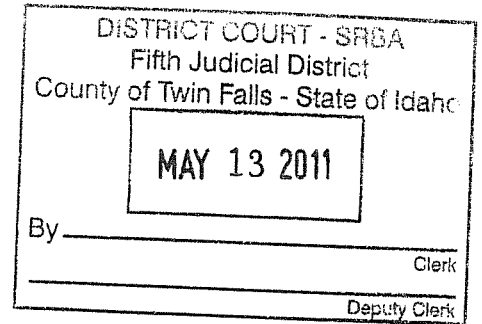


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DEPARTMENT OF
WATER RESOURCES



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 01-6
	)	(American Falls Reservoir Dist. No. 2)
Case No. 39576	)	
	)	ORDER DENYING AFRD No. 2
	)	MOTION TO COMPEL DISCOVERY

Background

Motion to Compel Discovery

On March 3, 2011, the American Falls Reservoir District No. 2 ("District") filed its *Motion to Compel Discovery* asking the Court "to order the State of Idaho to provide complete responses to discovery questions propounded upon it by the District on or about October 21, 2010." Particularly, the District is concerned with the State's answers to Interrogatories Nos. 10 and 12 in which the District wanted to learn "what the State's position *actually* is in SRBA subcase 01-06."

Interrogatory No. 10 concerns how the State contends the District's water is natural flow versus storage water "in language other than that set out in the Eagle Decree and the Palisades Contracts." Interrogatory No. 12 asks the State to identify that specific language from approximately 2,600 pages of documents the State served upon the District last year.

In its answer to Interrogatory No. 12, the State objected because it sought disclosure of information protected by the attorney work product doctrine and because the documents speak for themselves. The District contends that answer is insufficient, evasive and incomplete. It wants to know which documents support the State's position following the District's deposition of Anthony Olenichak, Program Manager and Deputy Watermaster for Water District No. 1.

The District suggested the State's interpretation of water right 01-6 was drafted after consultation with Mr. Olenichak; hence, he may be the "client" driving the State's participation in this matter.

State of Idaho's Response

The State filed its *Response to American Falls Reservoir District No. 2's Motion to Compel Discovery* on March 24, 2011. The State wrote that in order for it to disclose the significance of each page and line of the 2,600 pages "would necessarily require State's counsel to engage in a selective review of the documents, sifting the relevant facts from the irrelevant and identifying each passage that supports the State's position or otherwise is 'significant' to the State, thereby disclosing counsel's mental impressions, opinions, conclusions and legal theories of the case." State's *Response*, at 2.

The State also argued under *Sanders v. Ayhart*, 89 Idaho 302, 404 P.2d 589 (1965), the District "may not circumvent the attorney work product doctrine by seeking the very same information through an interrogatory rather than a request for production." State's *Response*, at 12. Then, the State wrote that its answer to Interrogatory No. 12 was sufficient given the burden of analyzing each document is substantially the same for both parties.

Finally the State urged the Court to deny the *Motion* and award the State attorney fees "because it was not substantially justified by existing law or good faith argument based upon the facts and was filed for the purpose of causing needless increase in the cost of litigation." State's *Response*, at 34.

District's Reply

The District filed its *Reply to State of Idaho's Response to AFRD No. 2's Motion to Compel Discovery* on March 29, 2011. The District argued the State's *Response* is without merit because the State "places a premium on form over substance, ignores the factual context in which Interrogatory No. 12 arose, and attempts to hide its contentions, which should be discoverable, behind a guise of 'work product' privilege." District's *Reply*, at 1-2. The District argued it chose to use interrogatories rather than depose a witness on the significance of 2,600 pages, to obtain the same information that should have been available at the State's deposition.

Next, the District wrote that it asked the State to identify those portions of the documents it disclosed that the State deems supportive of its position. Interrogatory No. 12 is a “contention interrogatory” that does not seek attorney work product.

Finally, the District wrote the Attorney General’s office has appeared in this matter to represent the State:

Therefore, for all purposes, the State is the AG, and vice versa. However, the State cannot use its status as both party and attorney to obtain an enhanced level of work product protection. . . . ‘A lawyer acting independently without a client is in no position to claim *any* work product.’
District’s *Reply*, at 10 citing 35 ALR 3rd 412, at 4.

In its conclusion, the District asked the Court to issue an order compelling the State to respond to Interrogatory No. 12 and for attorney fees and costs because “it is the State that is driving up the cost of this litigation, as the ultimate result will no doubt be more depositions on the State’s position.” District’s *Reply*, at 13.

Hearing

A hearing on the District’s *Motion* was held by telephone conference on March 31, 2011. Isaac D. Keppler appeared for the District; Michael C. Orr appeared for the State; Jane M. Newby and Mitra M. Pemberton appeared for the City of Pocatello; Candice M. McHugh appeared for the Ground Water Districts; Travis L. Thompson appeared for the Twin Falls and North Side Canal Companies; Jerry R. Rigby appeared for the United Canal Company, *et al.*; David W. Gehlert appeared for the United States, along with Fredric W. Price; and Chris M. Bromley appeared for IDWR.

Discussion

During oral argument on the District’s *Motion*, the State said no documents have been withheld from the District before Mr. Olenichak’s deposition or after. The State has already produced all documents Mr. Olenichak reviewed to prepare for his deposition, plus all “new” documents retrieved by the State from archives afterwards. And the District did not object to the State’s disclosure at the deposition nor requested the deposition be continued.

The State characterized the District’s *Motion* as a dress rehearsal for summary judgment proceedings because it is asking for the State’s opinions and legal conclusions – not merely

documents or facts. By asking the State to specify whatever language in the 2,600 pages of documents support the State's position in this matter, the District is clearly asking for the State's work product.

The Special Master agrees with the State. The District is now asking counsel for the State to review the documents and identify facts *he* deems relevant instead of asking Mr. Olenichek or other witnesses for the State to reveal what is relevant. There can be no clearer definition of work product that warrants protection.

The District's argument whether Mr. Olenichak or someone else is the "client" misses the point. The Idaho Water Resource Board and each state agency, except IDWR, may appear as a party in the SRBA through the Attorney General and the Attorney General represents the State. I.C. § 42-1401C. In this matter, the State is the party and it would be appropriate for the District to depose witnesses designated by the State to learn the State's positions, rather than requiring the Attorney General to identify specific language in documents the State contends supports its contention.

Regarding the parties' requests for attorney fees and costs, there is no evidence the arguments were not justified or filed for the purpose of causing needless costs and delays. Understandably, the District is concerned with who speaks for the State, but there is no basis to require the Attorney General to specify exact language from 2,600 pages the State believes supports its position, particularly where both sides have the same documents from which each must derive their own mental impressions, opinions, conclusions and legal theories of the case.

Order

THEREFORE, IT IS ORDERED that the District's *Motion to Compel Discovery* is **denied**, the parties to bear their own costs and fees in the matter.

DATED May 13, 2011.



TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING AFRD NO 2 MOTION TO COMPEL DISCOVERY was mailed on May 13, 2011, with sufficient first-class postage to the following:

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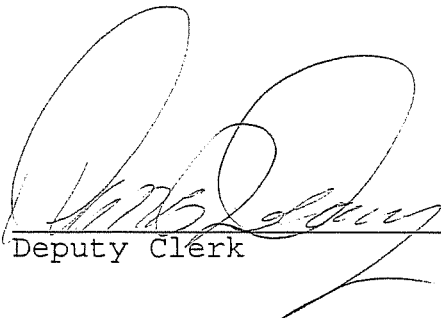
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