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

In re CSRBA

Case No. 49576

Steve and Deanne Hawks,

Claimants,

vs.

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

Objector.

Subcase No. 91-7102; 91-7173

**CLAIMANTS' RESPONSE TO
OBJECTOR'S MOTION TO COMPEL**

Claimants Steve and Deanne Hawks (collectively "Claimants"), by and through their counsel of record, hereby respond to the Coeur d'Alene Tribe's ("Objector") Motion to Compel.

Claimants responded to all Interrogatories and Requests for Production consistent with the discovery rules and properly objected where Objector filed deficient discovery requests. Accordingly,

Objector's Motion to Compel should be denied.

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DEPARTMENT OF
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I. ARGUMENT

A. This Motion Should Be Denied Because Objector Has Not Engaged in a True Meet and Confer to Resolve These Disputes.

Under Idaho Rule of Civil Procedure 37(a), before a motion to compel may be filed, the parties must meet and confer regarding the discovery responses at issue. Rule 37(a)(2) states, “[t]he motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.” Objector did not comply with this rule.

Objector served Claimants with *Objector’s First Requests for Discovery to Claimants* in Subcase Nos. 91-7102 and 91-7173 on February 5, 2016. Affidavit of Sarah McCormack (“Aff. McCormack”) Ex. A. Claimants provided Objector with timely responses in *Claimants Steve and Deanne Hawks’ Responses to Objector’s First Requests for Discovery* for Subcase Nos. 91-7102 and 91-7173 (the “First Responses”) on March 7, 2016. *Id.*, Ex. C. On March 15, 2016, counsel for Claimants participated in a conference call regarding the discovery responses from other claimants, Jack and Nancy Buell, in *Claimant(s) Buells’ Response to Objector’s First Request for Discovery* for Subcase No. 92-07226, served on March 4, 2016. *Id.*, ¶ 5; Ex. B. Included on the call was counsel for Claimants, joint counsel for the Buells and counsel for Objector. *Id.*, ¶ 5. During the conference call, Objector explained its concerns to counsel, request by request. *Id.*

The parties scheduled a follow-up call for March 21, 2016, to give time for Claimants to develop a plan to address Objector’s concerns. *Id.*, ¶ 7. Counsel for Objector sent a follow-up e-mail on March 15, 2016, confirming the agreement between the parties. *Id.*, ¶ 8. The only time counsel for Objector mentioned concern regarding the discovery requests for Claimants was in that e-mail, as follows, “[w]hile the discussion focused on the specific answers to the Buell matter, the

theme of our concerns of deficiency run consistent throughout the discovery we received for all the encroachment cases.” *Id.*, Ex. D.

During the conference call on March 21, 2016, Claimants agreed to provide amended responses to Objector’s discovery requests, in accordance with the concerns explained by Objector for the responses by Jack and Nancy Buell in Subcase No. 92-07226. *Id.*, ¶ 9. Claimants served *Claimants Steve and Deanne Hawks’ Amended Responses to Objector’s First Requests for Discovery Requests* for Subcase Nos. 91-7102 and 91-7173 (the “Amended Responses”) on March 28, 2016. *Id.*, Ex. E. As Objector has noted, the First Responses “are significantly different” than the Amended Responses. Objector’s Memorandum in Support of Motion to Compel (“Objector’s Mem. Supp. Mot. to Compel”) at 2. Nevertheless, Objector has been silent regarding Claimants’ Amended Responses until it served Claimants with *Objector’s Motion to Compel* and *Objector’s Memorandum in Support of its Motion to Compel* on April 16, 2016. Objector made no attempt to confer regarding the Amended Responses provided by Claimants. Counsel for Objector did not contact counsel for Claimants by telephone, e-mail, fax or regular mail, nor in any other manner, to explain its concerns with Claimants’ Amended Responses or to let counsel for Claimants know that the Amended Responses were not sufficient.

Objector seems to rely on the March 15 conference call as fulfilling the meet and confer requirement under Idaho Rule of Civil Procedure 37(a)(2). However, there are two problems with this. First, the topic of the March 15 conference call primarily addressed the responses from Jack and Nancy Buell, not Claimants. *Aff. McCormack* ¶ 5. Although the responses for the Buells and Claimants are similar, there was no clear explanation by Objector of the specific concerns with Claimants’ First Responses. In fact, counsel for Objector made no attempt to meet and confer regarding Claimants First Responses.

Second, even if the March 15 conference call was sufficient as a meet and confer for Claimants' First Responses, counsel for Objector has not met and conferred with counsel for Claimants regarding the Amended Responses. Claimants intentionally addressed Objector's concerns, expressed regarding the Buell responses, in their Amended Responses and drafted verbose, explanatory and qualified responses to Objector's discovery requests in order to meet Objector's expectations. Objector even admitted that the First Responses are "significantly different" than the Amended Responses. Objector's Mem. Supp. Mot. to Compel at 2. Despite this, Objector somehow did not find it necessary to attempt to resolve its concerns with Claimants regarding the Amended Responses prior to approaching the Special Master with this Motion. In fact, there was absolutely no attempt to resolve the issues in the Amended Responses informally. Therefore, Objector violated the rule requiring it to meet and confer with Claimants and caused Claimants and this Court to incur unnecessary and wasteful expense.

Objector's concern with the response for Interrogatory No. 7 provides a pertinent example of the consequence of Objector's failure to meet and confer with Claimants regarding their responses. During the March 15 conference call, Objector did not address any of the issues described in its Motion to Compel regarding the Buells' response for Interrogatory No. 7. *Aff. McCormack ¶ 5.* In fact, counsel for Objector informed counsel for Claimants that he found the Buells' licensing file online and reviewed the documents. *Id.* Consequently, under the assumption Claimants were required to make that Objector felt similarly regarding Claimants' response to Interrogatory No. 7, Claimants did very little to amend their response to Interrogatory No. 7 in its Amended Responses. *Compare* Claimants' Resp. to Objector's Interrog. No. 7 *with* Claimants' Am. Resp. to Objector's Interrog. No. 7. Now, to Claimants' surprise, Objector asserts that Claimants' response to Interrogatory No. 7 is not sufficient. These kinds of issues are meant to be addressed informally

among the parties. If Objector would have met its obligation to meet and confer with Claimants, this issue could have been addressed and resolved. However, Objector chose to ignore its obligation, thereby violating Rule 37(a) and unnecessarily bringing discovery issues before the Special Master.

B. Objector Is Not Entitled to Discovery Responses That Seek a Legal Conclusion.

Under Idaho Rule of Civil Procedure 33(b), “[i]nterrogatories may relate to any matters which can be inquired into under Rule 26(b).” The foundational element of the scope of allowable discovery is that it must be “relevant to the subject matter involved in the pending action.” IDAHO R. CIV. P. 26(b)(1). Relevant means “having any tendency to make the existence of any **fact** that is of consequence to the determination of the action more probable or less probable” See IDAHO R. EVID. 401 (emphasis added). Although a party may discover “an opinion or contention that relates to **fact** or the application of law to **fact**,” IDAHO R. CIV. P. 33(b) (emphasis added), discovery is not a fishing expedition meant to require a party to admit or provide legal conclusions meant to be addressed during trial.

Objector argues that neither Interrogatory Nos. 4 nor 8 seeks a legal conclusion.¹ Objector’s Mem. Supp. Mot. to Compel at 12, 16. However, this simply is not true. The questions in both Interrogatory Nos. 4 and 8 require Claimants to make a legal conclusion regarding the ownership of submerged lands of the St. Joe River and submerged lands underlying their point of diversion. This is not a question of fact. The issue of ownership of submerged lands of the St. Joe River and Lake Coeur d’Alene has been extensively litigated in the court systems. It is clear that Objector is not attempting to discover an opinion or contention that relates to fact or the application of law to fact, as Rule 33(b) permits, but is attempting to require Claimants to assume and describe a

¹ Claimants note that during the March 15 conference call, counsel for Objector admitted that some of the Interrogatories, specifically Interrogatory Nos. 8, 9, 12, 13, 14 and 15, sought a legal conclusion and offered to consider amending those requests or, alternatively, offered that Claimants should provide qualified answers. However, during the March 21 conference call, counsel for Objector reneged on his earlier offer to amend the requests and insisted that Claimants provide qualified answers, which is what Claimants did in their Amended Responses. Aff. McCormack ¶ 6.

legal conclusion that the United States or Objector owns the submerged lands. Objector even quotes direct language from relevant case law in its discovery requests. In doing so, Objector is attempting to introduce certain legal conclusions through forced admissions in discovery rather than litigate them during trial. Claimants have their own legal conclusions and arguments on the issue of ownership of submerged lands, but are not required to use their discovery responses to provide Objector with those legal arguments.

Despite the fact that Claimants objected to these interrogatories on the basis that they seek a legal conclusion, Claimants still answered all interrogatories with qualified answers for the benefit of Objector. Objector acts as if, by objecting, Claimants failed to answer the interrogatories. However, there is a difference between objecting to an interrogatory and not answering an interrogatory. The objections do not form the basis for the answer, but preserve issues to be decided during trial. Here, Claimants simply objected to the interrogatory to preserve its objection to the information requested, but still answered in a qualified manner. It does not matter that Objector does not like the answers provided by Claimants. If Claimants answered the requests, which they did, there is no deficiency.

C. Objections Based on Vagueness Are Adequately Explained and Claimants Were Responsive Despite Objections.

Although Objector finds issue with Claimants' objections to the vagueness of its discovery requests, Claimants note that none of Objector's discovery responses were objected to solely on the basis of vagueness. In addition, none of the discovery requests were unanswered because they contained vague language. Idaho Rule of Civil Procedure 33(a)(2) states that "[e]ach interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer." Not only did Claimants specify which phrases and language were vague, but Claimants also answered every interrogatory

and request for production regardless of the objections. Claimants objected on the basis of vagueness to preserve its objection to the language used, yet still answered in a qualified manner in order to be responsive. Again, if Claimants answered the requests, which they did, there is no deficiency.

Furthermore, the nature of the requests themselves demonstrate an adequate basis for these objections. For example, in Interrogatory No. 4, the question is framed in the context of the time “before installing the diversionary works.” Objector’s Mem. Supp. Mot. to Compel at 11. Objector assumes this is clear. However, Objector does not account for the long stretch of time that existed before diversionary works were installed and the possibility of multiple diversionary works installations at different times and by different people. It is not readily available to Claimants what Objector wanted and Claimants are thus entitled to object to language in the discovery request on the basis of vagueness. Despite Objector’s assertion, there is nothing in the rules that require Claimants to provide legal authority that “any court, executive, or administrative body ever having held such term to be vague.” *See id.* Claimants described the language they felt was vague, but still answered accordingly. Once more, Objector seems to ignore the fact that Claimants answered the discovery requests despite objections to the language used.

Specifically regarding Interrogatory No. 1 and Request for Production No. 1, Claimants answered, explained and provided requested documents that were in their possession and control despite the objections made within its responses. In addition, Objector served Claimants with *Objector’s Second Requests for Discovery to Claimants* for both Subcase Nos. 91-7102 and 91-7173 on April 13, 2016, and subsequent to the filing of this Motion, deposed Claimants on May 2, 2016. *See* Aff. McCormack ¶ 11. These multiple discovery methods have given Objector ample opportunity to request and receive information and documents from Claimants through less vague questions and requests. In light of the discovery produced and soon to be produced, Objector’s

motion to compel is excessive, especially since Claimants have been responsive even despite their objections.

D. Incorrect Verification of Interrogatories Does Not Justify a Motion to Compel.

Objector argues over and over again that Claimants failed to correctly verify their responses to Interrogatories. However, this is not a justification under Idaho Rule of Civil Procedure 37(a) to file a motion to compel. Rule 37(a)(1) provides that a party may move for an order compelling discovery when a party does not answer the discovery requests. As has been stated, it is clear that Claimants responded to Objector's discovery requests according to the rules.

If Objector would have expressed its overwhelming concern regarding the verification before this Motion to Compel, Claimants could have remedied the issue prior to the Motion. Given the concern expressed by Objector in its motion, counsel for Claimants have obtained formal verification from Claimants and served them on Objector and the parties. Aff. McCormack Ex. F.

E. Objector is Not Entitled to Attorney's Fees and Costs, but Claimants Are Entitled to Attorney's Fees and Costs if This Motion Is Denied.

Idaho Rule of Civil Procedure 37(a)(4) provides;

If the motion [compelling discovery] is granted, the court shall, after opportunity for a hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, *unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.*

(emphasis added). Here, Claimants' opposition to this motion is substantially justified by the fact that Objector has violated the meet and confer rule under Rule 37(a)(2). Objector made no effort, whatsoever, to consult Claimants specifically regarding their First Responses and entirely regarding their Amended Responses. In doing so, Objector did not meet the threshold requirement to bring this Motion to Compel and therefore, cannot be awarded any fees or costs by this Motion.

Rule 37(a)(4) also provides;

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

It is clear that Objector could have addressed its concerns before filing this Motion to Compel and that the making of this motion was not substantially justified. First, Objector ignored its obligation to meet and confer with counsel for Claimants regarding their responses. Second, Objector is not entitled to discovery requests that seek legal conclusions or to require Claimants to admit legal conclusions that will be addressed during trial. Third, Claimants adequately explained objections for vagueness and still responded despite the vague language. Finally, improper verification is not a basis for a motion to compel. Therefore, this Motion to Compel should be denied and the Court should award attorney's fees and costs to Claimants.

DATED this 4th day of May, 2016.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS,
CHARTERED

By  for Norman Semanko
Norman M. Semanko – Of the Firm
Attorneys for Claimant
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of May, 2016, I caused a true and correct copy of the foregoing **CLAIMANTS' RESPONSE TO OBJECTOR'S MOTION TO COMPEL** to be served by the method indicated below, and addressed to the following:

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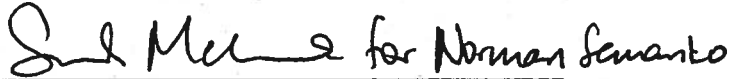
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