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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 Nos.	63-02529	63-03163
	63-03274	63-03323
	63-03324	63-09109
	63-10435	

RESPONSE IN OPPOSITION TO STATE OF
IDAHO'S MOTION FOR PROTECTIVE
ORDER

COMES NOW Pioneer Irrigation District, Jerry L. Tlucek, Mary Lou Tlucek,
Shelly Tlucek, Byron Tlucek, Kevin Tlucek, and DBSI Tiegs 979, LLC ("Claimants"), by and

through undersigned counsel of record and pursuant to Idaho Rule of Civil Procedure 7(b)(3)(E), and hereby submits this Response in Opposition to State of Idaho's Motion for Protective Order.

I. BACKGROUND

At issue in these subcases is the propriety of IDWR including annual diversion volume limitations in the Director's Reports for the water rights at issue. The State of Idaho has made itself a party to the subcases by responding to the Claimants' objections. On or about December 17, 2008, the Claimants served a notice of Rule 30(b)(6) deposition addressed to the State of Idaho ("State") and another addressed to the Idaho Department of Water Resources ("IDWR"). The State has filed this Motion for Protective Order to prevent deposition of a representative of the State on the grounds that (1) such a deposition *may* involve attorney work product, and (2) such a deposition will be duplicative. In this response, the Claimants argue that (1) the State's speculation and suggestion fails to meet the burden it clearly has to show attorney work product privilege, and (2) a deposition of a representative of the State will not be duplicative because the State of Idaho and IDWR are distinct entities with distinct roles in the SRBA.

II. LEGAL STANDARD

Courts exercise broad discretion in controlling discovery. *See Bailey v. Sanford*, 139 Idaho 744, 749, 86 P.3d 458, 463 (2004). This Court's decision to grant or deny a motion for protective order will be reviewed under an abuse of discretion standard. *Id.* The propriety of a court's exercise of discretion depends on: "(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to

it; and (3) whether the trial court reached its decision by an exercise of reason.” *Sun Valley Shopping Center, Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

III. ARGUMENT

The Court should deny the State’s Motion for Protective Order. In its Motion for Protective Order, the State attempts to place the burden on the Claimants to justify serving discovery on an adverse party. That is not appropriate. The Claimants are entitled, under the Idaho Rules of Civil Procedure, to “obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” IDAHO R. CIV. P. 26(b)(1). Accordingly, the Claimants may utilize any method outlined in the Rules, including depositions, to obtain discoverable information. IDAHO R. CIV. P. 26(a).

Further, as a respondent in these subcases, the State is a “party.” Administrative Order 1 (“AO1”), Rule 2.p. Therefore, the State’s motion asks this Court to preclude one party from deposing an adverse party. Absent a legitimate assertion of privilege, that is an extraordinary request which certainly does not comport with the purpose of discovery. *See Edmunds v. Kramer*, 142 Idaho 867, 873 (2006) (“The purpose of our discovery rules is to facilitate fair and expedient pretrial fact gathering.”). Put simply, the State has failed to show why the Claimants should not be afforded the opportunity to depose both an individual representing the State and an individual from IDWR.

A. The State Has Failed To Show That The Attorney Work Product Privilege Applies To Claimants’ Deposition Of A Representative Of The State

The State argues that the Claimants “may be seeking attorney work product that is not the proper subject of discovery.” (Brief in Support of Idaho’s Motion for Protective Order, p. 4 (“State’s Brief”).) Notably, the State simply raises the specter of work product without

actually asserting any privilege. (State's Brief, pp. 4-5.) "The burden of showing information is privileged, and therefore exempt from discovery, is on the party asserting the privilege." *Kirk v. Ford Motor Co.*, 141 Idaho 697, 704, 116 P.3d 27, 34 (2005). Suggestion or speculation by the State that the Claimants *may* be seeking attorney work product does not even carry the burden necessary for this Court to enter an order to *limit* discovery by deposition, let alone a protective order to *entirely preclude* discovery by deposition.

Further, the State suggests that Claimants are "attempting to depose a deputy attorney general." (State's Brief, p. 5.) The State argues that such an alleged attempt is inappropriate under *State v. Dunlap*, 141 Idaho 50, 106 P.3d 376 (2005), which upheld the district court's decision to preclude an inmate's deposition of the prosecuting attorney. *Dunlap*, 141 Idaho at 65. The State's reliance on *Dunlap* is misplaced, however, because that case involved a specific attempt to depose a particular attorney. *See id.* The Claimants' notice of deposition to the State is clearly distinguishable from *Dunlap* because the State need not designate an attorney as its representative. If the deponent ends up being an attorney, that is not the Claimant's decision—it is the decision of the State.

Put simply, the State's motion is based upon unfounded and unsupported conclusions about the Claimants' purpose for deposing a Rule 30(b)(6) representative of the State. Its objection to the Claimants' deposition of a representative of the State presumes that Claimants are certain that each and every available individual that can speak to the State's interests, policies, and positions in this matter is an attorney. Moreover, the State has wrongly represented to the Court that the Claimants bear the burden of showing that they seek discovery of non-privileged information. To the extent the State asserts the work product privilege, the State must bear the burden of demonstrating the privileged nature of the information it seeks.

Kirk, 141 Idaho at 704. The Motion for Protective Order and supporting documents have presented nothing but speculation and supposition.

B. The State Misconstrues The Distinct Roles Of The State Of Idaho And IDWR In The SRBA

The State seems to argue that deposing representatives of both the State and IDWR would be duplicative because “the State would designate a knowledgeable person from the IDWR to testify at that deposition.” (State’s Brief, p. 4.) First, that is not a proper basis for denying the Claimants the opportunity to depose the State since the State of Idaho and IDWR have distinct roles in the SRBA. As a respondent, the State is a “party” to these subcases. *See* AO1, Rule 2.p. On the other hand, IDWR is an “independent expert and technical assistant” and “shall not be a party” to the SRBA. IDAHO CODE § 42-1401B(1), (3). Again, the State’s statement that “the Claimants’ Rule 30(b)(6) deposition of the State is an apparent request [for] the same information,” (State’s Brief, p. 4) is speculation and the State has failed to demonstrate why the Claimants should not be afforded the opportunity to depose a Rule 30(b)(6) representative of the State.

Second, in light of their distinct roles in SRBA proceedings, the State’s designation of an IDWR employee as its Rule 30(b)(6) representative would be inappropriate. Although IDWR may be more familiar with the background of the policy at issue in these proceedings, that fact does not dictate that the “*independent expert*” in this proceeding is the permissible Rule 30(b)(6) deponent of the State as a party in these subcases. Additionally, while the State attempts to restrict the scope of the Rule 30(b)(6) deposition to a narrow policy issue, the Notice of Deposition does *not* do so. Instead, the Notice requests the testimony of “knowledgeable representatives” for purposes of “examination . . . on the State’s interest in the above-referenced subcases, *and* the State’s position that annual diversion volume (“ADV”)

limitations should be included on those water rights.” *See* Notice of Deposition, Exhibit A to Affidavit of Matthew J. McGee (emphasis added). The Notice also seeks all documents supporting the State’s position. *See* McGee Aff., Ex. A.

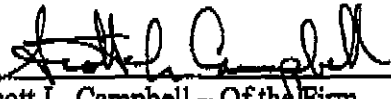
In sum, the Claimants should have the opportunity to depose (1) a representative of the State and (2) an employee of IDWR. Because IDWR is *not* a party and is required by statute to be an “independent expert” in this litigation, by definition it can *not* be designated as the Rule 30(b)(6) representative of the State, a party in this proceeding. To do so would destroy IDWR’s non-party, “independent expert” status. Accordingly, the State cannot designate an IDWR employee as its Rule 30(b)(6) representative. To the extent the State asserts that deposing a representative of the State is “duplicative, unduly burdensome and oppressive,” it either misstates or misunderstands its role as a “party” and IDWR’s distinct role as an “independent expert and technical assistant.”

IV. CONCLUSION

The Court should deny the State’s Motion for Protective Order. The State has failed to make the required showing of privilege in order to avoid designating a representative for deposition. The State has also failed to demonstrate that a deposition of a representative of the State will be duplicative. Contrary to its assertion, the State may not simply designate an employee of IDWR to be deposed. Therefore, pursuant to AO1 and the discovery provisions in the Idaho Rules of Civil Procedure, the Claimants should have the opportunity to depose a representative of the adverse party, the State of Idaho.

DATED this 15th day of January, 2009.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of January, 2009, I caused a true and correct copy of the foregoing **RESPONSE IN OPPOSITION TO STATE OF IDAHO'S MOTION FOR PROTECTIVE ORDER** to be served by the method indicated below, and addressed to the following:

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