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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 SRBA,
Case No. 39576

Subcase No. 63-03174

**RESPONSE TO STATE OF IDAHO'S MOTION
FOR PROTECTIVE ORDER**

COME NOW Jerry L. Tlucek and Mary Lou Tlucek, by and through their counsel of record, Scott L. Campbell of the firm Moffatt, Thomas, Barrett, Rock & Fields, Chartered, and hereby submit this Response to the State of Idaho's Motion for Protective Order, filed with this Court on Friday, January 18, 2008. The State seeks to prevent the Tluceks from deposing Garrick Baxter and Andrea Courtney, attorneys for IDWR.

ORIGINAL

I. I.R.E. 706 Specifically Allows the Tluceks to Depose Baxter and Courtney

The State arguments in support of its Motion for Protective Order are two-fold. First, the State argues that previous communications between the deponents and IDWR employees are privileged pursuant to I.R.E. 502 and therefore should not be the subject of deposition testimony. (Mem. in Supp. of State of Idaho's Mot. for Protective Order, pp. 4-6.) Second, the State argues that the depositions are "unreasonable, oppressive and unnecessary" pursuant to I.R.C.P. 26(c). (*Id.*, pp. 2-4.) The Tluceks deal with each of these arguments in subsequent sections of this Response.

However, as an initial matter, the State fails to appreciate that I.R.E. 706 is the applicable rule in this scenario. That rule specifically states in pertinent part:

Rule 706. Court appointed experts.

(a) **Appointment.** The court may . . . appoint expert witnesses of its own selection. . . . A witness so appointed shall advise the parties of the witness' findings, if any; a deposition of the witness may be taken by any party; and the witness may be called to testify by any party or by the court pursuant to Rule 614(a). The expert witness shall be subject to cross-examination by each party, including a party calling the expert as a witness.

I.R.E. 706(a) (emphasis added).

Rule 706 cannot state it more plainly: "a deposition of the witness may be taken by any party." The Supplemental Director's Report, or "706 Report," that is the subject of this dispute was prepared at the direction of this Court pursuant to Rule 706. (Order Requesting 706 Report from IDWR of April 25, 2007, at 1.) Prior deposition testimony of IDWR employees Donald Shaff (Exhibit A hereto) and Jan Shurte (Exhibit B hereto), as well as the Baxter and Courtney Affidavits that were filed in support of the State's Motion, all establish unequivocally

that the deponents assisted with the preparation of the Report. (Shaff Dep., 16:12-17:2; Shurte Dep., 10:3-10:4, 10:8-10:13, 12:8-12:12, 14:5-14:6, 14:14-14:18; Baxter Aff., p. 2, n.4; Courtney Aff., p. 2, n.4.) Therefore, they are “court appointed experts” pursuant to Rule 706 that may be deposed.

II. Previous Communications Between the Deponents and IDWR Employees Regarding the Preparation of the 706 Report Are Not Privileged Because They Were Not for Legal Representation

The State argues that the Tluceks are using the depositions to obtain information that is protected by the attorney-client privilege. (Mem. in Supp. of State of Idaho’s Mot. for Protective Order, pp. 4-6.) In doing so, the State quotes from and discusses I.R.E. 502. (*Id.*, p. 5.) Again, that rule provides in pertinent part:

Rule 502. Lawyer-client privilege.

(b) **General rule of privilege.** 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. . . .

I.R.E. 502(b) (emphasis added).

It is also important to begin this analysis by noting that the State has the burden of demonstrating that privilege applies. *See, e.g., Kirk v. Ford Motor Co.*, 141 Idaho 697, 704, 116 P.3d 27, 34 (1005) (“[t]he burden of showing information is privileged, and therefore exempt from discovery, is on the party asserting the privilege”).

The State seems to assume that any communication between a Department employee and one of its attorneys is privileged. This is not the case. To the contrary, pursuant to Rule 502, a communication is privileged only if it is made for the purposes of rendering legal

representation to the client. This does not characterize the Department's creation of the 706 Report. Again, Baxter, Courtney, and the Department employees were co-authors on an expert report; they were not in an attorney-client relationship. Communications between co-authors—regardless of the fact that some of them may be attorneys—are not privileged under Rule 502.

Idaho Code Section 42-1401B supports this conclusion. That statute states plainly that, “[t]he director [of the Department] shall not be a party to an adjudication.” I.C. § 42-1401B(3). This make sense, since the Department's role is limited to being “an independent expert and technical assistant.” I.C. § 42-1401B(1). This demonstrates that the Department has no legal rights that are at stake in this proceeding. The only party with any legal rights at stake are the Tluceks. Therefore, communications between the deponents and the Department employees were not privileged because they were not made for the specific purpose of providing the Department with legal representation.

The State argues that this “non-party status in the SRBA does not affect” the attorney-client privilege, because “[t]he attorney-client relationship exists between IDWR and its attorneys regardless of the court before which an action proceeds.” (Mem. in Supp. of State of Idaho's Mot. for Protective Order, p. 6.) These arguments miss the point. The Tluceks do not argue that the venue of this action in the SRBA district court is determinative. Again, it is the nature of the communications that establishes privilege. The fact that the Department is a technical expert to, rather than a party in, this SRBA subcase supports the conclusion that the deponents' participation in the preparation of the 706 Report was as co-authors to an expert report, rather than as attorneys representing the legal interests of the Department.

III. The Depositions Are Not “Unreasonable, Oppressive and Unnecessary”

The State argues that the depositions should be vacated because they would be “unreasonable, oppressive and unnecessary” pursuant to I.R.C.P. 26(c). (Mem. in Supp. of State of Idaho’s Mot. for Protective Order, pp. 2-4.) At the outset, it is important to note that the State is attempting to shift the burden to the Tluceks to “justify” the depositions. (*Id.*, p. 3.) There is simply no basis in the rules of procedure for requiring a party to “justify” its discovery requests. To, the contrary, the scope of discovery is quite liberal:

Rule 26(b)(1). Scope of discovery in general.

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
(1) Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

I.R.C.P. 26(b)(1) (emphasis added).

Privilege is a separate issue that has already been addressed and that is not relevant to the State’s specific argument that the depositions will be “unreasonable, oppressive and unnecessary.” So, that particular exception in the above-quoted rule is of no import in this context.

Instead, the operative language here is that discovery may be had regarding “any matter . . . relevant to the subject matter involved in the pending action.” Far from requiring the Tluceks to “justify” their discovery requests, this language establishes a liberal rule for allowing discovery. *See, e.g., Kirk v. Ford Motor Co.*, 141 Idaho 697, 703, 116 P.3d 27, 33 (2005) (“I.R.C.P. 26(b)(1) permits broad discovery of any matter that is not privileged”).

The State argues that, “[g]iven this uncontested fact that IDWR agrees with the content of the [706] Report, discovery of counsel’s communication with clients is irrelevant as a matter of law.” (Mem. in Supp. of State of Idaho’s Mot. for Protective Order, p. 3.) However, the State does not explain its reasoning. And, the State certainly does not overcome the mandate of Rule 706 that “a deposition of the witness may be taken by any party.” Simply put, there is no basis for concluding that discovery of the reasoning behind an expert report is “irrelevant” simply because all of its authors agreed on the ultimate work product.

The State next argues that “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.” (*Id.*, pp. 3-5.) This is not true. One of the Tluceks’ primary arguments in this case, as is reflected in their summary judgment materials, is that the 706 Report does not comply with the rules of evidence. (Br. in Supp. of Mot. for Summ. J., pp. 4-8.) Because the deponents helped to prepare that document, the Tluceks should be permitted to inquire as to their participation in preparing that document, their qualifications for preparing an expert report, and related matters. This type of information would certainly “benefit” the Tluceks as this subcase moves forward, because it is directly relevant to one of their primary arguments. Again, the State is attempting to shift the burden to the Tluceks to “justify” their discovery requests, which is inappropriate as this Response has already explained.

Finally, the State relies upon *Cosgrove v. Merrell Dow Pharmaceuticals, Inc.* for the proposition that the Tluceks should not be allowed to take the requested depositions because they have “failed to show a ‘need for the information.’” (Mem. in Supp. of State of Idaho’s Mot. for Protective Order, p. 4.) However, an analysis of that case demonstrates the State’s flawed reasoning.

In *Cosgrove*, the plaintiff sought to depose various employees, officers, past employees, and past officers of a large pharmaceutical company. 117 Idaho 470, 474, 788 P.2d 1293, 1297. Critically, those depositions had already been taken through discovery in related, federal multi-district litigation. *Id.* Therefore, the Idaho Supreme Court upheld the trial court's finding that the plaintiffs made no showing of need, because "[a]ll materials generated in the federal multi-district litigation were available to appellants for a reasonable charge." *Id.*

The fact that the requested depositions had already been taken in previous litigation is a critical distinction between *Cosgrove* and this case. Neither the Tluceks nor their counsel are aware that depositions have already been taken of Baxter and Courtney by another party that would provide the necessary information regarding their participation in the preparation of the 706 Report and their qualifications for doing so. Therefore, the *Cosgrove* case does not support the State's position.

IV. Conclusion

The 706 Report about which the Tluceks seek discovery was prepared at the request of this Court pursuant to I.R.E. 706. That rule specifically states that any party may depose the author of an expert report prepared pursuant to Rule 706. Here, previous deposition testimony establishes that Baxter and Courtney helped to prepare the 706 Report. Therefore, Rule 706 mandates the ability of the Tluceks to take their depositions.

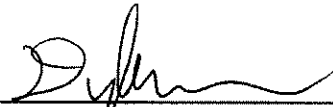
The State's arguments regarding the attorney-client privilege and the "unnecessary" nature of the discovery requests are unpersuasive. The attorney-client privilege does not apply in this situation because the deponents were acting as expert witnesses pursuant to Rule 706, not as attorneys providing legal representation to the Department. Moreover,

information regarding the deponents' qualifications and participation in the preparation of the 706 Report is critical to the Tluceks' arguments in this case.

Therefore, the Tluceks respectfully request that this Court order that the depositions scheduled for Thursday, January 24, 2008, proceed, and that the deponents must answer questions regarding their involvement in the preparation of the 706 Report.

DATED this 21st day of January, 2008.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 
Dylan B. Lawrence – Of the Firm
Attorneys for Jerry L. Tlucek and
Mary Lou Tlucek

CERTIFICATE OF SERVICE

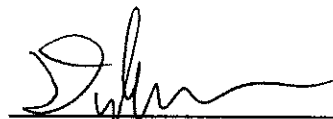
I HEREBY CERTIFY that on this 21st day of January, 2008, I caused a true and correct copy of the foregoing **RESPONSE TO STATE OF IDAHO'S MOTION FOR PROTECTIVE ORDER** to be served by the method indicated below, and addressed to the following:

James D. Carlson
Office of the Attorney General
P. O. Box 83720
Boise, ID 83720-0010
Fax: 208-334-2530

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

Director
IDAHO DEPARTMENT OF WATER RESOURCES
P.O. Box 83720
Boise, ID 83720-0098
Fax: 208-287-6700

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



Dylan B. Lawrence

EXHIBIT A

to

Response to State of Idaho's Motion for
Protective Order

:

) Subcase No.

Case No. 39576.

) 63-03174

)

1

DEPOSITION OF DONALD V. SHAFF

Law Offices of
Moffatt, Thomas, Barrett, Rock & Fields, Chartered
101 South Capitol Boulevard, 10th Floor
Boise, Idaho 83702

Thursday, October 25, 2007
Beginning at 9:00 o'clock a.m.

QnA COURT REPORTING

Lori A. Pulsifer, CSR, RMR, CRR
Idaho Certificate No. 354
PMB 219, 111 Broadway, Suite 133
Boise, Idaho 83702-7200
E-mail: realtimeqna@msn.com

(ELECTRONIC COPY)

Telephone: (208) 484-6309

Deposition of Donald V. Shaff

1 A. And, therefore, Exhibit No. 1 is a Supplemental
2 Director's Report.

3 Q. Let me ask you this question, Mr. Shaff. Why
4 was this document, Exhibit No. 1, prepared, as far as
5 you understand it?

6 A. It's my understanding the Special Master in
7 Subcase 63-3174 requested the Department to prepare
8 Exhibit No. 1.

9 Q. And how did you come to that understanding?

10 A. One, I saw the order from the Special Master in
11 Subcase 63-3174.

12 Q. Could you describe for me the procedure that
13 you followed after you received the order from the
14 Special Master to generate this document, Exhibit No. 1?

15 A. Exhibit No. 1 was prepared with the person, Jan
16 Shurte, S-h-u-r-t-e, who had knowledge of Water Right
17 Claim 63-3174 and with assistance from the Deputy
18 Attorney General's staff.

19 Q. And who with the Deputy Attorney General's
20 staff assisted her?

21 A. Ms. Andrea Courtney, who is a Deputy Attorney
22 General, assisted in preparing Exhibit No. 1.

23 Q. Do you know if anyone else besides Ms. Andrea
24 Courtney assisted in the preparation of Exhibit No. 1
25 with the Attorney General's staff?

1 A. I believe Mr. Garrick Baxter reviewed the
2 document, as well -- Deputy Attorney General.

3 Q. Anyone else?

4 A. Not to my knowledge, other than Carter
5 Fritschle who signed the document.

6 Q. Now, in terms of my question, I am asking for
7 the assistants in preparing the document. Did Mr.
8 Fritschle assist in the preparation of the document?

9 A. Not to my knowledge.

10 Q. So what was Mr. Fritschle's involvement, other
11 than signing the document, so far as you know?

12 A. I can presume he read the document to be
13 satisfied that it appeared complete, assembled properly,
14 and signed it.

15 Q. Now, you said you can assume that he did those
16 things. Does that mean that you do assume that he did
17 those things?

18 A. That's correct. I was not in the office and
19 did not ask him.

20 Q. I am just trying to clarify.

21 A. Sure.

22 Q. You said that you can assume it, but that does
23 not mean you did assume it. So we have to be very
24 specific in these questions. Did you have any
25 conversations with Mr. Fritschle about his review of

CERTIFICATE OF WITNESS

I, DONALD V. SHAFF, depose and say the following:

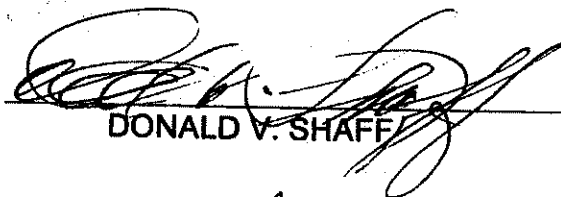
That I am the witness in the foregoing deposition consisting of pages
1 through 120;

That I have read said deposition transcript and that I know the contents
thereof;

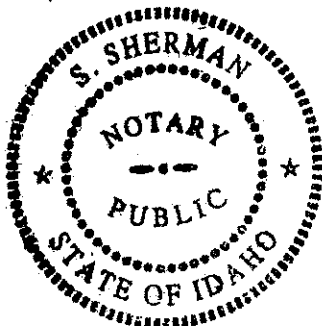
That the questions contained therein were propounded to me; and

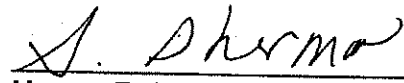
That the answers contained therein are true and correct except for
any changes that I may have listed on the Change Sheet attached hereto.

DATED AND SIGNED this 26th day of November 2007.


DONALD V. SHAFF

SUBSCRIBED AND SWORN to before me this 26th day of
November 2007.




Notary Public in and for the
County of Ada

My commission expires:

11-14-2010

EXHIBIT B

to

Response to State of Idaho's Motion for
Protective Order

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

In Re: SRBA,

)

) Subcase No.

Case No. 39576.

) 63-03174

)

)

DEPOSITION OF JAN GROVER SHURTE

Law Offices of
Moffatt, Thomas, Barrett, Rock & Fields, Chartered
101 South Capitol Boulevard, 10th Floor
Boise, Idaho 83702

Monday, November 26, 2007

Beginning at 8:57 o'clock a.m.

QnA COURT REPORTING

Lori A. Pulsifer, CSR, RMR, CRR

Idaho Certificate No. 354

PMB 219, 111 Broadway, Suite 133

Boise, Idaho 83702-7200

E-mail: realtimeqna@msn.com

(ELECTRONIC COPY)

Telephone: (208) 484-6309

Deposition of Jan Grover Shurte

1 is that correct?

2 A. Uh-huh. It is, yes.

3 Q. Can you tell me whether or not you had any role
4 in the preparation of this document, Exhibit No. 1?

5 A. No. I did not make the recommendation on this
6 one.

7 Q. No. I am talking about this document.

8 A. Oh, this document? Excuse me. Yes, I did.

9 Q. Can you describe that for me, please?

10 A. I, basically, spoke with the attorneys
11 concerning how the recommendation was made, just the
12 steps that were taken to go through the recommendation,
13 and what was in the claim file. That was about it.

14 Q. Did you actually prepare any portion of Exhibit
15 No. 1?

16 A. Let's see. I did -- I did -- I did write out
17 some things about -- you know, in line. They were
18 rephrased in here but let me -- yes. So I guess the
19 answer is "yes."

20 Q. What portions of the report did you initially
21 draft before they were redone, as you say?

22 A. Good question. I will have to read through it
23 here.

24 Q. That's fine. Take your time.

25 A. Thank you. Part B and "Background."

1 you either drafted or provided information to the
2 attorneys who drafted Exhibit No. 1?

3 A. No. I believe they already knew. No. We
4 discussed it, but they already had known about that.
5 So --

6 Q. About what?

7 A. About the other issues that are in here.

8 Q. And can you identify the attorneys that you
9 worked with to produce Exhibit No. 1?

10 A. I worked with Andrea.

11 Q. Andrea Courtney?

12 A. Uh-huh. Andrea Courtney.

13 Q. Anyone else?

14 A. No.

15 Q. Did you work with any paralegals of the
16 Department to produce --

17 A. No, I don't believe I did, on this one.

18 Q. Did you see any drafts of Exhibit No. 1 before
19 it was finalized?

20 A. Yes, I did.

21 Q. How many?

22 MR. BAXTER: I am going to object to that
23 question, based upon -- it is asking for information
24 related to attorney-client-privileged communications. I
25 gave you a little bit of leeway that, yes, there are

1 Department's employees in a deposition. It is proper to
2 raise attorney-client-privileged objections within that
3 deposition.

4 BY MR. CAMPBELL:

5 Q. Ms. Shurte, can you tell me how many drafts of
6 Exhibit 1 you actually reviewed?

7 MR. BAXTER: Again, I just instructed the
8 witness not to answer that question, Mr. Campbell.

9 MR. CAMPBELL: I asked her if she can tell me
10 how many drafts she reviewed. That is not
11 attorney-client privilege.

12 MR. BAXTER: Go ahead and answer the question,
13 Jan.

14 THE WITNESS: Probably, two. I would say two,
15 to the best of my recollection.

16 BY MR. CAMPBELL:

17 Q. Who generated those drafts?

18 A. Andrea.

19 Q. Did you see a final version of Exhibit No. 1?

20 A. Oh, yes.

21 Q. And did that final version appear to be very
22 similar to the prior drafts?

23 MR. BAXTER: Excuse me, Mr. Campbell. Can you
24 restate the question, please? I missed the question.

25

CERTIFICATE OF WITNESS

COPY

I, JAN GROVER SHURTE, depose and say the following:

That I am the witness in the foregoing deposition consisting of pages
1 through 18;

That I have read said deposition transcript and that I know the contents
thereof;

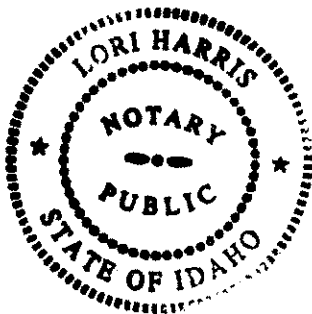
That the questions contained therein were propounded to me; and

That the answers contained therein are true and correct except for
any changes that I may have listed on the Change Sheet attached hereto.

DATED AND SIGNED this 19th day of December 2007.


JAN GROVER SHURTE

SUBSCRIBED AND SWORN to before me this 19th day of
December 2007.




Notary Public in and for the
County of Ada

My commission expires:

12-12-2012