

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
JEFFERSON RIVER BASIN (41G)

* * * * *

IN THE MATTER OF THE ADJUDICATION)
OF THE EXISTING RIGHTS TO THE USE)
OF ALL THE WATER, BOTH SURFACE AND)
UNDERGROUND, WITHIN THE JEFFERSON)
RIVER DRAINAGE AREA, INCLUDING ALL)
TRIBUTARIES OF THE JEFFERSON RIVER)
IN BROADWATER, GALLATIN, MADISON,)
JEFFERSON AND SILVER BOW COUNTIES,)
MONTANA.)

CASE NO. 41G-47
41G-W-042432-00
41G-W-042433-00
41G-W-042434-00

FILED

NOV - 6 1992

Montana Water Court

CLAIMANT: William G. and Laura E. Forbes

OBJECTOR: United States of America (Bureau of Land Management)
Potosi Generating Station
Montana Department of Fish, Wildlife and Parks

ORDER COMPELLING DISCOVERY

On October 9, 1992, the Montana Department of Fish Wildlife and Parks (DFWP), objector in the above-entitled case, filed its Motion to Compel Answers to Interrogatories and supporting brief. Exhibit A to the Motion indicates that DFWP served interrogatories upon the claimants on May 17, 1990. Exhibits B, D, and E to DFWP's motion indicate that DFWP contacted claimants' attorney on several occasions requesting that the claimants respond to the interrogatories. As of this date, the claimants have not responded to the interrogatories. In its Motion DFWP requests the Court for its Order compelling the claimants to file answers to its interrogatories and for an award of reasonable costs and attorneys fees incurred in obtaining such Order.

Rule 37, M.R.Civ.P. allows application by a party for an Order Compelling Discovery when the opposing party fails to respond

to reasonable discovery requests. Subdivision (a)(4) of the Rule provides that "the court shall, after opportunity for 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." Rule 37(a)(4) does not require a hearing but merely an opportunity for a hearing on expenses. It is the burden of the party opposing the award to request a hearing on whether such an award is warranted under the circumstances. State ex rel. Burlington Northern R.R. Co. v. District Court, 239 Mont. 207, 222, 779 P.2d 885 (1989).

The objector certified that the motion was served on all parties in the case. Over 10 days, plus an additional 3 days for service by mail, have elapsed since the October 9, 1992 filing of the motion. Rule 6, M.R.Civ.P. No response to the motion has been filed. Thus, the record does not indicate any justified opposition to the motion. Furthermore, because no response has been filed, there is nothing in the record at this time demonstrating any circumstances that may make an award of expenses unjust. See e.g., Granite County v. Komberec, 245 Mont. 252, 800 P.2d 166 (1990).

Failure to file an answer brief by the adverse within ten days shall be deemed an admission that the motion is well taken. Rule 2, Montana Uniform District Court Rules. Therefore, pursuant

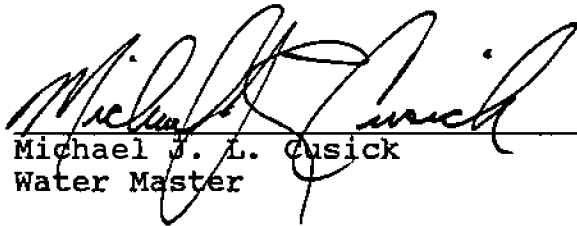
to Rule 37, M.R.Civ.P. and Montana Uniform District Court Rule 2, DFWP's Motion to Compel Answers to Interrogatories is deemed well taken, and it is hereby

ORDERED that the claimants shall file answers to DFWP's interrogatories by December 15, 1992,

FURTHER ORDERED that the claimants and the claimants' attorney shall pay DFWP's reasonable expenses incurred in obtaining this Order, including attorney's fees, and

FURTHER ORDERED that DFWP shall submit its Affidavit of reasonable expenses incurred in obtaining this Order and serve a copy upon the claimants by December 15, 1992. Claimants shall have until January 6, 1992 to file a response opposing the amount claimed as expenses incurred by DFWP in obtaining this Order.

DATED this 6th day of November 1992.



Michael J. L. Cusick
Water Master

William G. Forbes
P. O. Box 656
Pony, MT 59747

R. Thomas Garrison, Attorney
120 W. Wallace St.
Virginia City, MT 59755

United States of America
Bureau of Land Management
P.O. Box 36800
Billings, MT 59107

Eric S. Gould, Attorney
U. S. Dept. of Justice
Environment & Natural Resources Division
P. O. Box 663
Washington, DC 20044

Potosi Generating Station
5160 Wiley Post Way
Salt Lake City, UT 84116

Matt Williams, Attorney
506 E. Babcock
Bozeman, MT 59715

G. Steven Brown, Attorney
1313 Eleventh Ave.
Helena, MT 59601

OCT - 9 1992

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
JEFFERSON RIVER BASIN (41G)

IN THE MATTER OF THE ADJUDICATION)	
OF THE EXISTING RIGHTS TO THE USE)	
OF ALL THE WATER, BOTH SURFACE AND)	CASE NO. 41G-47
UNDERGROUND, WITHIN THE JEFFERSON)	CLAIM NO. 41G-W-042432
RIVER DRAINAGE AREA, INCLUDING ALL)	41G-W-042433
TRIBUTARIES OF THE JEFFERSON RIVER)	41G-W-042434
IN BROADWATER, GALLATIN, MADISON,)	
JEFFERSON AND SILVER BOW COUNTIES,)	
<u>MONTANA.</u>)	

MOTION TO COMPEL ANSWERS TO INTERROGATORIES
AND SUPPORTING BRIEF

I. MOTION TO COMPEL DISCOVERY

On May 17, 1990, the Montana Department of Fish, Wildlife and Parks ("DFWP") served interrogatories on the claimants, Laura and William Forbes (see Exhibit A attached to this Motion and Brief). Mr. Forbes appeared at the March 2, 1992 status conference and advised that the claimants would be represented by Mr. R.T. Garrison in this case. On March 3, 1992, counsel for DFWP wrote Mr. Garrison requesting that the claimants answer DFWP's interrogatories (see Exhibit B attached to this Motion and Brief). Mr. Garrison filed a Notice of Appearance on Behalf of Claimants on March 27, 1992. By letter dated May 20, 1992, Mr. Garrison advised counsel for DFWP that the water right claims in question are valid but declined to describe how the mining water right claims have been used for mining purposes (see Exhibit C attached to this Motion and Brief). Counsel for DFWP advised Mr. Garrison that his

May 20, 1992 letter did not provide adequate information concerning the historic use of the water right claims for mining purposes (see Exhibit D attached to this Motion and Brief). On September 25, 1992, counsel for DFWP advised Mr. Garrison that information concerning the historic use of the water right claims would be necessary in order to resolve DFWP's objections (see Exhibit E attached to this Motion and Brief). As of this date, Mr. Garrison has not submitted any information concerning the historic use of the above-referenced water right claims for mining purposes.

DFWP hereby moves the Court for entry of an order:

1. Requiring the claimants to file answers to interrogatories.
2. Awarding DFWP reasonable costs and attorney fees as authorized by Rule 37 of the M.R.Civ.P.
3. Awarding DFWP such other relief as the Court deems necessary.

II. BRIEF IN SUPPORT OF MOTION TO COMPEL DISCOVERY

Rule 33(a), M.R.Civ.P., requires that each 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." The claimants have refused to answer DFWP's interrogatories. The claimants have even refused to provide a letter describing how the water right claims in

question have been historically used for mining purposes.

DFWP's interrogatories are designed to elicit specific information concerning the historic use of water right claims 41G-W-042432, 042433 and 042434 for mining purposes. DFWP cannot trespass to acquire this information. Discovery is the vehicle by which DFWP can acquire the material information necessary to adequately participate in the adjudication process and determine how to proceed in this case. DFWP's interrogatories will lead to the discovery of material facts. DFWP cannot proceed to a hearing in this case until its interrogatories are fully and completely answered by the claimants.

Based on the preceding, DFWP requests entry of an order requiring the claimants to:

1. File answers to DFWP's interrogatories.
2. Pay DFWP's reasonable costs and attorney fees as authorized by Rule 37 of the M.R.Civ.P.
3. Comply with such other orders as the Court deems necessary.

Respectfully submitted this 8th day of October, 1992.

G. STEVEN BROWN

G. Steven Brown
1313 Eleventh Avenue
Helena, MT 59601
Attorney for Department of
Fish, Wildlife and Parks

CERTIFICATE OF SERVICE

I, G. Steven Brown, attorney for the Department of Fish, Wildlife and Parks, certify that I did, on the 8th day of October, 1992, serve a copy of the foregoing and attached Motion to Compel Answers to Interrogatories and Supporting Brief upon opposing counsel as follows:

R. Thomas Garrison
Attorney at Law
120 Wallace Street
Virginia City, MT 59755

Eric S. Gould, Attorney
U.S. Dept. of Justice
Environment & Natural Resources Division
P.O. Box 663
Washington, D.C. 20044

Matt Williams, Attorney
506 E. Babcock
Bozeman, MT 59715



G. Steven Brown

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IN THE WATER COURTS OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
JEFFERSON RIVER BASIN (41G)

* * * * *

IN THE MATTER OF THE ADJUDICATION OF)
THE EXISTING RIGHTS TO THE USE OF ALL)
THE WATER, BOTH SURFACE AND UNDERGROUND,)
WITHIN THE JEFFERSON RIVER DRAINAGE)
AREA, INCLUDING ALL TRIBUTARIES OF THE)
JEFFERSON RIVER IN BROADWATER, GALLATIN,)
MADISON, JEFFERSON AND SILVER BOW)
COUNTIES, MONTANA.)

FIRST INTERROGATORIES FROM DEPARTMENT
OF FISH, WILDLIFE AND PARKS

COMES NOW the Department of Fish, Wildlife and Parks, by
and through its attorneys, G. Steven Brown and Robert Lane, and
submits the following First Interrogatories to:

Laura and Williams Forbes
Box 656
Pony, MT 59747

These Interrogatories are submitted under Rule 33 of the
Montana Rules of Civil Procedure.

INSTRUCTIONS

1. Each interrogatory must be answered separately and
fully in writing under oath within thirty (30) days after
receipt of these Interrogatories unless a longer period for
filing your answers is granted by the Water Court. The answers
to these Interrogatories must be signed by the person making
the answers. You may submit answers to these Interrogatories
in the spaces provided. If more space is needed, you must set
forth a verbatim recopy of the Interrogatories, followed by

EXHIBIT
"A"

1 your answer. A copy of your answers must be filed with the
2 Water Court and the attorneys for the Department of Fish,
Wildlife and Parks.

3 2. These Interrogatories shall be deemed continuing in
4 nature pursuant to Rule 26(e) of the Montana Rules of Civil
5 Procedure. You are required to serve supplemental answers upon
6 the attorneys of record for the Department of Fish, Wildlife
7 and Parks if you later obtain information upon the basis of
8 which (A) you know that an answer was incorrect when made; or
9 (B) you know that an answer, though correct when made, is no
10 longer true, and the circumstances are such that a failure to
11 amend your answer is in substance a knowing concealment.

12 3. When you believe that a complete answer to a
13 particular Interrogatory or part thereof is not possible, then
14 answer such Interrogatory to the extent possible and furnish a
15 statement explaining the reason for your inability to answer
16 further.

17 4. When an Interrogatory calls for the "reasons" or
18 "grounds" or "basis" of any action or belief, or when your
19 answer to any Interrogatory gives a reason or ground or states
20 an opinion, identify completely all sources of the same,
21 including the identity of the person or persons responsible for
22 the reason, ground, or opinion or any document or other source
23 of information contributing thereto.

24 5. To the extent any information called for by these
25 Interrogatories is unknown to you, so state, and set forth such
remaining information as is known. If any estimate can
reasonably be made in place of unknown information, also set
forth your best estimate, clearly designated as such, in place
of unknown information, and describe the basis upon which the
estimate is made.

6. If, pursuant to Rule 33(c) of the Montana Rules of
Civil Procedure, you opt to produce business records in lieu of
formulating answers to any of these Interrogatories, specify
those business records in sufficient detail to permit the
Department of Fish, Wildlife and Parks to locate and to
identify, as readily as you can, the records from which the
answers may be ascertained.

1 INTERROGATORY NO. 1: For each mining water right claim
2 you have filed in the Jefferson River Basin (Basin 41G), please
3 describe in detail each mining operation in which each water
4 right claim is or has been used. Please be specific as to the
5 following:

6 (A) The name of each mining operation in which any or all
7 of your Jefferson River Basin mining water right claims is or
8 has been used.

9
10 (B) The location of each separate mining operation listed
11 in your answer to Interrogatory 1(A) by reference to the
12 approximate distance and direction from the nearest city or
13 town.
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16 (C) For each mining operation listed in your answer to
17 Interrogatory 1(A), please list which Jefferson River Basin
18 mining water right is or has been used at each mining operation
19 for each calendar year you have owned or operated the mining
20 operation. In listing the water rights used at each mining
21 operation, please use the Water Court adjudication number
22 assigned to your water right claim for the Jefferson River
23 Basin.
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1 (D) For each mining operation listed in your answer to
2 Interrogatory 1(A), please provide the following information:

3 (1) The calendar years in which ore, minerals or material
4 was mined, processed, produced, sold, extracted, removed or
5 milled.

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10 (2) The mineral, ore or material being mined, processed,
11 produced, explored, sold, extracted, removed or milled each
12 calendar year.

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17 (3) The amount or volume of ore, minerals or material
18 mined, processed, produced, sold, extracted, removed or milled
19 each calendar year.

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(4) The name, address and telephone number of the person, corporation or entity to whom you sold the minerals, ore or material mined, processed, produced, extracted, removed or milled each calendar year.

(5) How each Jefferson River Basin mining water right is or was used to mine, process, explore for, produce, sell, extract, remove or mill ore, minerals or material each calendar year.

(6) The number of employees, if any, who were hired to assist in the mining, processing, production, exploration for, sale, extraction, removal or mining of ore, minerals or material each calendar year.

1 (7) If you will do so without a motion to produce, please
2 attach copies of any written records, including mill receipts
3 or other written documents, concerning the amount or volume of
4 ore, minerals or material mined, processed, produced, sold,
5 extracted, removed or milled each calendar year.

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12 INTERROGATORY NO. 2: For the years prior to your
13 ownership or operation of the mining operations listed in your
14 answer to Interrogatory 1(A), please describe in detail the
15 operating history of each mining operation.

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INTERROGATORY NO. 3: Please list the name, address and the approximate dates of ownership of each person, firm, corporation or other entity who previously owned or operated each mining operation listed in your answer to Interrogatory 1(A).

INTERROGATORY NO. 4: For each mining operation listed in your answer to Interrogatory 1(A), please indicate whether the mining operation was licensed, permitted or approved by the:

- (A) Montana Department of State Lands Yes No.
- (B) The U.S. Forest Service Yes No.
- (C) The U.S. Bureau of Land Management Yes No.

(D) If your answer is "yes" to any portion of this Interrogatory, please provide the following information:

(1) The years each mining operation was licensed, permitted or approved by each agency.

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(2) If available, the license number, permit number, reclamation contract number or other identifying number assigned by each agency.

(3) If any mining operation was conducted under a small miner's exclusion from the Department of State Lands, please indicate the years such an exclusion was received.

INTERROGATORY NO. 5: Do any other persons, corporations, firms or entities have an ownership, leasehold or

1 royalty interest in any of the mining operations listed in your
2 answer to Interrogatory 1(A)? Yes No.

3 If your answer is "yes", please list the name, address and
4 telephone number of each person, corporation, firm or entity
5 who has an ownership, leasehold or royalty interest in each
6 mining operation.

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14 INTERROGATORY NO. 6: What buildings, vehicles,
15 equipment or machinery needed to mine, process, explore for,
16 produce, sell, extract, remove or mill minerals, ore or
17 material is presently located on site at each of the mining
18 operations listed in your answer to Interrogatory 1(A)? Please
19 provide a specific description of each item of building,
20 vehicle, equipment or machinery presently located at each
21 mining operation.

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24 INTERROGATORY NO. 7: For each month of the calendar

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1 year in which you claim to use each water right in question for
2 mining purposes, please specify how each water right is
3 actually used to mine, process, explore for, produce, extract,
4 remove or mill minerals, ore or material from each mining
5 operation listed in your answer to Interrogatory No. 1(A).

6
7 DATED this 17th day of May, 1990.

8 G. STEVEN BROWN
9 G. Steven Brown
10 1313 Eleventh Avenue
11 Helena, MT 59601
12 Attorney for Department of
13 Fish, Wildlife and Parks

14 CERTIFICATE OF SERVICE

15 I, G. Steven Brown, one of the attorneys for the
16 Department of Fish, Wildlife and Parks in the above-entitled
17 action, hereby certify that I did, on the 17th day
18 of May, 1990, serve a copy by mail of the foregoing
19 and attached First Interrogatories from Department of Fish,
20 Wildlife and Parks upon the claimant or claimants listed on
21 page 1.

22 G. STEVEN BROWN
23 G. Steven Brown

24 DATED this _____ day of _____, 1990.

25 _____
Person Answering Interrogatories

Subscribed and sworn to before me this _____ day
of _____, 1990.

NOTARY PUBLIC for the State
of _____
Residing at _____
My commission expires _____

(NOTARIAL SEAL)

G. STEVEN BROWN

ATTORNEY AT LAW
1313 ELEVENTH AVENUE
HELENA, MONTANA 59601
(406) 442-8711

March 3, 1992

Mr. R.T. Garrison
Attorney at Law
120 Wallace Street
Virginia City, MT 59755

Re: 41G-47
Montana Water Court

Dear Mr. Garrison:

Mr. William Forbes of Pony, Montana has advised that you will be representing him in the above-entitled matter. I represent the Department of Fish, Wildlife and Parks ("DFWP"). DFWP has filed an objection to Mr. Forbes' three mining water right claims. Two other objectors have also filed objections to Mr. Forbes' claims.

Attached are interrogatories submitted to Mr. Forbes in May of 1990. As of this date, Mr. Forbes has not responded to the interrogatories. The Water Court has given the parties sixty days to attempt to resolve the objections to Mr. Forbes' mining water right claims. DFWP will need answers to the attached interrogatories in order to determine whether it is possible to undertake settlement discussions.

Thank you for your cooperation. If you have any questions, please contact me.

Sincerely,

STEVE BROWN

G. Steven Brown

GSB rs
attach
cc: William Forbes

EXHIBIT
"B"

R. Thomas Garrison

Attorney at Law

120 W. Wallace Street

Virginia City

Montana

59755

Phone 406 • 843-5328

May 20, 1992

Re: Water Rights Objections
Jefferson River Drainage
41-G-47
41G-W-042432,
41G-W-042433,
41G-W-042434

G. Steven Brown
Attorney for DFWP
1313 Eleventh Ave.
Helena, Montana 59601

Dear Mr. Brown:

It is my understanding that time has been extended until June for a settlement of the issues involved in the foregoing objections.

The water rights held by Mr. and Mrs. Forbes were for the beneficial historical use for mining activity. The numerous mining claims have been kept in good standing by William G. Forbes, even and although they have not been in commercial production for many years. So long as the claims are maintained pursuant to the requirement of federal and state law, there can be no abandonment. The water to such appropriations may still always be used for mining purposes, which might be developed at some future date.

The Forbes have no objection that a stipulation might be entered by all objectors to allow multiple use of their water appropriations by BLM, FWLP and Potosi Generating, reserving however expressly, use unto themselves if ever is need for contingent commercial mining operations.

Respectfully yours,



R. THOMAS GARRISON
Attorney for Forbes

RTG:jg
cc: W. Forbes

RECEIVED

MAY 21 1992

EXHIBIT
"C"

G. STEVEN BROWN

ATTORNEY AT LAW
1313 ELEVENTH AVENUE
HELENA, MONTANA 59601
(406) 442-8711

May 22, 1992

R. Thomas Garrison
Attorney at Law
120 W. Wallace
Virginia City, MT 59755

Re: 41G-47

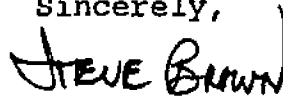
Dear Mr. Garrison:

Thank you for your letter of May 20, 1992. I have been notified that the settlement deadline in this case has been extended until June 2, 1992.

Your letter does not provide sufficient information regarding the historic use of the three water right claims in question. The issue in these adjudication proceedings is not the validity of Mr. Forbes' mining claims. The assessment work that must be done to maintain the validity of those claims may or may not involve the use of water. I will need a specific description of the historic use of the water rights in question for mining purposes. Such information as the last year in which commercial production occurred and how the water rights have been used since the cessation of commercial mining activity is important to our evaluation of the issues in this case. Please provide answers to DFWP's interrogatories so that I can determine whether settlement discussions will be possible.

If you have any questions, please contact me.

Sincerely,



G. Steven Brown

GSB rs

EXHIBIT

"D"

G. STEVEN BROWN

ATTORNEY AT LAW
1313 ELEVENTH AVENUE
HELENA, MONTANA 59601
(406) 442 8711

September 25, 1992

R. Thomas Garrison
Attorney at Law
120 West Wallace
Virginia City, MT 59755

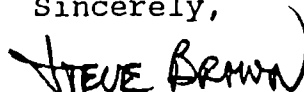
Re: 41G-47

Dear Mr. Garrison:

As I indicated during the status conference on August 6, 1992, I prefer to resolve the objections of the Department of Fish, Wildlife and Parks ("DFWP") on an informal basis. However, you have still not provided sufficient information regarding the historic use of these water right claims for mining purposes. Specifically, I need a letter from you or Mr. Forbes describing how the water rights have been historically used for production of minerals, including a detailed description of the mining operation (e.g., dimensions of the sluice box). I also need to know the last year in which commercial production of minerals occurred. Please provide copies of any documents or publications confirming the commercial production. Please advise whether I can expect a letter providing this information. If I do not hear from you on or before October 5, 1992, I will file a Motion to Compel Discovery.

If you have any questions, please contact me.

Sincerely,



G. Steven Brown

GSB rs
cc: Matt Williams
Eric Gould

EXHIBIT

"E"