

Davidson, Florene, EMNRD

From: Goetze, Phillip, EMNRD
Sent: Wednesday, March 23, 2016 9:12 AM
To: Davidson, Florene, EMNRD
Subject: FW: Case 15397; Devon's Motion to Compel

Florene:

Please make this part of the case file record. Thanks. PRG

Phillip R. Goetze, PG
Engineering and Geological Services Bureau
Oil Conservation Division
New Mexico Energy, Minerals and Natural Resources Department
1220 South St. Francis Drive
Santa Fe, NM 87505
Direct: 505.476.3466
e-mail: phillip.goetze@state.nm.us



From: Brooks, David K, EMNRD
Sent: Tuesday, March 22, 2016 3:49 PM
To: jamesbruc@aol.com; mfeldewert@hollandhart.com; jkessler@hollandhart.com
Cc: Goetze, Phillip, EMNRD <Phillip.Goetze@state.nm.us>
Subject: Case 15397; Devon's Motion to Compel

Good Afternoon Ms. Kessler and Gentlemen

After reading the papers filed, the authorities cited and the official comments on the source federal rule, I conclude that Rule 1-026.B(5) does establish a privilege for party work product prepared in anticipation of litigation, and that specific attorney involvement is not essential for the privilege to apply. Although our Supreme Court, in *Hartman v. Texaco*, cited by Devon, indicates that attorney involvement is a material factor to be considered, I do not read that opinion as making that involvement a *sine qua non* of the privilege.

It follows that the documents Oxy seeks to protect, or some of them, may be privileged. It is accordingly necessary that Oxy furnish these documents for review by the examiners, together with evidence of the dates the documents were prepared if they are not dated. OXY may submit any other evidence it feels is necessary in support of the privilege. In view of the scheduled hearing, these documents must be submitted not later than the close of business on Thursday February 24, so that if we decide they are discoverable, they can be furnished to Devon's counsel first thing Monday morning.

Assuming the documents are privileged, I do not believe Devon has made a case of "substantial need" and "under hardship." The statements made in Paragraph 11 of Devon's Reply are such as could be made in most any case, and, if accepted, would nullify the privilege.

If we decide the documents, or any of them, are privileged, they will be returned, and OCD will not make or retain copies. A record is not necessary, since Commission review is *de novo*. The issue can again be presented to that body, and only its decision will be reviewable.

Sincerely

David K. Brooks
Assistant General Counsel
Attorney for Phillip Goetz, Examiner