

Norman M. Semanko, ISB No. 4761
Sarah A. McCormack, ISB No. 9683
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
nms@moffatt.com
sam@moffatt.com
26002.0001

COPY

RECEIVED
MAY 05 2016
DEPARTMENT OF
WATER RESOURCES

Attorneys for Claimants Steve and Deanne Hawks

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

Subcase No. 91-7102; 91-7173

**CLAIMANTS' RESPONSE TO
OBJECTOR'S MOTION TO
DETERMINE SUFFICIENCY OF
OBJECTIONS AND TO DEEM
CERTAIN MATTERS ADMITTED**

Steve and Deanne Hawks,

Claimants,

vs.

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

Objector.

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
Determine Sufficiency of Objections and to Deem Certain Matters Admitted. Claimants

responded to all Requests for Admission consistent with the discovery rules and properly objected where Objector filed deficient discovery requests. Accordingly, *Objector's Motion to Determine Sufficiency of Objections and to Deem Certain Matters Admitted* should be denied.

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 Objecter of the specific concerns with Claimants' First Responses. In fact, counsel for Objecter 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 Objecter has not met and conferred with counsel for Claimants regarding the Amended Responses. Claimants intentionally addressed Objecter's concerns, expressed regarding the Buell responses, in their Amended Responses and drafted verbose, explanatory and qualified responses to Objecter's discovery requests in order to meet Objecter's expectations. Objecter even admitted that the First Responses are "significantly different" than the Amended Responses. Objecter's Mem. Supp. Mot. to Compel at 2. Despite this, Objecter 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, Objecter violated the rule requiring it to meet and confer with Claimants and caused Claimants and this Court to incur unnecessary and wasteful expense.

B. Despite Objections Made, Claimants Answered All Requests for Admission with Clear Admissions or Denials.

Idaho Rule of Civil Procedure 36(a) provides:

The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify the answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder.

Despite the fact that Claimants objected to the Requests for Admission, Claimants still answered all Requests for Admission with a denial or a qualified admission. Objecter acts

as if, by objecting, Claimants have failed to answer the Requests for Admission. However, there is a difference between objecting to a request for admission and not answering a request for admission. The objections do not form the basis for the answer, but preserve issues to be decided during trial. Here, Claimants simply objected to the Requests for Admission to preserve their objection to the information requested or the language used. However, despite those objections, Claimants still answered in a qualified manner.

It does not matter that Objector does not like the answers provided by Claimants. Objector cannot compel Claimants to answer in a manner that they would prefer. Objector's Motion requests that certain matters be deemed admitted. However, this is not contemplated by the rules when a party has answered those requests for admission. If Claimants answered the requests, which they did here, there is no deficiency and the Court cannot compel Claimants to answer differently.

C. Objector Is Not Entitled to Admissions That Seek a Legal Conclusion.

Under Idaho Rule of Civil Procedure 36(a), “[a] party may serve upon any other party a written request for the admission, for the purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or the application of law to fact, including the genuineness of any documents described in the request.” The foundational element of the scope of allowable discovery is that it must be “relevant to the subject matter involved in the pending action.” I.R.C.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 I.R.E. 401 (emphasis added). Thus, discovery is not a fishing expedition meant to require a party to admit or provide legal conclusions intended to be addressed during trial.

Objector argues that none of its Requests for Admission seek legal conclusions. *See* Objector's Memorandum in Support of Motion to Determine Sufficiency and Deem Certain Matters Admitted ("Objector's Mem. Supp. Mot. to Determine Sufficiency and Deem Certain Matters Admitted"). However, this simply is not true. Request for Admission Nos. 1, 2, 3, 10 and 11 require Claimants to make legal conclusions regarding the ownership of submerged lands of the St. Joe River, submerged lands of Lake Coeur d'Alene and submerged lands underlying their point of diversion. Request for Admission Nos. 4 and 13 require Claimants to make legal conclusions regarding the property rights of Objector. Request for Admission Nos. 6 and 7 require Claimants to make legal conclusions regarding the Ordinary High Water Mark ("OHWM") of the St. Joe River and Lake Coeur d'Alene. These are not questions of fact. These issues have been extensively litigated in the court systems and implicate multiple legal authorities and concepts that will eventually form the basis of the issues in the upcoming trial on these subcases. 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. Instead, Objector is attempting to require Claimants to assume and describe legal conclusions that the United States or Objector owns certain submerged lands, that Objector's property rights are being violated by Claimants' actions and that the OHWM of the St. Joe River and Lake Coeur d'Alene is 2128. Objector even quotes direct language from relevant case law and legal authorities in its Requests for Admission. In doing so, Objector is endeavoring to introduce certain legal conclusions through forced admissions in discovery rather than to litigate them during trial.

Objector claims that "[i]f 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." Objector's Mem. Supp. Mot. to Determine Sufficiency and Deem

Certain Matters Admitted at 11. This assertion is a misstatement of the rules. It is clear from Idaho Rule of Civil Procedure 36(a) that Objector is only “entitled” to responses which reveal statements of fact or the application of law to fact, not to admissions that Objector’s interpretation of legal conclusions is correct. Claimants do have their own legal conclusions and arguments on the issues of the ownership of submerged lands, Objector’s property rights and the OHWM of the St. Joe River and Lake Coeur d’Alene. However, they are not required to use their discovery responses to provide Objector with those legal arguments.

Objector accuses Claimants of “linguistic gymnastics” in providing qualified answers to the Requests for Admission that seek legal conclusions. Objector’s Mem. Supp. Mot. to Determine Sufficiency and Deem Certain Matters Admitted at 7. Objector cites to an obscure district court case from Missouri to assert that Claimants were “asserting an interrogatory was ambiguous but . . . went on to imply that they knew the answer to that interrogatory.” *Id.*; see *Hunter v. Int’l Sys. & Controls Corp.*, 56 F.R.D. 617 (W.D. Mo. 1972). However, this case is not applicable. First, in *Hunter* the court dealt with interrogatories specifically requesting a list of customers. *Id.* at 623. This is distinguishable from the issue at hand because Objector cites this in the context of responses to requests for admission. The standard and procedure for responses to requests for admission are undoubtedly different for interrogatories. Second, the plaintiff in *Hunter* asked for factual responses from defendant regarding names and details of defendant’s customers and defendant evaded answers to the factual questions. *Id.* at 624. This is also distinguishable from the issue at hand because Objector is asking for responses to requests for admission regarding legal conclusions found in cases, not factual information.

In reality, rather than evade the Requests for Admission, Claimants intentionally admitted that the cases, which matched the language used by Objector in its requests, say what

they say. Claimants went so far as to actually quote the language Objector referred to in order to make it clear that Claimants were admitting the language of the cases. However, Claimants denied those Requests for Admission because Claimants do not agree that the cases or language of the cases apply in this situation or agree that the cases stand for the legal conclusions Objector is assuming. Claimants are permitted to object and provide a qualified answer without being compelled to admit the very request they denied.

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

Although Objector finds issue with Claimants' objections to the vagueness of the discovery requests, Claimants note that none of the discovery requests were unanswered because they contained vague language. Idaho Rule of Civil Procedure 36(a) states that "[i]f objection is made [to a request for admission], the reasons thereof shall be stated." Not only did Claimants specify which phrases and language were vague, but Claimants also answered every Request for Admission with an admission, denial or qualified admission, 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 both Request for Admission Nos. 5 and 8, Objector used undefined terms, "exterior boundary" and "navigable," which created ambiguity for Claimants. Objector's Mem. Supp. Mot. to Determine Sufficiency and Deem Certain Matters Admitted at 13, 16. Objector assumes Claimants can guess what it means by those terms, but this is not the case. Claimants clearly 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.

In addition, Objector has not only deposed both Claimants on May 2, 2016, but has served Claimants with *Objector's Second Requests for Discovery to Claimants* for both Subcase Nos. 91-7102 and 91-7173 on April 13, 2016. Both of these discovery methods give Objector ample opportunity to request more information and documents regarding the issues presented. Thus, in light of the additional discovery requested by Objector and not yet responded to by Claimants, it is excessive and unnecessary for Objector to file a motion to compel based on objections made to discovery requests that are, in fact, answered.

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.

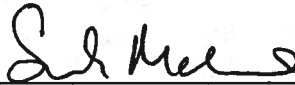
Rule 37(a)(4) also provides:

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, Claimants answered all Requests for Admission. Third, Objector is not entitled to discovery requests that seek legal conclusions. Finally, Claimants adequately explained their objections for vagueness and still responded despite the vague language. Therefore, this Motion 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 Claimants
Steve and Deanne Hawks

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 DETERMINE SUFFICIENCY OF OBJECTIONS AND TO DEEM CERTAIN MATTERS ADMITTED** to be served by the method indicated below, and addressed to the following:

Howard A. Funke
Kinzo H. Mihara
Dylan Hedden-Nicely
HOWARD FUNKE & ASSOCIATES, P.C.
424 Sherman Avenue, Suite 308
P.O. Box 969
Coeur d'Alene, ID 83816-0969
Facsimile (208) 667-4695
hfunke@indian-law.org
kmihara@indian-law.org
dhedden@indian-law.org

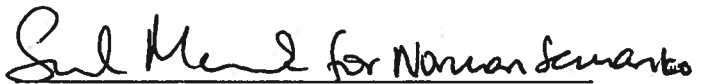
☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile
☐ E-Mail

Chief, Natural Resources Division
OFFICE OF THE ATTORNEY GENERAL
STATE OF IDAHO
700 W. State St., 2nd Floor
P.O. Box 83720
Boise, ID 83720-0010
Facsimile (208) 854-8072

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile
☐ E-Mail

Director
IDAHO DEPARTMENT OF WATER RESOURCES
322 E. Front St.
P.O. Box 83720
Boise, ID 83720-0098
Facsimile (208) 287-6700
gary.spackman@idwr.idaho.gov

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile
☐ E-Mail


Norman M. Semanko