

DEPARTMENT OF
WATER RESOURCES

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MEMORANDUM IN SUPPORT OF
STATE OF IDAHO'S MOTION FOR
PROTECTIVE ORDER

MEMORANDUM IN SUPPORT OF STATE OF IDAHO'S MOTION FOR PROTECTIVE ORDER - 1

Pursuant to Rule 26(c) of the Idaho Rules of Civil Procedure, the STATE OF IDAHO, by and through undersigned counsel, seeks an order from the Court vacating the oral depositions of Baxter and Courtney for two separate and independent reasons. First, the requested discovery seeks matter irrelevant to the proceedings, serving solely to oppress IDWR, waste time and waste resources. Second, the deposition subpoenas call for disclosure of non-discoverable privileged communications.

II. ANALYSIS.

Rule 26(c) states in pertinent part:

Upon motion ... by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending ... may make any order which justice requires to protect a ... person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery be not had; (2) that the discovery may be had only on specified terms and conditions... (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters....

I.R.C.P. 26(c). A motion for protective order made pursuant to Rule 26(c) is proper if made before the date set for the deposition. See U.S. v. Portland Cement Co., 338 F.2d 793, 803 (10th Cir. 1964). The date set for the depositions is January 24, 2008.

A. The Depositions are Unreasonable, Oppressive and Unnecessary

Through the depositions of Baxter and Courtney, the Tluceks are attempting to discover counsel's involvement with respect to IDWR's recommendation of an annual diversion volume descriptor on the Tluceks' water right in this subcase. Notably, Tluceks have received IDWR's Supplemental Director's Report Regarding Subcase No. 63-3174 ("Supplemental Director's Report") which explains its basis for the recommendation, and the Tluceks have already taken the depositions of three IDWR witnesses, inquiring of all three the basis for IDWR's recommendation for water right number 63-3174.

At the depositions of Donald V. Shaff, IDWR's Adjudication Bureau Chief, and David R. Tuthill, Jr., IDWR's Director, counsel for the Tluceks posed questions about IDWR's director's report for this subcase, the Supplemental Director's Report and IDWR policy related to

recommending volumes on water rights. Both Shaff and Tuthill testified during their depositions that they agree with the content of the Supplemental Director's Report, including the presentation of IDWR's position as to the basis of inclusion of the annual diversion volume descriptor. Courtney Aff., Exhs. A (Shaff Deposition, 33:8-11, 41:4-9, 104:17-24) & B (Tuthill Deposition, 7:21-8:17). By signing and filing the Supplement Director's Report with the Court, IDWR adopted all contents therein. Given this uncontested fact that IDWR agrees with the content of the Report, discovery of counsel's communication with clients is irrelevant as a matter of law.

Given the legal irrelevance of the requested discovery, the Tluceks lack reasons sufficient to justify the depositions. What constitutes good cause to prevent harassment and oppression pursuant to I.R.C.P. Rule 26 is determined on a case-by-case basis. As stated in conjunction with Rule 26(c) of the Federal Rules of Civil Procedure, which is identical to I.R.C.P. 26(c):

The harassment or oppression should be unreasonable to justify restricting discovery, but "discovery has limits and ... these limits grow more formidable as the showing of need decreases." Thus even very slight inconvenience may be unreasonable if there is no occasion for the inquiry and it cannot benefit the party making it.

8 Wright & Miller, Federal Practice & Procedure, § 2036 at 490-92 (quoting United Air Lines, Inc. v. United States, 26 F.R.D. 213, 219 n.6 (D.C. Del. 1960) (other citations omitted)). Idaho follows the federal rule which requires that the party seeking the discovery bears the burden of demonstrating its merits. See Clark v. Universal Builders, Inc., 501 F.2d 324, 340 (7th Cir. 1974), cert. denied, 419 U.S. 1070, 95 S. Ct. 657 (1974).

Fatal to the Tluceks' desire to depose counsel is their motion for summary judgment in this subcase. The purposes of discovery, and depositions in general, are to narrow the issues for trial and otherwise prepare for dispositive motions and/or trial. 8 Wright & Miller, Federal Practice & Procedure, § 2001, at 40-41. In earlier proceedings before the Court in this subcase, counsel for the Tluceks admitted that there were no facts in dispute and agreed that summary judgment would obviate the need for trial in this matter. Baxter Aff. at ¶ 7; Courtney Aff. at ¶ 8. Thus, because the Tluceks acknowledge there are no facts in dispute in this subcase, the

depositions of counsel cannot benefit them in discovering relevant information in preparation. Given this lack of benefit and need, the depositions of counsel are per se unduly burdensome and oppressive.

As a matter of law, Idaho courts are well within their authority to limit discovery efforts. Cosgrove v. Merrell Dow Pharmaceuticals, Inc., 117 Idaho 470, 788 P.2d 1293 (1989). In Cosgrove, the trial court precluded the plaintiff from taking the depositions of various employees and officers of the defendant because the plaintiff failed to show a "need for the information." Id. at 474. Similarly, the Tluceks cannot show a need for the information considering that (1) the Tluceks have received the Supplemental Director's Report and thereafter deposed three IDWR employees about IDWR's recommendation, (2) IDWR stands by its Supplemental Director's Report as made clear in the depositions of IDWR's employees, (3) according to the Tluceks, there are no issues of fact to be determined, only a matter of law, and (4) the Tluceks have already filed a motion for summary judgment, placing counsel and the Court on notice that there are no facts in issue. Accordingly, the Court should order that this discovery should not be had pursuant to Rule 26(c).

B. The Tluceks Seek Information Protected by the Attorney-Client Privilege and Outside the Scope of Allowable Discovery.

At the deposition of IDWR's Shaff, counsel for the Tluceks requested specifically the production of privileged material.

Q. Now, we have gone through the same exercise with regard to Jan Shurte. Can you tell me if you, yourself, prepared any of the verbiage in Exhibit No. 1 [Supplemental Director's Report]? Let me clarify that question. By "prepared," I am talking about actually creating sentences, modifying words, that sort of thing – not reviewing the document but actually crafting language in the document.

A. I reviewed an electronic copy of this document. I did do edits on the draft document and returned the document to Ms. Courtney.

MR. CAMPBELL: I would like to have copies of those emails. Can they be provided to me?

MR. BAXTER: Because they constitute attorney-client privileged communications, those communications between the Department and the Department's legal staff are not going to be provided.

Courtney Aff., Exh. A (Shaff Deposition, 26:11-27:4). Depositions of counsel only serve to continue the quest.

Communications between IDWR and its attorneys, here, Baxter and Courtney, are entitled to protection from discovery pursuant to the attorney-client privilege. Rule 502 of the Idaho Rules of Evidence protects from disclosure confidential communications not intended to be disclosed to third parties and "made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."

I.R.E. 502(a)(5). Rule 502 declares in pertinent part that:

a client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client which were made (1) between the client or the client's representative and the client's lawyer or the lawyer's representative...

I.R.E. 502(b). The privilege afforded by Rule 502 is echoed in the Idaho Rules of Professional Conduct.¹ "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent..." I.R.P.C. 1.6(a).

The Supplemental Director's Report was prepared under the direction of the Director and the Adjudication Bureau Chief, who are managing officers of IDWR and clients that counsel communicated with in the preparation of the Supplemental Director's Report. Further, as set forth in the Baxter and Courtney Affidavits, communications with these two IDWR officials and other IDWR employees occurred during the course of the Deputy Attorney Generals'

¹ These rules are repeated in the Office of the Attorney General's ("OAG") Handbook for its deputy attorney generals. "The Idaho Rules of Professional Conduct (IRPC) make it clear that the Attorney General has a traditional attorney-client relationship with his clients. ... Similar to a private law firm, the attorney-client relationship binds all OAG employees to abide by and respect all associated duties and privileges, including the traditional attorney-client privilege, attorney work product, and rules of confidentiality." Baxter Aff., Exh. C (§ 3.4). As further instructed, "[i]n daily practice, the term 'client' as it appears in these guidelines means a particular agency, the highest officer(s) in the agency, and other officials up the organizational chain of command, including the board, the Governor, or other constitutional officers as the case may be." Baxter Aff., Exh. C (§ 3.5).

employment, there was an expectation of confidentiality with respect to the communications, and there has been no waiver of the attorney-client privilege. Baxter Aff. at ¶ 3; Courtney Aff. at ¶ 3.

IDWR's non-party status in the SRBA does not affect this protection. The attorney-client relationship exists between IDWR and its attorneys regardless of the court before which an action proceeds. No exception to the attorney-client privilege rule applies. IDWR cannot be compelled to disclose any confidential communications and it has not waived its privilege. Therefore, this discovery should not be had.

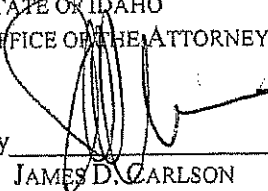
III. CONCLUSION.

For the foregoing reasons, the State respectfully requests the Court vacate the depositions scheduled for January 24, 2008.

DATED this 17 day of January, 2008.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

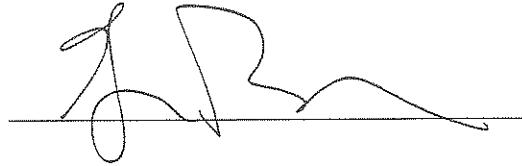
By


JAMES D. CARLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the within and foregoing document was made this 17th day of January, 2008, by hand delivery to each of the parties listed below.

Scott L. Campbell
Dylan Lawrence
Moffatt Thomas
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Post Office Box 829
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A handwritten signature in black ink, appearing to be "JR", is written over a horizontal line.

