**BEFORE THE DEPARTMENT OF WATER RESOURCES**

**OF THE STATE OF IDAHO**

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| **IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02551 AND 36-07694** | ) | **CM-DC-2011-004** |
| **(RANGEN, INC.)** | ) | **ORDER DENYING IGWA AND POCATELLO'S MOTION TO COMPEL PRODUCTION OF RESEARCH LIST; ORDER SHORTENING TIME FOR INTERROGATORY** |

## FINDINGS OF FACT

On January 30, 2013, the City of Pocatello ("Pocatello") and the Idaho Ground Water Appropriators, Inc. ("IGWA") filed a *Motion to Compel Production of Research List* ("Motion") in the Rangen, Inc. ("Rangen") delivery call. Filed in support of the Motion was the *Affidavit of Sarah A. Klahn*. The Motion asks the Director of the Department of Water Resources ("Director" or "Department") to issue an order compelling Rangen "to disclose a document discovered at the deposition of David Brock on January 22, 2013." *Motion* at 1. The document IGWA and Pocatello seek is referred to as "the Research List." *Motion* at 2. According to the Motion, Rangen did not produce the Research List because of its belief that it was protected as attorney work product and/or attorney-client privilege. IGWA and Pocatello also ask "that a hearing be set for determination of whether costs and fees are a proper sanction, in accordance with I.R.C.P. 37(a)(4)." *Id.* at 11.

On February 13, 2013, Rangen filed a *Response in Opposition to Motion to Compel and Request for Sanctions* ("Response"). Filed in support of the Response was the *Affidavit of Robyn M. Brody* ("Brody Affidavit"). Rangen argues it did not produce the Research List because: "(1) it constitutes an attorney-client communication; and (2) it is attorney work-product and the Intervenors have other means of discovering the information they are requesting." *Response* at 2. Regarding "other means of discovering" the Research List, Rangen states: "One of the simplest and least expensive methods to obtain this type of information is simply by crafting an interrogatory directed at the corporation." *Id.* at 6. Lastly, Rangen argues that if the Motion is granted, IGWA and Pocatello's request for costs and attorneys fees should be denied.

On February 20, 2013, IGWA and Pocatello filed their *Reply in Support of Motion to Compel* ("Reply"). The Reply disputes Rangen's arguments and specifically responds to Rangen's claim that the Research List could be obtained through other means: "Pocatello and IGWA have made repeated attempts to obtain the type of information contained in the Research List through 'other means' since at least September of 2012. . . . Rangen has made clear it will not produce this information unless ordered by the Director, and this alternative 'means' would simply result in another motion to compel and delay the discovery dispute over the Research List." *Reply* at 5-6. The Reply then suggests the Director conduct "an *in camera* inspection of the Research List and corresponding emails to determine whether said documents are privileged." *Id.* at 6, 8.

**CONCLUSIONS OF LAW**

<u>The Department's Rules of Procedure, the Idaho Rules of Civil Procedure, and the Idaho Rules of Evidence</u>

Rule 52 of the Department's *Rules of Procedure* states as follows:

> The rules in this chapter will be liberally construed to secure just, speedy and economical determination of all issues presented to the agency. . . . Unless required by statute, <u>or otherwise provided by these rules</u>, the Idaho Rules of Civil Procedure and the Idaho Rules of Evidence do not apply to contested case proceedings conducted before the agency.

IDAPA 37.01.01.052 (emphasis added).

Regarding discovery, the Department's *Rules of Procedure* state as follows: "Unless otherwise provided by statute, rule, order or notice, <u>the scope of discovery . . . is governed by the Idaho Rules of Civil Procedure</u>." IDAPA 37.01.01.520.02 (emphasis added). Discovery has been ongoing in this case since 2012.

Idaho Rule of Civil Procedure 26(b)(1) ("Scope of discovery") states as follows:

> Parties may obtain discovery regarding any matter, <u>not privileged</u>, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . . 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.

Emphasis added.

Regarding "privileged" communications between an attorney and his or her client, Idaho Rule of Evidence 502(b) provides as follows:

> 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, (2) between the client's lawyer and the lawyer's representative, (3) among clients, their representatives, their lawyers, or their lawyer's representatives, in any combination, concerning a matter of common interest, but not including communications solely among clients or their representatives when no lawyer is a party to the communication, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

Regarding materials "prepared in anticipation of litigation," I.R.C.P. 26(b)(3), referred to as "work product," *In re Grand Jury Subpoena*, 357 F.3d 900, 907 (9th Cir. 2004), Idaho's Rules of Civil Procedure provide as follows:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case <u>and</u> that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

I.R.C.P. 26(b)(3) (emphasis added).

<u>Attorney-Client Privilege</u>

Rangen argues that attorney-client privilege[1] bars production of the Research List because the List "came about as a result of an email exchange between Robyn M. Brody, counsel for Rangen, and Wayne Courtney, Rangen's Executive Vice President." *Response* at 3 *citing Brody Affidavit* at 2. IGWA and Pocatello argue that the Research List itself is not a "communication" and is not protected under I.R.E. 502. *Response* at 7. The key question here is whether the Research List is a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client. As the proponent of the privilege,

[1] Citing Rule 52 of the Department's *Rules of Procedure*, Rangen argues that I.R.E. 502(b) does not apply, yet seeks protection of its "privilege[d] . . . attorney-client communication." *Response* at 3. Rangen's argument is unavailing. As cited above, Rule 520.02 of the Department's *Rules of Procedure* states that "the scope of discovery . . . is governed by the Idaho Rules of Civil Procedure." IDAPA 37.01.01.520.02. Idaho Rule of Civil Procedure 26(b)(1) sets forth the "Scope of discovery" and prohibits discovery of "privileged" information. Idaho Rule of Evidence 502 describes the application of "lawyer-client privilege." Furthermore, Rule 600 of the Department's *Rules of Procedure* expressly allows the presiding officer to "exclude evidence . . . on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho." IDAPA 37.01.01.600. If Rangen seeks to protect the Research List as privileged attorney-client communication, the Department must evaluate Rangen's assertion based on I.R.E. 502.

Rangen carries "[t]he burden of showing information is privileged, and therefore exempt from discovery . . . ." *Kirk v. Ford Motor Co.*, 141 Idaho 697, 704, 116 P.3d 27, 34 (2005).

The Director concludes that the Research List is a protected communication. The Research List came about as a result of an email exchange between counsel for Rangen and Rangen's Executive Vice President. Brody Aff. at ¶ 2. The list was prepared as a result of a request from Rangen's attorney. Brock Depo., p. 98, lines 14-17. Mr. Brock, who prepared the list, is an employee of Rangen. *Rangen's Response in Opposition to IGWA's Motion in Limine to Exclude Brock* at 1. While Rangen fails to explicitly state that the email exchange was intended to be confidential, that is the only conclusion that can be drawn given Rangen's response in this matter.

IGWA and Pocatello cite *United Heritage Prop. & Cas. Co. v. Farmers Alliance Mut. Ins. Co.*, No. 1: CV 10-456-BLW, 2011 WL 781249 (D. Idaho Mar. 1, 2011), an unpublished Idaho federal district court decision, for the proposition that the Research List "is not a communication, but instead is a 'tangible thing[] prepared by a party in anticipation of litigation.'" *Motion* at 7. The unstated implication being that if a document is a tangible thing prepared by a party in anticipation of litigation, then it cannot be a communication and cannot be subject to the attorney-client privilege. The Director disagrees with IGWA and Pocatello's reading of this case. In *United Heritage*, two insurance companies were in a dispute over insurance coverage. United Heritage was trying to gain access to the notes of the other company's insurance adjuster. The court found that the notes were "tangible things prepared by a party in anticipation of litigation" and so were protected by the work product doctrine unless some other exemption applied. *United Heritage* at *4. The court did not analyze whether the documents may also be attorney-client privileged in the order, so there is no basis for suggesting that something, once characterized as a "tangible thing prepared by a party in anticipation of litigation," cannot also be an attorney-client privileged communication. In fact, the court in *United Heritage* expressly went on to reserve ruling on whether the notes may also be privileged pending an in camera review of the documents. *United Heritage* at *5. This cuts against IGWA and Pocatello's argument.

When Rangen disclosed Brock as a witness, Rangen stated that Brock would testify as to "what type of feed research Rangen could do if more water were available at the facility." Brock Depo., p. 148, lines 5-11. The Director recognizes that IGWA and Pocatello are trying to understand exactly what type of feed research Rangen could do with more water. It would be a different issue if counsel for Rangen, claiming an attorney-client privilege, had ordered Brock to not explain what types of feed research Rangen could do with more water, but that is not what happened in this case. In response to the above question being posed to Brock, counsel for Rangen stated, "Now, if that's your question, you can ask him those questions all day long. You can ask those questions." Because the attorney-client privilege does not protect disclosure of the underlying facts by those who communicated with the attorney, Brock, or any other Rangen witness for that matter, must respond if asked about the types of research Rangen could do if more water were available. Brock did attempt to answer the question that was asked. Brock Depo., p.149, lines 1-3. But once he provided his response, IGWA then went a step further and asked about a communication prepared at the request of Rangen's attorney on this issue. IGWA and Pocatello are entitled to an answer to the question about what type of feed research Rangen

could do with more water, but are not entitled to seek confidential communications between legal counsel for Rangen and Rangen employees on that issue.

Attorney Work Product

Rangen next argues that the Research List is protected as attorney work product. Three tests must be satisfied before materials can be classified as work product. The materials must be: 1. "documents and tangible things;" 2. "prepared in anticipation of litigation or for trial;" and 3. "by or for another party or by or for that other party's representative." C. Wright & A. Miller, § 2024 The Work–Product Rule—Matters Protected by the Work–Product Rule, 8 Fed. Prac. & Proc. Civ. § 2024 (3d ed.).[2] There appears to be no dispute about whether the Research List is work product because IGWA and Pocatello concede that it is a "tangible thing prepared by a party in anticipation of litigation." *Motion* at 7.

"[T]he work product doctrine is not an absolute bar to discovery of materials prepared in anticipation of litigation . . . ." *In re Cendant Corp. Securities Litigation*, 343 F.3d 658, 663 (3rd Cir. 2003). A party seeking qualified work product has the burden of demonstrating "substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." I.R.C.P. 26(b)(3); *Garcia v. City of El Centro*, 214 F.R.D. 587, 591 (S.D. Cal. 2003) ("If the work product privilege is found to apply, the burden shifts and the party seeking discovery must show that substantial need of the materials exists and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by an alternative method."). I.R.C.P. 26(b)(3)'s use of the conjunctive "and" establishes a two-part test. *Morgan v. State, Dept. of Public Works*, 124 Idaho 658, 665, 862 P.2d 1080, 1087 (1993).

Here, Rangen argues IGWA and Pocatello do not have a "substantial need" because of the parties' disagreement over the relevancy and admissibility of "this type of evidence." *Response* at 5. The Director is unsure what exactly Rangen means when it refers to "this type of evidence" but assumes that Rangen means evidence related to what research projects Rangen could accomplish with more water. While it does not state that the Research List itself could be discovered through "other means," Rangen avers, "there are other means of seeking the information without violating the attorney-client or attorney work-product privilege." *Response* at 6 (emphasis added). Rangen suggests that IGWA and Pocatello "craft[] an interrogatory directed to the corporation . . . to obtain this type of information. . . . At no point in time, however, have they submitted an interrogatory to the corporation asking it to supply this information." *Id.* (emphasis added).

As stated in the Motion and Reply, IGWA and Pocatello only learned of the Research List during the January 22, 2013 deposition of Mr. Brock. While IGWA and Pocatello may be able to serve an interrogatory on Rangen through the normal discovery process, the hearing date in this proceeding is rapidly approaching. The Director is leery of Rangen's request for IGWA and Pocatello to submit an interrogatory to the corporation seeking "this type of information," as

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[2] While this treatise focuses on the federal rules of procedure, the relevant section of the Idaho rule and the federal rule are the same.

the parties could waste valuable time over the form and content of the interrogatory. *See Reply* at 6. The Director agrees that IGWA and Pocatello are owed an answer to their question about Rangen's inability to conduct certain research projects. However, the Director agrees with Rangen that an interrogatory is a process available to IGWA and Pocatello to get the desired response. Because of the late date in the proceedings and to avoid further delay, the Director will order that the interrogatory service and response time be shortened. IDAPA 37.01.01.521. If IGWA and Pocatello desire to serve on Rangen interrogatories related to the issue of "what type of feed research Rangen could do if more water were available at the facility," they can do so within five (5) days of the service date of this order. Rangen will then have five (5) days to provide responses to the interrogatories.

Sanctions and *In Camera* Review

Citing I.R.C.P. 37(a), IGWA and Pocatello ask for sanctions against Rangen in the form of costs and attorneys fees, as well as a hearing on the Motion. Because the Director does not grant IGWA and Pocatello's motion to compel, the request for costs and attorneys fees is denied. The Director also concludes there is no need for an *in camera* review of the documents.

**ORDER**

Based upon and consistent with the foregoing, the Director hereby DENIES IGWA and Pocatello's *Motion to Compel Production of Research List.*

Furthermore, the Director DENIES IGWA and Pocatello's request for sanctions and an *in camera* review of email communications between Rangen and its attorney.

Furthermore, the Director ORDERS that if IGWA and Pocatello desire to serve interrogatories on Rangen related to the issue of "What type of feed research Rangen could do if more water were available at the facility", they can do so within five (5) days of the service date of this order. Rangen will then have five (5) days to provide responses to the interrogatories.

Dated this 4th day of March, 2013.

GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of March, 2013, the above and foregoing document was served on the following by providing a copy in the manner selected:

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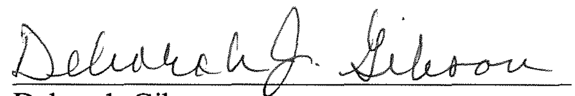

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