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DEPARTMENT OF
WATER RESOURCES

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	)	
	)	
	)	
_____	)	
Steve and Deanne Hawks,	)	
	)	
Claimant(s),	)	OBJECTOR'S MEMORANDUM IN
	)	SUPPORT OF ITS MOTION TO
v.	)	DETERMINE SUFFICIENCY OF
	)	OBJECTIONS AND TO DEEM CERTAIN
	)	MATTERS ADMITTED
Coeur d'Alene Tribe, a federally-recognized	)	
Indian Tribe,	)	
	)	
Objector.	)	
	)	
_____	)	

COMES NOW, Objector, the Coeur d'Alene Tribe (hereinafter "Tribe" or "Objector"),
and hereby offers the Court this Memorandum of Law in support of its motion to determine

OBJECTOR'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DETERMINE
SUFFICIENCY OF OBJECTIONS AND TO DEEM CERTAIN MATTERS ADMITTED - 1

adequacy of answers or objections. This memorandum is filed concurrently with, and is incorporated into said motion.

FACTUAL BACKGROUND

On February 5, 2016, Objector served Steve and Deanne Hawks (hereinafter “Claimants”) and their attorney of record, Norman S. Semanko, with *Objector’s First Requests for Discovery to Claimant(s)* (“*Objector’s First Requests*”) appertaining to the claims, objections, and responses filed in the subcases noted above. *See* Aff. Counsel, ¶ 2.

On March 7, 2016 Claimants served *Claimants Steve and Deanne Hawks’ Responses to Objector’s First Requests for Discovery* (“*Claimants’ Responses*”) upon the Tribe. *Id.*, ¶ 3.

On March 14, 2016, counsel for the Claimants were notified that the Tribe believed the objections, answers, and responses to *Objector’s First Requests* were deficient, unfounded, and otherwise not substantially justified. *Id.*, ¶ 4.

On March 15, 2016 counsel for the Tribe met telephonically with attorneys for Claimants. *Id.*, ¶ 5. During that meeting the Tribe iterated, request by request, why it believed Claimants’ objections, answers, and responses to be deficient, unfounded, and otherwise not substantially justified or evasive. *Id.* A follow up call was scheduled between counsel for March 21, 2016 for the purpose of allowing Claimants’ attorneys time to formulate responses, if any, to the concerns set forth during the meeting of March 15, 2016. *Id.*, ¶ 6.

On March 21, 2016, attorneys for both Claimants and Objector met again telephonically to discuss Claimants’ responses to the concerns set forth during the meeting on or about March 15, 2016. *Id.*, ¶ 7. During this second phone call, counsel for Claimants agreed to serve amended answers and responses to Objector’s discovery requests. *Id.* Counsel for both parties agreed to an extension until March 25, 2016 for Claimants to serve their amended answers and responses to

Objector's discovery requests. *Id.* Counsel agreed that no further discovery would be served upon Claimants until after the amended answers and responses were served. *Id.*

On March 28, 2016, Claimants served and delivered *Claimants Steve and Deanne Hawks' Amended Responses to Objector's First Requests for Discovery* ("Claimants' Amended Responses") upon the Tribe. *Id.* ¶ 8.

Upon review of the objections asserted in *Claimants Amended Responses*, the Tribe believes and alleges that such objections are deficient, unfounded, and otherwise not substantially justified. *Id.* ¶ 9.

The Tribe's requests for admissions, interrogatories, and requests for production contained in *Objector's First Request*, along with the Claimants' original objections, answers, and responses contained in *Claimants' Responses* are attached to the affidavit of counsel filed contemporarily herewith. *Id.* ¶¶ 12, 13, Ex. 3 (91-7102) and Ex. 4 (91-7173). *Claimants' Amended Responses* are likewise attached to the affidavit of counsel filed contemporarily herewith. *Id.* ¶¶ 10, 11, Ex. 1 (91-7102) and Ex. 2 (91-7173).

STANDARD OF REVIEW

Motions to determine adequacy of answers and objections, and motions to compel are reviewed under an abuse of discretion standard. *Taylor v. AIA Services Corp.*, 151 Idaho 552, 570 (2011) (citing *Jen-Rath Co. v. Kit Mfg. Co.*, 137 Idaho 330, 336 (2002) ("Control of discovery is within the discretion of the trial court.")).

The test for whether a trial court has abused its discretion is three-fold: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an

exercise of reason. *DAFCO LLC v. Stewart Title Guar. Co.*, 156 Idaho 749, 755 (2014) (citing *Burgess v. Salmon River Canal Co., Ltd.* 127 Idaho 565 (1995)).

LAW RELEVANT TO DISCOVERY

It has long been held that discovery allows, “the parties to obtain the fullest possible knowledge of the issues and facts before trial. *Hickman v. Taylor*, 329 U.S. 495, 501 (1947).

The scope of discovery is very broad. I.R.C.P. 26(b)(1). A party is entitled to discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, including the existence, description, nature, custody, condition and location of any books, documents, or tangible things and the identity and location of persons having knowledge of discoverable material. *Id.*

The purpose of requests for admission is to remove issues of fact from the trial. *James v. Boyd Truck Lines*, 11 F.R.D. 67, 70 (W.D. Mo. 1951). The rule “is not only referring to direct basic facts, but also to ultimate facts, that is, facts which are conclusions acquired by reflection and natural reasoning deduced from primary evidentiary facts. *Id.* As such, it is appropriate to ask for admissions that “go[] to the question of proof of those facts at trial and [allow for] the elimination of the necessity of a party making the request for admission to call witnesses to introduce testimony and documents to prove those facts. *Straley v. Idaho Nuclear Corp.*, 94 Idaho 917, 922 (1972).

A party is allowed to serve requests for admission upon another party in litigation regarding any matter that is within the scope of discovery under I.R.C.P 26. I.R.C.P. 36(a). A request for admission is appropriate for inquiries that relate to statements or opinions of fact or of the application of law to fact. *Id.* The Idaho Court of Appeals has interpreted this rule to permit “requests involving opinions, conclusions and mixed questions of law and fact.” *Ruge v. Posey*,

114 Idaho 890, n. 1 (Idaho Ct. App. 1988) (citing 8 C. WRIGHT AND A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2255 (1970)).

Rule 36 sets forth that a request for admission is “admitted unless, within 30 days after service of the request... the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed under oath by the party or the party’s attorney...” I.R.C.P. 26. I.R.C.P. 36(a). If the answering party lodges objection to the request for admission, the party must detail the specific reasons for the objection. *Id.* If the request for admission is denied, “[t]he answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.” *Id.* The denial must “fairly meet the substance of the requested information.” *Id.* Where a qualified answer or partial denial is appropriate, “the party shall specify so much of it as is true and qualify or deny the remainder.”

Rule 36 specifies that “if the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served.” ...”

If a party is forced to make a motion to compel discovery or to determine the sufficiency of answers or objections thereof, a party is entitled to an award of the necessary costs, including attorney’s fees, of having to do so. I.R.C.P. 37(a)(4).

ARGUMENT

REQUEST FOR ADMISSION NO. 1

Request for Admission No. 1 asks Claimants to 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" Aff. Counsel, Ex. 1, p. 2. Claimants objected to the Tribe's first request for admission on the grounds that the term "exterior boundaries of the Coeur d'Alene Indian Reservation" is vague. *Id.* Claimants also objected on the grounds that the request sought a legal conclusion or opinion "regarding who owns '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.'" *Id.*

Despite the alleged ambiguity of request for admission No. 1, Claimants went on to admit that "in *United States v. Idaho*, 95 F. Supp. 2d 1094, 1117 (1998) [*"Idaho IP"*] , the court stated the following: '[t]itle is quieted in favor of the United States, as trustee, and the Coeur d'Alene Tribe of Idaho, as the beneficially interested party of the trusteeship, to the bed and banks of the Coeur d'Alene Lake and the St. Joe River lying within the current boundaries of the Coeur d'Alene Indian Reservation.'" *Id.* Nonetheless, Claimants denied that the United States or the Tribe own the submerged lands at Claimants' point of diversion. *Id.*

Claimants have failed to answer the Tribes first request for admission. The request for admission did not concern the holding of *Idaho II* or ask whether the Tribe owns the lands located underneath Claimants' point of diversion. Claimants have failed to timely admit or expressly deny the Tribe's first request for admission and it should therefore be deemed admitted.

Claimants' vagueness objection should be overruled. Claimants have not explained why the term is vague, provided alternative readings of the allegedly vague term, or cited to any precedent that would suggest the term or similar terms are vague. Claimants are long-time residents of the area and should be well aware of the extent of the "exterior boundaries of the

Coeur d'Alene Indian Reservation.” Even if Claimants were not keenly aware of the local geography, they need only look at a standard highway map to determine reservation boundaries. Importantly, Claimants went on to expressly admit a portion of the holding of *Idaho II* that included a statement regarding “current” reservation boundaries. However, Claimants’ splitting of hairs is a distinction without a difference. The exterior boundary of the Reservation has not changed since 1894 and it is obvious that reference to “boundary” means the boundary as it exists today. Further, Claimants’ property is firmly and clearly within the exterior boundaries of every permutation of the Coeur d’Alene Reservation since its inception to now. The Tribe should not have to prefix the term “exterior boundary” with “current” every time it refers to its boundary just to avoid an objection from Claimants.

Importantly, other courts have confronted this type of linguistic gymnastics with distain. For example, the court in *Hunter v. International Systems Controls Corporation* found that a party asserting an interrogatory was ambiguous but who went on to imply they knew the answer to that interrogatory was deliberately misconstruing the question asked. 56 F.R.D. 617, 625 (W.D. Mo 1972). The court found that “this misconstruction and failure to make discovery was a callous disregard of discovery obligations, and a designing, self-serving unilateral construction of [the interrogatories].” *Id.* Citing *Hunter*, a California court found that simultaneously calling a question ambiguous and then answering the question amounted to “deliberately misconstrue[ing] a question for the purpose of supplying an evasive answer.” *Deyo v. Kilbourne*, 84 Cal. App. 3d 771, 782 (1978).

Even if the term were not absolutely clear, “where the question is somewhat ambiguous, but the nature of the information sought is apparent, the proper solution is to provide an appropriate response.” *Deyo v. Kilbourne*, 84 Cal. App. 3d 771, 782 (1978). In other words,

consistent with I.R.C.P. 36(a), if Claimants in good-faith believed there is an important distinction between “exterior boundary” and “current boundary” they should have simply qualified their answer to make that clear rather than file an unnecessary objection. Accordingly, Claimants' objection should be overruled.

Further, Request for Admission No. 1 does not seek a pure legal conclusion or opinion. The Tribe is entitled to ask questions of fact or mixed questions of law and fact. I.R.C.P. 36(a). Whether or not the Tribe is the owner of submerged lands within the exterior boundaries of the Coeur d’Alene Reservation is a mixed question of law and fact. This question was conclusively determined by the Federal District Court for the District of Idaho in a section entitled “*Findings of Fact and Conclusions of Law.*” *Idaho II*, 95 F. Supp. 2d. at 1099-1116, *aff’d*, *Idaho v. United States*, 533 U.S. 262 (2001) (emphasis added). The question does not call for an admission or bare interpretation of the common law, a regulation, or a statute. *See, Pittsburg Hotels Ass’n v. Urban Redevelopment Authority of Pittsburg*, 29 F.R.D. 512 (W.D. Penn. 1962). Instead, the purpose of the question is to narrow the issues to be litigated in this subcase. *Boyd Truck Lines*, 11 F.R.D. at 70. If the Claimants plan on attempting to relitigate the district court’s findings of fact from *Idaho II* in the CSRBA the Tribe is entitled to know before summary judgment or trial. Therefore Claimants’ objection should be overruled.

REQUEST FOR ADMISSION NO. 2

Request for Admission No. 2 asked Claimants to “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. Aff. Counsel, Ex. 1, p. 3.

Claimants objected to the Tribe's second request for admission on the grounds that the request sought a legal conclusion or opinion "regarding who owns 'the bed and banks of Coeur d'Alene Lake and the St. Joe River within the current boundaries of the Coeur d'Alene Indian Reservation.'" *Id.*

Claimants went on to admit that "in [*Idaho II*], the court stated the following: '[t]he United States, as trustee, and the Coeur d'Alene Tribe of Idaho, as the beneficially interested party of the trusteeship, are 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 lying within the current boundaries of the Coeur d'Alene Indian Reservation.'" *Id.* Nonetheless, Claimants denied that the United States or the Tribe are entitled to the exclusive use, occupancy, and right to quiet enjoyment of the bed and banks at Claimants' point of diversion. *Id.*

Claimants did not answer the Tribe's request for admission. The request for admission did not concern the holding of *Idaho II* or ask whether the Tribe is entitled to the exclusive use, occupancy, or right to the quiet enjoyment of the bed and banks at Claimants' point of diversion. Claimants have failed to timely admit or expressly deny the Tribe's second request for admission and it should therefore be deemed admitted.

Request for Admission No. 2 does not seek a pure legal conclusion or opinion. The Tribe is entitled to ask questions of fact or mixed questions of law and fact. I.R.C.P. 36(a). Whether or not the Tribe is the owner of submerged lands within the exterior boundaries of the Coeur d'Alene Reservation is a mixed question of law and fact. This question was conclusively determined by the Federal District Court for the District of Idaho in a section entitled "*Findings of Fact and Conclusions of Law*." *Idaho II*, 95 F. Supp. 2d. at 1099-1116, *aff'd*, *Idaho v. United States*, 533 U.S. 262 (2001) (emphasis added). The question does not call for an admission or

bare interpretation of the common law, a regulation, or a statute. *See Pittsburg Hotels Ass'n v. Urban Redevelopment Authority of Pittsburg*, 29 F.R.D. 512 (W.D. Penn. 1962). Instead, the purpose of the question is to narrow the issues to be litigated in this subcase. *Boyd Truck Lines*, 11 F.R.D. at 70. If the Claimants plan on attempting to relitigate the district court's findings of fact from *Idaho II* in the CSRBA the Tribe is entitled to know before summary judgment or trial. Therefore Claimants' objection should be overruled.

REQUEST FOR ADMISSION NO. 3

The Tribe asked Claimants to 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. Aff. Counsel, Ex. 1, p. 3. Claimants objected to the Tribe's third request for admission on the grounds that the request sought a legal conclusion or opinion "regarding the State of Idaho's right, title or interest 'in or to the bed and banks of Coeur d'Alene Lake and the St. Joe River within the current boundaries of the Coeur d'Alene Indian Reservation.'" *Id.*

Claimants went on to admit that "in [*Idaho II*], the court stated the following: '[t]he 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 lying within the current boundaries of the Coeur d'Alene Indian Reservation.'" *Id.* Nonetheless, Claimants denied that the State of Idaho is permanently enjoined from asserting any right, title or interest in or to the bed and banks at Claimants' point of diversion. *Id.*

Claimants failed to answer the Tribe's request for admission. The request for admission did not concern the holding of *Idaho II* or ask whether the Idaho has any right, title, or interest at

Claimants' point of diversion. Claimants have failed to timely admit or expressly deny the Tribe's third request for admission and it should therefore be deemed admitted.

Request for Admission No. 3 does not seek a pure legal conclusion or opinion. The Tribe is entitled to ask questions of fact or mixed questions of law and fact. I.R.C.P. 36(a). Whether the Tribe or the State is the owner of submerged lands within the exterior boundaries of the Coeur d'Alene Reservation is a mixed question of law and fact. This question was conclusively determined by the Federal District Court for the District of Idaho in a section entitled "*Findings of Fact and Conclusions of Law*." *Idaho II*, 95 F. Supp. 2d. at 1099-1116, *aff'd*, *Idaho v. United States*, 533 U.S. 262 (2001) (emphasis added). The question does not call for an admission or bare interpretation of the common law, a regulation, or a statute. *See, Pittsburgh Hotels Ass'n v. Urban Redevelopment Authority of Pittsburgh*, 29 F.R.D. 512 (W.D. Penn. 1962). Instead, the purpose of the question is to narrow the issues to be litigated in this subcase. *Boyd Truck Lines*, 11 F.R.D. at 70. If the Claimants plan on attempting to relitigate the district court's findings of fact from *Idaho II* in the CSRBA the Tribe is entitled to know before summary judgment or trial. Therefore Claimants' objection should be overruled.

REQUEST FOR ADMISSION NO. 4

Request for Admission No. 4 asks Claimants to admit "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." Aff. Counsel, Ex. 1, p. 4. Claimants objected to the Tribe's request for admission on the grounds that the terms "inherent right," "non-members," and "tribally owned lands within the Coeur d'Alene Reservation" are vague. *Id.*

Claimants went on to admit that “in [*Idaho II*], the court stated the following: ‘[t]he United States, as trustee, and the Coeur d’Alene Tribe of Idaho, as the beneficially interested party of the trusteeship, are 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 lying within the current boundaries of the Coeur d’Alene Indian Reservation.’” *Id.* Nonetheless, Claimants denied that the Tribe has the right to exclude Claimants from their point of diversion. *Id.*

Once again, Claimants have failed to answer the Tribe’s request for admission. The request for admission did not concern the holding of *Idaho II* or ask whether the Idaho has any right, title, or interest at Claimants’ point of diversion. Claimants have failed to timely admit or expressly deny the Tribe’s fourth request for admission and it should therefore be deemed admitted.

Further, Claimants’ vagueness objection should be overruled. As before, Claimants provide no possible alternative readings of any of the terms, or otherwise explain why the terms are vague, and cite no precedent that would suggest the terms or similar terms are have been found to be vague. The term “right” should not have to be specifically defined because it is a term of common usage. The term “right” is defined in Black’s Law Dictionary to mean “[s]omething that is due to a person by just claim, legal guarantee, or moral principle.” BRYAN A. GARNER, BLACKS LAW DICTIONARY 623 (Pocket ed. 1996). In asking this question, the Tribe is simply asking Claimants to admit or deny the basic proposition that the Tribe has the legal ability, like any landowner, to exclude people from their land. The Tribe believes this definition to be straightforward and common and did not intend to use the term in any other way.

Similarly, the term “non-members of the Coeur d’Alene Tribe” is not an ambiguous term. The term simply refers to those people that are not members of the Coeur d’Alene Tribe. This is

no more ambiguous than referring to “non-citizens of the United States,” or “non-members of the Republican Party.” If you were to ask any person in the United States whether or not they were a member of the Coeur d’Alene Tribe they would be immediately able to tell you either yes or no. No one would ask what was meant by the term “member.”

The term “tribally owned lands” is also unambiguous. Simply put, the term refers to the lands owned by the Coeur d’Alene Tribe. This term is no more ambiguous than the term “state owned lands” or “federal lands.” In no way can the term be defined in any other manner and, in any case, the Tribe did not intend for it to mean anything other than its obvious definition. Accordingly, Claimants' objection should be overruled.

REQUEST FOR ADMISSION NO. 5

This request for admission asks Claimants to admit “the point of diversion for this claim is located within the exterior boundary of the Coeur d’Alene Indian Reservation.” Aff. Counsel, Ex. 1, p. 5. Claimants object to the Tribe’s request for admission on the grounds that the term “exterior boundaries of the Coeur d’Alene Indian Reservation” is vague. *Id.* Despite the alleged ambiguity of request for admission No. 5, Claimants went on to admit that “the point of diversion for this claim is located within the current boundary of the Coeur d’Alene Indian Reservation.” *Id.* Nonetheless, Claimants denied that the United States or the Tribe own the submerged lands at Claimants' point of diversion. *Id.*

Claimants' vagueness objection should be overruled. Claimants expressly admit they are within the “current boundary of the Coeur d’Alene Indian Reservation.” By not specifying as to time (i.e. the 1873 boundary or the 1887 boundary) the Tribe believes it perfectly clear that it meant the “current” exterior boundary of the Reservation. Once again, even if the term were not

absolutely clear, “where the question is somewhat ambiguous, but the nature of the information sought is apparent, the proper solution is to provide an appropriate response.” *Kilbourne*, 84 Cal. App. 3d at 782. In other words, rather than lodge an objection and force the parties to seek relief from the court, the proper solution is to qualify the admission by clarifying that the Claimants admits he is within the *current* exterior boundary of the Reservation. Accordingly, Claimants' objection should be overruled and the matter should be deemed admitted.

REQUEST FOR ADMISSION NO. 6

Request for Admission No. 6 asked Claimants “[p]lease admit that the presumed OHWM for Coeur d’Alene Lake and the St. Joe River is 2128 feet above sea level”. Aff. Counsel, Ex. 1, p. 5. Claimants object to the Tribe’s request for admission on the grounds that the term “presumed OHWM” is vague and without temporal context. *Id.* Claimants admitted that “in *City of Coeur d’Alene v. Mackin (In re Ownership of Sanders Beach)*, the court stated the following: ‘[t]he current OHWM of the Lake is 2128 feet’ and ‘the OHWM of Lake Coeur d’Alene has been 2128 feet since 1907.’ 143 Idaho 443, 447, 147 P.3d 75, 79 (2006) (citing *Erickson v. State*, 132 Idaho 208, 211, 970 P.2d 1, 4 (1998)); *Id.* at 451, 83.” *Id.* However, Claimants went onto deny that “the historic OHWM or the natural high water mark for Coeur d’Alene Lake and the St. Joe River is or has always been 2128 feet.” *Id.*

Claimants' vagueness objection should be overruled because the term “ordinary high water mark or OHWM” was specifically defined in the definitions section provided to Claimants as “the presumed Ordinary High Water Mark of Coeur d’Alene Lake and the St. Joe River of 2128 feet consistent with the holding of *In re Sanders Beach*, 143 Idaho 443 (2008). Aff. Counsel, Ex. 5, p. 4. The term “elevation was defined to mean “the elevation in feet above mean

sea level.” *Id.* As such, the term “OHWM” unambiguously is defined to mean 2128 feet above mean sea level. The Tribe did not include temporal context because none is necessary; the Tribe simply asks the Claimants to either admit or deny that the ordinary high water mark is 2128 feet. Although Claimants may deny that fact, they certainly cannot argue that the term “OHWM” as defined in this case is ambiguous. Accordingly, the Court should overrule Claimants’ objection and allow the admission and denial provided to stand on its own.

REQUEST FOR ADMISSION NO. 7

Request for Admission No. 7 asks Claimants to admit that “the point of diversion and/or some or all of the diversion works at issue in the above-encaptioned matter is below the presumed OHWM of the St. Joe River”. Aff. Counsel, Ex. 1, p. 5. Claimants objected to the Tribe’s request for admission on the grounds that the term “presumed OHWM” is vague and without temporal context. *Id.* Claimants admitted that “in *City of Coeur d’Alene v. Mackin (In re Ownership of Sanders Beach)*, the court stated the following: ‘[t]he current OHWM of the Lake is 2128 feet’ and ‘the OHWM of Lake Coeur d’Alene has been 2128 feet since 1907.’ 143 Idaho 443, 447, 147 P.3d 75, 79 (2006) (citing *Erickson v. State*, 132 Idaho 208, 211, 970 P.2d 1, 4 (1998)); *Id.* at 451, 83.” *Id.* However, Claimants went onto deny that “the point of diversion and/or some or all of the diversion works at issue in this claim are below the applicable natural or ordinary high water mark.” *Id.*

Claimants’ vagueness objection should be overruled because the term “ordinary high water mark or OHWM” was specifically defined in the definitions section provided to Claimants as “the presumed Ordinary High Water Mark of Coeur d’Alene Lake and the St. Joe River of 2128 feet consistent with the holding of *In re Sanders Beach*, 143 Idaho 443 (2008). Aff.

Counsel, Ex. 5, p. 4. The term “elevation was defined to mean “the elevation in feet above mean sea level.” *Id.* As such, the term “OHWM” unambiguously is defined to mean 2128 feet above mean sea level. The Tribe did not include temporal context because none is necessary.

Regardless of whether we are talking about 1873, 1891, 1907, or 2016, the defined OHWM is 2128 feet above mean sea level. The Request for Admission simply asks whether the point of diversion and/or some or all of the diversion works at issue in this subcase are below an elevation of 2128 feet. This is not ambiguous and therefore, Claimants' objections should be overruled and, to the extent Claimants failed to admit or deny, the matter should be deemed admitted.

REQUEST FOR ADMISSION NO. 8

Request for Admission No. 8 asks Claimants to admit “that the waters overlying the bed and banks at the location of Claimant(s)[’] water diversion point are navigable.” *Id.* Claimants objected to the Tribe’s request for admission on the grounds that the term “navigable” is vague. *Id.* Claimants also objected on the grounds that the request sought a legal conclusion or opinion on “whether ‘the waters overlying the bed and banks at the location of Claimants’ water diversion point are navigable.’” *Id.* Nonetheless, Claimants admitted that “said waters are ‘navigable’ according to Claimants’ understanding of the definition in Idaho Code Section 36-1601 and the definition in 33 U.S.C. § 1362.” *Id.*

Claimants' vagueness objection should be overruled because the term “navigable” is not vague. If the Tribe were using the term “navigable” in a manner outside of the common usage—a stream that can be navigated by boat—it would have specified as such. The Tribe does not ascribe any special or more particular meaning to the term and does not believe that

additional definition is necessary in order for Claimants to understand what the Tribe means by “navigable.” Pictures in Claimants' backfile¹ show boats docked next to Claimants' point of diversion. The maps generated by IDWR for the Claimants' claim unambiguously show boats and docks immediately adjacent to Claimants' point of diversion. Rather than lodge an objection Claimants should qualify their answer to make clear their understanding of the term and then either admit or deny on that basis. Accordingly, the objection on vagueness grounds should be overruled.

Similarly, Claimants' objection that this request for admission seeks a legal conclusion or opinion should be overruled. Once again, the Tribe seeks to know, as a matter of fact, whether the water overlying Claimants' point of diversion is navigable—whether a boat can navigate over that section of water. The Tribe did not ask Claimants for their interpretation of any statutes including, but not limited to, I.C. § 36-1601 and 33 U.S.C. § 1362. Even if the Tribe sought an admission regarding whether the water overlying Claimants' point of diversion is navigable pursuant to a statute or common law, that request for admission would be a mixed question of law and fact, which is permissible under I.R.C.P. 36. Under that circumstance the Tribe would not seek an opinion regarding the common law, a regulation, or a statute but would instead seek to understand Claimants' understanding of how the law relates to Claimants' specific point of diversion. *See Pittsburgh Hotels Ass'n v. Urban Redevelopment Authority of Pittsburgh*, 29 F.R.D. 512 (W.D. Penn. 1962). Once again, a primary purpose of requests for admission is to narrow the issues to be litigated. The Tribe needs to know whether the navigability of the water at Claimants' point of diversion is an issue that needs to be litigated so that it can adequately

¹ The Tribe requests pursuant to IRE 201 that the court take judicial notice of the contents of IDWR's backfiles for the above noted subcases, 91-7102 and 91-7173.

prepare. Accordingly, the objection should be overruled and the Claimants' should be directed to answer the question.

REQUEST FOR ADMISSION NO. 10

Request for Admission No. 10 asks Claimants to admit that they “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.” Aff. Counsel, Ex. 1, p. 7. Claimants objected to the Tribe’s request for admission on the grounds that the term “permission to encroach upon the submerged lands of the St. Joe River” is vague. *Id.* Claimants also objected on the grounds that the request sought a legal conclusion or opinion on “who owns the ‘submerged lands of the St. Joe River.’” *Id.*

Nonetheless, Claimants admitted that “they did not have a permit from either the United States or the Coeur d’Alene Tribe to encroach upon the submerged lands of the St. Joe River at the time the diversion works were constructed for this claim.” *Id.* Claimants denied, however, “that the United States or the Coeur d’Alene Tribe owns the land upon which the diversion works may have been constructed and further deny that any such permission was needed.”

Claimants' vagueness objection should be overruled because the term “permission to encroach upon the submerged lands of the St. Joe River” is not vague. None of the words in this phrase were used by the Tribe in a manner inconsistent with their plain meaning. The phrase clearly asks the simple question of whether the Claimants have ever sought and received authorization from either the Tribe or the United States to have their diversion works on the St. Joe River. Claimants do not explain why the term is vague, provide no possible alternative readings of the allegedly vague term, and cite no precedent that would suggest the term or

similar terms have been found to be vague. Claimants may believe that they do not need any permission but if that is the case the proper path forward would be to qualify the answer rather than lodge an unnecessary objection.

In fact, Claimants did qualify their answer to clarify that while they have not received permission to encroach, they do not believe permission is necessary. In other words, Claimants once again have objected that a question is too vague to answer and then go on to answer the question. This conclusively shows that the question is in no way vague or ambiguous and instead Claimants are “deliberately misconstruing” the question. *Hunter*, 56 F.R.D. at 625. Even if it were somewhat unclear, “but the nature of the information sought is apparent, the proper solution is to provide an appropriate response.” *Id.* Accordingly, the objection should be overruled.

Similarly, Claimants' objection that this request for admission seeks a legal conclusion or opinion should be overruled. The plain language of the question in no way asks the Claimants to opine as to who owns the submerged lands at Claimants' point of diversion. Instead it asks a simple question of fact, whether they have received permission to have their works located at their point of diversion. To the degree Claimants believe this question may imply an issue of ownership, they should qualify their answer to clarify that while they have not received permission they deny such permission is necessary. Accordingly, the objection should be overruled and the answer should be allowed to stand on its own.

REQUEST FOR ADMISSION NO. 11

Request for Admission No. 10 asks Claimants to 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." Aff. Counsel, Ex. 1, p. 7.

Claimants objected to the Tribe's request for admission on the grounds that the term

"permission to encroach upon the submerged lands of the St. Joe River" is vague. *Id.*

Claimants also objected on the grounds that the request was vague as to time. *Id.* Claimants

also objected on the grounds that the request sought a legal conclusion or opinion on "who owns the 'submerged lands of the St. Joe River.'" *Id.* Nonetheless, Claimants admitted that

"they have never received a permit from either the United States or the Coeur d'Alene Tribe to encroach upon the submerged lands of the St. Joe River." *Id.* at 8. Claimants denied, however,

"that the United States or the Coeur d'Alene Tribe owns the land upon which the diversion works may have been constructed and further deny that any such permission was needed."

Claimants' vagueness objection should be overruled because the term "permission to encroach upon the submerged lands of the St. Joe River" is not vague. None of the words in this phrase were used by the Tribe in a manner inconsistent with their plain meaning. The phrase clearly asks the simple question of whether the Claimants have ever sought and received authorization from either the Tribe or the United States to have their diversion works on the St. Joe River. As before, Claimants provide no possible alternative readings of the allegedly vague term, or otherwise suggest why it is vague, and cite no precedent that would suggest the term or similar terms are have been found to be vague. Claimants may believe that they do not need any permission but if that is the case the proper path forward would be to qualify the answer rather than lodge an unnecessary objection.

In fact, Claimants did qualify their answer to clarify that while they have never received permission to encroach, they deny permission is necessary. In other words, Claimants once

again have objected that a question is too vague to answer and then go onto answer the question. This conclusively shows that the question is in no way vague or ambiguous and instead Claimants are “deliberately misconstruing” the question. *Hunter*, 56 F.R.D. at 625. Even if it were somewhat unclear, “but the nature of the information sought is apparent, the proper solution is to provide an appropriate response.” *Id.* Accordingly, the objection should be overruled.

Nor is the question vague as to time. The question clearly delineates the timeframe of the question to be from the time Claimants initially began diverting water to the present. Further the Tribe expressly defined the time period of its discovery requests as “[u]nless otherwise indicated, these discovery requests apply to the time period from the priority date of the claim at issue . . . to the present time.” Aff. Counsel, Ex. 5. Claimants' priority date for 91-17102 dates to 1988 and for 91-7173 to 2008. The question simply asks whether, since 1988 or 2008, Claimants have applied for and received permission from the United States or Tribe to have their point of diversion upon the submerged lands of the St. Joe River. Claimants should know whether this is the case or not. As such, Claimants' objection to vagueness of time should be overruled.

Similarly, Claimants' objection that this request for admission seeks a legal conclusion or opinion should be overruled. The plain language of the question in no way asks Claimants to opine as to who owns the submerged lands at Claimants' point of diversion. Instead it asks a simple question of fact, whether they have ever received permission to have their works located at their point of diversion. To the degree Claimants believes this question may imply an issue of ownership, they should qualify their answer to clarify that while they have not received permission they deny such permission is necessary. Accordingly, the objection should be overruled and the answer should be allowed to stand on its own.

REQUEST FOR ADMISSION NO. 13

Request for Admission No. 13 asks Claimants to admit that “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.” Aff. Counsel, Ex. 1, p. 8. Claimants objected to the Tribe’s request for admission on the grounds that the terms “right” and “purpose of maintaining” are vague. *Id.* Claimants also objected on the grounds that the request sought a legal conclusion or opinion on “who owns the land at Claimants’ point of diversion and the rights of Claimants to their diversion works.” *Id.* Claimants went on to deny request for admission no. 13 “including any assertion that the Coeur d’Alene Tribe owns the land at Claimants’ point of diversion. *Id.* at 9.

Claimants’ vagueness objection should be overruled. Claimants do not explain why the term is vague, provide no possible alternative readings of the allegedly vague terms, and cite no precedent that would suggest the terms or similar terms have been found to be vague. The term “right” should not have to be specifically defined because it is a term of common usage. Right is defined in Black’s Law Dictionary to mean “[s]omething that is due to a person by just claim, legal guarantee, or moral principle.” BRYAN A. GARNER, BLACKS LAW DICTIONARY 623 (Pocket ed. 1996). The Tribe believes this definition to be clear and common and did not intend to use the term in any other way. Similarly, the phrase “purpose of maintaining” is not vague. By “maintain” the Tribe means to conduct maintenance on Claimants’ diversion works. This would include things like repairs and routine maintenance of Claimants’ pump, conduit, and other equipment that is part of the diversion works. All of these actions clearly, unambiguously,

and accurately fall under the more general term of “maintaining.” The terms “right” or “purpose of maintaining” are not vague and therefore Claimants' objections should be overruled.

Likewise, Claimants' objection that this request for admission seeks a legal conclusion or opinion should be overruled. The plain language of the question in no way asks the Claimants to opine as to who owns the submerged lands at Claimants' point of diversion. Instead, the question simply asks whether Claimants believe they have some right to enter lands owned by the Coeur d'Alene Tribe as a general matter. Again, the purpose of these questions is to narrow the scope of issues to be litigated and the Tribe has a right to know if Claimants plan to assert some right to be on tribal lands in litigation so that it can prepare to address that issue. To the degree Claimants believe this question may imply an issue of ownership, they should qualify their answer rather than lodge an unnecessary objection. Accordingly, Claimants' objection should be overruled.

CONCLUSION

For the foregoing reasons, the Tribe requests this Court overrule Claimants' objections to the Tribe's discovery requests and to order certain matters admitted, and, where necessary, to further compel Claimants to fully and fairly respond to the Tribe's discovery requests.

Respectfully submitted this 15th day of April, 2016.

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Certificate of Service

I hereby certify that on the 16th day of April, 2016, a copy of the foregoing Motion to Compel and to Determine Adequacy of Answers or Objections was served on the following counsel of record and other entities via the method indicated below:

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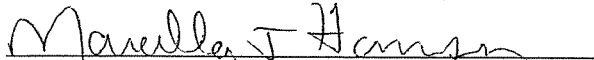
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