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DEPARTMENT OF
WATER RESOURCES

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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 In Re SRBA	)	Subcase No.: 01-00211A, 01-00214A,
	)	01-00219, 01-02061, 01-10034, 01-10482
Case No. 39576	)	and 01-10526 ^{1/}
	)	
	)	UNITED STATES' RESPONSE TO
	)	MOTION TO COMPEL

Introduction

This is the United States' response to the Ground Water Districts ("Districts") Motion to Compel Discovery Responses.^{2/} The Districts ask this Court to order the United States and several other parties (referred to collectively as "Claimant" by the Districts) to

^{1/} Although the Districts filed their Motion to Compel in 01-00004 and 30 other SRBA Subcases, their discovery request to the United States was made in the above-listed subcases only. The United States therefore response only to the Motion to Compel in regards to that request.

^{2/} The Districts also moved the Court for an order adjusting the summary judgment schedule. That motion has already been addressed.

“respond fully and fairly to the Ground Water Districts First Interrogatories and Requests for Production.” Motion to Compel at 2. The Districts’ Motion must be denied because the United States has already “fully and fairly” responded to the Districts’ discovery requests.

Indeed, the United States has twice offered to provide documents responsive to the Districts’ requests. The Districts filed their Motion to Compel against the United States *one* day after informally advising the United States that the Districts believe the United States’ discovery response to have been inadequate.^{3/} A few days after the Districts’ filed their Motion, Counsel for the United States wrote the Districts. The letter expressed disappointment that the Districts had filed their motion without even making an attempt to arrange an opportunity to inspect and copy responsive documents and informed the Districts the United States remained willing to provide responsive documents for inspection and copying. Letter Dated Aug. 25, 2008 at 1 (Attached as Exhibit 1 to the Affidavit of David Gehlert). The United States also specifically addressed the Districts’ Interrogatory No. 6(d). The United States informed the Districts that “[p]ursuant to I.R.C.P. 33(c), the United States is not required to compose a history of the water rights. Rather we need only identify the records from which such history may be derived and allow you a reasonable opportunity to review and copy those records.” *Id.* The United States reiterated its willingness to do so in the letter and does so again through this memorandum. The Districts have never responded to the United States’ letter.

^{3/} Thus at least with respect to the United States, the Districts did not confer in good faith with the United States in an effort to resolve this matter as is required by Idaho Rule of Civil Procedure 37(a)(2). Nor does it appear that the Districts included the certification required under the rule. Those omissions alone are grounds to deny the motion to compel.

Argument

I. THE MOTION TO COMPEL MUST BE DENIED BECAUSE THE UNITED STATES HAS PROPERLY RESPONDED TO THE GROUND WATER DISTRICTS' DISCOVERY REQUESTS.

The Districts specifically object to the United States' responses to the District's Request for Production Nos. 2 & 3 and Response to Interrogatory No. 6. *See* Ground Water Districts' Memorandum in Support of the Motion to Compel Discovery Responses and Motion to Extend Deadlines (Subcase Nos. 01-00004, *et al.*) dated August 20, 2008 at 3-4 ("Mem. In Supp."). The Districts base their motion to compel on two contentions: (1) the United States and the other responding parties have not adequately identified the responsive documents they have offered to produce and (2) "even an inspection of the records will not fully explain the history, development, and use of the water rights that are the subject of this action." Mem. In Supp. at 5-6.

A. The United States Properly Responded to Requests for Production Nos. 2 and 3.

The Districts' Motion to Compel additional responses to Requests for Production Nos. 2 and 3 is premised on a belief that the United States must do more than reasonably make the responsive documents available for inspection and copying as it has twice offered to do. The Districts' own Memorandum in Support undermines that assertion. *See* Mem. In Support at 6 (acknowledging that a responding party may "identify" responsive records by providing them separate from other records). Regardless, Idaho Rule of Civil Procedure 34, which the Districts do not even acknowledge, governs requests for production and requires no more than what the United States has offered to do.

Rule 34(b) sets up a simple process. The requestor is to describe each item or category of items it is requesting with "reasonable particularity" and "specify a reasonable time,

place and manner of making the inspection” and copying the documents sought. IRCP 34(b).

The responder is only obligated to state, for each item or category of items, whether the inspection and related activities will be permitted as requested or object to the request. Here the Districts failed to specify a time, place and manner for inspecting the documents.

The United States responded with an objection to Request No. 2, as allowed by the Rule. It further offered to make the documents responsive to Requests Nos. 2 and 3 available for inspection and copying at Reclamation offices in Boise and Burley. UNITED STATES’ RESPONSES TO GROUND WATER DISTRICTS’ FIRST INTERROGATORIES, REQUESTS FOR PRODUCTION AND REQUESTS FOR ADMISSION (Subcase Nos. 01-00211, *et al.*) date July 15, 2008 (attached at Exhibit C to the Affidavit of Candice McHugh). The Districts never attempted to make arrangements for doing so. The plain terms of Rule 34 demonstrate that the United States has done all that is required by the Rule.

B. The United States Properly Responded to Interrogatory No. 6 Pursuant to Idaho Rule of Civil Procedure 33(c).

There is simply no justification for the District desire to have this Court compel the United States to “fully answer interrogatory No. 6.” The Districts’ Interrogatory No. 6 seeks to impose a number of burdens on the United States. It asks the United States first, to identify records “precisely and in detail,” including, *inter alia*, the source of any information contained in the record; second, to review *all* records maintained by the Idaho Department of Water Resources relating to each of the water rights for the purpose of identifying which of those records the United States “disagree[s] with;” and third, and perhaps most onerously, to “describe precisely and in detail...[the history, the development, and the use of the water rights that are the subject of this action.” Mem. In Supp. at 6. The United States properly objected to the Districts’ Interrogatories Nos. 6(a), 6(b) and 6(c) as, *inter alia*, overly broad and unduly burdensome.

Those objections provide one means to dispose of the Districts' Motion to Compel an additional response to those Interrogatories.^{4/}

Even were that not the case, Idaho has adopted a rule intended to prevent parties from using discovery requests to burden opposing parties as the Districts seek to do. Idaho Rule of Civil Procedure 33(c), wholly ignored by the Districts, provides:

Where the answer to an interrogatory may be derived or ascertained from the business or other records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business or other records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

Idaho Rule 33 (c) is substantively identical to former Federal Rule of Civil Procedure 33(c) as it was originally enacted in 1970.^{5/} The Federal Rule was expressly designed prevent what the Districts seek to do – require a party to engage in burdensome or expensive

^{4/} Although Idaho Rule of Civil Procedure 33(a)(2) states that objections “shall be stated in lieu of an answer,” the United States went above and beyond the requirements of the rule and offered to produce responsive documents for the Districts’ inspection and copying. *See UNITED STATES’ RESPONSES TO GROUND WATER DISTRICTS’ FIRST INTERROGATORIES, REQUESTS FOR PRODUCTION AND REQUESTS FOR ADMISSION* (Subcase Nos. 01-00211, *et al.*) dated July 15, 2008 (attached as Exhibit C to the Affidavit of Candice McHugh). The Districts have failed to provide any authority supporting their claim that such a response is inadequate.¹

^{5/} Where there is a federal rule substantively identical to an Idaho rule, Idaho courts have long treated federal court’s interpretation of the federal rule as persuasive. *E.g. Steed and Associates, Inc. v. Young*, 125 Idaho 247, 249, 766 P.2d 717, 719 (1988); *Ade v. Batten*, 126 Idaho 114, 117, 878 P.2d 813, 816 (Idaho App. 1994). The Federal Rule has since been amended several times and was redesignated as Rule 33(d) in 1993. Idaho, however, has not adopted any of those amendments.

research into his own business records in order to give an answer.⁹ *Petroleum Ins. Agency, Inc. v. Hartford Acc. and Indem. Co.*, 111 F.R.D. 318, 319 (D. Mass. 1983) (quoting Advisory Committee Note to Rule 33, 1970 Amendment). The rule addressed that problem by providing “an option to make the records available and place the burden of research o[n] the party who seeks the information.” *Id.* (“the stated purpose of the Rule is to require the party seeking the discovery to expend the effort and expense to procure it”) (emphasis in original omitted). Here the United States offered – twice – to make the documents from which responsive information could be drawn available for the Districts inspection and copying. Idaho Rule of Civil Procedure 33(c) requires no more. *See Mid-America Facilities, Inc. v. Argonaut Ins. Co.*, 78 F.R.D. 497, 498 (D. Wis. 1978) (affirming response made pursuant to Federal Rule 33(c) in which the defendant offered to make available to plaintiffs the records which will enable them to ascertain for themselves the information requested).

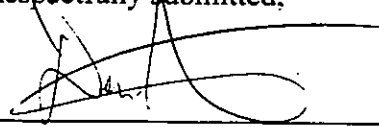
Conclusion

The United States has provided responses to the Districts’ discovery request which are in full compliance with the Idaho rules and which in some cases go above and beyond the requirements of the rule. Indeed, the Districts offer no authority to support their claim that the United States’ responses are inadequate. Further, the Districts’ Motion to Compel asks this Court to burden the United States with requirements which are not contemplated by the Idaho Rules and in some cases, directly at odds with the intent of the Rules. Their Motion to Compel must be denied.

DATED this 29th day of September, 2008.

⁹ The Districts’ request was even more burdensome. The District asks this Court to compel the United States to search records held by the Idaho Department of Water Resources in addition to Reclamation’s own records.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David W. Gehlert', is written over a horizontal line.

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