

**STATE OF NEW MEXICO
DEPARTMENT OF ENERGY, MINERALS AND NATURAL RESOURCES
OIL CONSERVATION DIVISION**

**APPLICATION OF DEVON ENERGY PRODUCTION
COMPANY L.P. TO REVOKE THE INJECTION
AUTHORITY GRANTED BY ADMINISTRATIVE
ORDER SWD-640, LEA COUNTY, NEW MEXICO.**

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CASE NO. 15397

OXY'S RESPONSE TO MOTION TO COMPEL PRODUCTION

In response to Devon's motion to compel production ("Motion"), OXY USA Inc. ("Oxy") states as follows:

In paragraph 4 of the Motion, Devon asserts that Oxy must produce internal correspondence related to Oxy's investigation of the well.¹ Documents or correspondence created in anticipation of litigation are protected by the work product doctrine and are therefore immune from discovery. Work-product immunity under New Mexico law is set forth in Rule 1-026(B)(5) NMRA, which provides in pertinent part:

a party may obtain discovery of documents, electronically stored information and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party or that party's representative . . . only upon a showing that the party seeking discovery has 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.

Consistent with Rule 1-026, Oxy's internal correspondence is subject to protection from disclosure under the work product doctrine because it was prepared following allegations by Devon that Oxy's disposal well was the cause of the water encountered at 1,800 feet and

¹ Devon also seeks to compel daily WellView reports based on its request for "all tests conducted on the well." See Motion, p. 2. Devon also issued a third subpoena, dated February 16, 2016, specifically requesting WellView reports. Information related to WellView reports will be produced in conjunction with Devon's third subpoena.

demands by Devon that Oxy shut-in its well. See *Gingrich v. Sandia Corp.*, 2007-NMCA-101, ¶ 9, 142 N.M. 359.

1. The correspondence was prepared in anticipation of litigation.

The correspondence at issue includes Oxy employees' thoughts, opinions, reactions, impressions and conclusions concerning Devon's allegations. Courts have held that "[l]itigation need not necessarily be imminent as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation." *Anaya v. CBS Broad., Inc.*, 251 F.R.D. 645, 651 (D.N.M. 2007). Courts have recognized that investigations are frequently performed in anticipation of litigation. See *Transocean Deepwater, Inc. v. Ingersoll Rand Co.*, No. 2010 U.S. Dist. LEXIS 145073 at **8-9. (E.D. La. Dec. 21, 2010) (investigation into root cause of incident covered by work product protection); see also *Eoppolo v. National R. Passenger Corp.*, 108 F.R.D. 292, 294 (E.D. Pa. 1995); *Gargano v. Metro-North*, 222 F.R.D. 38, 40 & n.2 (D. Conn. 2004) ("Statements taken by claims agents in anticipation of litigation are protected by [the work product doctrine].").

The requested correspondence is exclusively related to the investigation performed by Oxy in response to Devon's allegations and request that Oxy shut in the disposal well. Oxy's sole purpose for conducting an investigation into the status of the well was to address the Devon's demands related to shutting-in the well, which Oxy believed would result in litigation. Thus the investigation, and Oxy's related correspondence, was solely in anticipation of litigation.

2. Devon has failed to establish undue hardship.

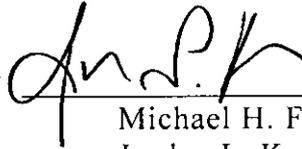
Opinion work product, which reflects the “mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party” concerning prospective litigation or trial, is protected from disclosure under a near “absolute immunity.” Rule 1-026(B)(5) NMRA, *S.F. Pac. Gold Corp. v. United Nuclear Corp.*, 2007-NMCA-133, ¶ 39, 143 N.M. 215. “Ordinary work product, or ‘non-opinion’ work product, has a qualified immunity” and may be discoverable “only upon a showing that the party seeking discovery has 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.” *S.F. Pac. Gold*, 2007-NMCA-133, ¶ 39.

Even if the Division determines that the correspondence is non-opinion work product, Devon has failed to meet its burden to establish undue hardship. *See Knight v. Presbyterian Hosp. Ctr.*, 1982-NMCA-125, ¶ 98 N.M. 523 (party seeking to compel information protected by the work product doctrine has burden of proving undue hardship). Furthermore, Oxy provided Devon with all of the requested data related to the well as well as the results of all of the tests conducted on the well. Devon has the facts, and is not entitled to the protected correspondence containing Oxy employees’ thoughts opinions, reactions, impressions and conclusions concerning the well, the tests or Devon’s allegations.

WHEREFORE Oxy requests that Devon's motion to compel be denied.

Respectfully submitted,

HOLLAND & HART LLP



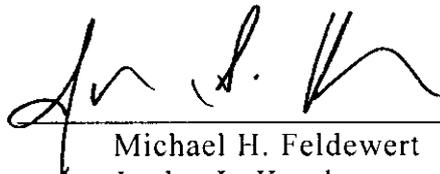
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ATTORNEYS FOR OXY USA, INC.

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2016, I served a copy of the foregoing document to the following counsel of record via Electronic Mail to:

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