other information considered by the witness in forming his or her opinions;
- (d) Note any exhibits to be used by the expert witness as a summary of or support for the opinions; and,
- (e) Provide the qualifications of the witness, including a list of all publications (co)authored by the witness within the preceding ten (10) years, the compensation to be paid for the testimony, and a list of other cases in which the witness has testified as an expert at trial or by deposition within the four preceding years.

ANSWER:

INTERROGATORY NO. 7: Please describe the Claimant(s) diversion works and water system from the point of diversion to the place of use, including but not limited to, a description of all materials located in the water, the pump capacity (in gallons per minute), the conduit diameter(s) (in inches), any storage facilities on the property (and storage volume in gallons), and a description of the water conveyance on the property.

ANSWER:

INTERROGATORY NO. 8: If the Claimant(s) assert anyone other than the Coeur d'Alene Tribe owns the submerged lands underlying the claimant's point of diversion please list the name and contact information of such person or entity.

ANSWER:

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1: Please produce any documents you assert support your factual and/or legal basis in answering Requests for Admission Nos. 1-15 and Interrogatories Nos. 1-8.

RESPONSE:

REQUEST FOR PRODUCTION NO. 2: Please produce a true, accurate, correct, and admissible copy of the deed, or other document, by which you acquired title to your property. If you acquired your property by operation of law, please produce any documents which evidence the factual basis of your acquisition.

RESPONSE:

REQUEST FOR PRODUCTION NO. 3: Please produce a true, accurate, correct, and admissible copy of any title insurance policy (with declarations page) covering the real property to which the water right claim at issue in this matter is appurtenant.

RESPONSE:

REQUEST FOR PRODUCTION NO. 4: Please produce a true, accurate, correct, and admissible copy of any available engineering/draftsman drawings, reports, or other documents related to your property's water-system.

RESPONSE:

REQUEST FOR PRODUCTION NO. 5: Please produce a true, accurate, correct, and admissible copy of a scaled elevation-view (side-cut view) diagram of the diversion works at issue in this case. On the diagram, please draw the OHWM and the ordinary low water mark. Please provide the elevation of the pump, the elevation of the high/low point of the water line, the length of the water line (in feet), and depth of pump (in feet below OHWM). Please provide the lowest elevation of the entire diversion works.

RESPONSE:

REQUEST FOR PRODUCTION NO. 6: Please produce a true, accurate, correct, and admissible copy of a scaled plan-view (top view) diagram of the property and diversion works at issue in this case. On the diagram, please include all property boundaries, structures, pasture, yard, gardens, and other locations where water use is occurring. Please include the location of the St. Joe River, the location of all components of the diversion works, pump, and water line, and the location of all water conveyance systems on the property.

RESPONSE:

REQUEST FOR PRODUCTION NO. 7: Please produce a true, accurate, correct, and admissible copy of photos showing the diversion works and water-system, including but not limited to the pump, water lines and/or piping, pump house, and irrigation system.

RESPONSE:

REQUEST FOR PRODUCTION NO. 8: Please produce a true, accurate, correct, and admissible copy of any deeds, surveys, plats, or other document which relates to the property at the location of your point of diversion. In this request the term “property” means land appurtenant to your point of diversion.

RESPONSE:

REQUEST FOR PRODUCTION NO. 9: Please produce a true, accurate, correct, and admissible copy of any water withdrawal permit(s) and license(s) and/or encroachment permit(s) you may hold from the Idaho Department of Water Resources and/or the Idaho Department of Lands.

RESPONSE:

REQUEST FOR PRODUCTION NO. 10: Please produce all I.R.C.P. Rule 26 material for any witness listed or noted as an expert witness in your answer to Interrogatories Nos. 5 and 6 above.

RESPONSE:

REQUEST FOR PRODUCTION NO. 11: Please produce documents related to available water use data for the diversion works and/or the property.

RESPONSE:

REQUEST FOR PRODUCTION NO. 12: Please produce any documents related to other sources of water used by the Claimant(s) on the property and/or other claims made in the CSRBA by the Claimant(s) for other water rights appurtenant to the property and/or any additional water use permits or licenses acquired by the claimant since the commencement of the CSRBA for water use appurtenant to the property at issue.

RESPONSE:

REQUEST FOR PRODUCTION NO. 13: Please produce any other documents which may be relevant to, or support, Claimant(s)' water right claim, Objector's objection, and/or any responses to the objection which have been filed in this matter.

RESPONSE:

Respectfully submitted this 5th day of February, 2016.

HOWARD FUNKE & ASSOCIATES, P.C.

By: Howard Funke
Howard Funke, Of the Firm
Attorneys for the Coeur d'Alene Tribe

Certificate of Service

I hereby certify that on the 5th day of February, 2016, a copy of the foregoing Objector's First Requests for Discovery to Claimant(s) was served on the following counsel of record and other entities via email and/or hard-copy via first class mail, postage pre-paid:

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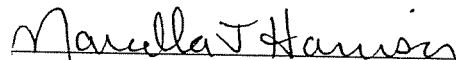
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By: Marcella J. Harrison