

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

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

Case No. 15397

**DEVON ENERGY PRODUCTION COMPANY, L.P.'s  
REPLY REGARDING ITS MOTION TO COMPEL PRODUCTION**

Devon Energy Production Company, L.P. ("Devon") submits this reply regarding its motion to compel production of documents from OXY USA Inc. ("OXY"). In support thereof, Devon states:

A. INTRODUCTION.

1. Devon filed a motion to compel production of certain of OXY's documents requested by a subpoena issued by the Division on December 22, 2015. The documents sought are all of OXY's correspondence and notes generated as a result of discussions with Devon personnel since August 1, 2015 regarding OXY's SWD well.

2. OXY submitted a response to the motion to compel, asserting that certain (unidentified) documents were not produced because they were "generated in anticipation of litigation," and thus protected by "investigative privilege" or "work-product immunity." However, OXY did not give any information as to which documents were withheld from production, and what the documents contained.

3. While recognizing that there is a presumption in favor of discovery, OXY argued that privileges should be strictly upheld under NMRA 1-026(B)(5), regarding trial preparation materials.

B. ARGUMENT.

4. What OXY omitted from its response is any reference to NMRA 1-026(B)(7), under which a party asserting a privilege "shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the applicability of the privilege." OXY did not do so.

5. A party seeking to avoid responding to discovery requests may not simply claim that materials have been prepared in anticipation of litigation, but must specify the basis for the objection and the items of work-product involved in order to assert the privilege. **Nutmeg Insurance Co. v. Atwell, Vogel & Sterling, A Div. of Equifax Services, Inc.**, 120 F.R.D. 504 (W.D.La.1988). In addition, the burden is on party asserting work product doctrine to establish that the material sought to be withheld from disclosure consists of documents or tangible things, prepared in anticipation of litigation or for trial, and that they were prepared by or for another party or that party's representative. **Ennis By and Through McMillan v. Anderson Trucking Service, Inc.**, 141 F.R.D. 258 (E.D.N.C.1991).

6. OXY unilaterally withheld documents and communications about which neither the Division nor Devon can assess whether they are privileged or not, or merely contain damaging general information. If a party withholds materials that are the object a of discovery request on basis of privilege, then that party is obligated to document those materials in a "privilege log" in order to give the requesting party an opportunity to assess the privilege asserted. **Aecon Buildings, Inc. v. Zurich North America**, 253 F.R.D. 655. The information provided in a privilege log must be sufficient to enable opposing parties and the court to determine whether each element of the asserted privilege is satisfied. A blanket claim of the

asserted privilege does not satisfy the burden of proof. **Zander v. Craig Hospital**, 743 F.Supp.2d 1225 (D.Colo.2010); **Krahling v. Executive Life Insurance Co.**, 125 N.M. 228.

7. Moreover, documents not prepared pursuant to the request, direction, or supervision of legal counsel are not subject to the work-product rule. **Hartman v. Texaco, Inc.**, 123 N.M. 220. OXY has not shown that any of the above requirements have been met.

8. Documents produced in response to a communication from a plaintiff regarding potential claims which could be brought unless defendant took certain actions are not protected from discovery by work product privilege; though litigation may have been a distinct possibility, the documents must be produced. **Rayman v. American Charter Federal Sav. & Loan Ass'n**, 148 F.R.D. (647 D.Neb.1993). In this case, Devon first contacted OXY about its SWD well on September 7, 2015. The application herein was not filed until September 29, 2015.

9. Work product discovery privilege does not apply to documents that are prepared in the ordinary course of business, or that would have been created in essentially similar form irrespective of the litigation. **U.S. v. Textron Inc. and Subsidiaries**, 507 F.Supp.2d 138. The work-product doctrine is not an umbrella that shades all materials prepared by a lawyer or agent of the client; if a document would have been created regardless of whether litigation was expected to ensue, the document is deemed to have been created in the ordinary course of business, and not in anticipation of litigation as would trigger protection under the doctrine. **ReedHycalog UK, Ltd. v. Baker Hughes Oilfield Operations Inc.**, 242 F.R.D. (357 E.D.Tex.2007).

10. In this case the documents requested by Devon would have been prepared in the ordinary course of business by OXY in checking on Devon's claim. They must be produced.

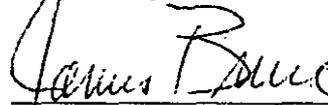
11. In addition, Devon is entitled to the documents prepared in anticipation of litigation by or for a party's attorney, whether or not work-product, upon a showing of substantial need and undue hardship. **Knight v. Presbyterian Hospital Center**, 98 N.M. 523. In this case, the substantial need is the need to know OXY's thoughts of Devon's claims, and the undue hardship is the fact that Devon has no other access to OXY's documents. Devon submitted all of its internal communications to OXY, and is entitled to the same information from OXY.

C. CONCLUSION.

12. OXY has not satisfied the provisions of Rule 1-026 to withhold e-mail correspondence between its employees regarding Devon's claims about the SWD well. Therefore, Devon must be provided with the subpoenaed documents.

WHEREFORE, Devon requests the Division to order that the requested be produced.

Respectfully submitted,



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James Bruce  
Post Office Box 1056  
Santa Fe, New Mexico 87504  
(505) 982-2043

Attorney for Devon Energy Production  
Company, L.P.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was served upon the following counsel of record this 7<sup>th</sup> day of March, 2016 via e-mail:

Michael H. Feldewert  
Jordan L. Kessler  
Holland & Hart LLP  
P.O. Box 2208  
Santa Fe, New Mexico 87504  
(505) 988-4421

*mfeldewert@hollandhart.com*  
*jdkessler@hollandhart.com*

  
James Bruce