

WYOMING OUTDOOR COUNCIL, ET AL.

IBLA 2006-64

Decided June 28, 2006

Appeal from a Finding of No Significant Impact/Decision Record of the Acting State Director, Wyoming, Bureau of Land Management, approving the drilling and completion of natural gas wells. WY-100-EA06-043.

Motion to submit Reply granted, Motion for Protective Order granted in part.

1. Administrative Procedure: Administrative Record--Board of Land Appeals--Evidence: Generally

When an appellant attaches a copy of a communication between BLM and its attorney to a pleading filed in a pending case before the Board and BLM asserts that the document is privileged material protected from disclosure by the attorney-client communication or attorney work-product privileges, the Board will adjudicate the claim of privilege to determine if it has been properly asserted.

2. Evidence: Generally

A document prepared by counsel for BLM for the purpose of advising BLM is privileged material protected from disclosure by the attorney work-product privilege when it is prepared for the purpose of filing a responsive pleading in a case pending before the Board, and it contains counsel's theories of the case and legal strategy for defending the challenged BLM decision.

3. Administrative Procedure: Administrative Record--Board of Land Appeals--Evidence: Generally

In determining whether the attorney work-product privilege has been waived by an inadvertent disclosure, the Board will examine all the circumstances surrounding the disclosure, including: (1) the reasonableness of precautions taken to prevent disclosure; (2) the amount of time taken to remedy the error; (3) the scope of discovery; (4) the extent of the disclosure; and (5) the overriding issue of fairness.

4. Administrative Authority: Generally--Board of Land Appeals--Evidence: Generally

When a party attempts to use a privileged document of another party and the privilege has not been waived, the Board may issue a protective order placing the privileged document under seal and striking references to the document in pleadings.

APPEARANCES: Bruce Pendery, Esq., Logan, Utah, for the Wyoming Outdoor Council; Hadassah M. Reimer, Esq., Jenifer E. Scoggin, Esq., and Jack D. Palma, II, Esq., Cheyenne, Wyoming, and Eric Dady, Esq., Questar Exploration and Production Company, Denver, Colorado, for the Questar Exploration and Production Company; Terri L. Debin, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

On March 13, 2006, the Bureau of Land Management (BLM) filed a Motion for Protective Order (Motion) in the pending appeal by Wyoming Outdoor Council, Biodiversity Conservation Alliance, The Wilderness Society, Greater Yellowstone Coalition, and Upper Green River Valley Coalition (hereinafter, appellants) from a November 9, 2005, Finding of No Significant Impact/Decision Record (FONSI/DR) of the Acting State Director, Wyoming, BLM. In its FONSI/DR, BLM had approved the drilling and completion of nine natural gas wells during the winter of 2005-2006 by Questar Exploration and Production Company (Questar) on public lands in T. 32 N., R. 109 W., Sixth Principal Meridian, Sublette County, Wyoming, within the Pinedale Anticline Natural Gas Field.<sup>1/</sup>

---

<sup>1/</sup> Questar was permitted to intervene in the present proceeding, by order dated Dec. 22, 2005.

By order dated January 30, 2006, the Board denied appellants' petition to stay the effect of BLM's November 2005 FONSI/DR. On March 13, 2006, the Board received appellants' Motion to Submit Reply to Questar's Answer, together with appellants' proposed Reply. We grant appellants' Motion, which concludes briefing. The appeal now awaits final adjudication on its merits.

BLM's current concern centers on "two pages of typed notes from BLM's counsel to BLM," prepared in connection with BLM's response to appellants' stay petition, which were later transmitted to appellants, in response to a December 15, 2005, Freedom of Information Act (FOIA) request:

The notes were typed up by \* \* \* counsel and faxed to a BLM employee who was assisting in preparing a response to the appeal. The notes were clearly intended only for the BLM employee and were not shared with anyone else until they were inadvertently turned over as part of the employee's file containing documents responsive to Appellants' FOIA [request]. The employee mistakenly did not flag the document as one to be protected, and the FOIA Officer likewise failed to give the document the protection it warranted. [<sup>2/</sup>]

(Motion at 2-3.) BLM argues that these notes, prepared by its attorney during litigation, contain her thoughts, ideas, and plans to best defend her client's actions, and are, therefore, privileged material protected from disclosure to other parties to the proceeding by the attorney-client communication and attorney work-product privileges. Although the notes were mistakenly provided to appellants, BLM asserts that the privilege has not been waived under prevailing legal standards and that the

---

<sup>2/</sup> BLM states that the notes were transmitted to the BLM employee with a "transmission cover sheet" which was expressly directed to the employee, and stated: "This message is intended only for the use of the individual to whom, or entity to which, it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law." (Motion at 3.) Included as part of "Exhibit 4" to appellants' Mar. 10, 2006, Reply to Questar's Answer (Reply) is a copy of the transmission cover sheet (entitled "Telefax Message"), which bears, in pre-printed form, the language quoted by BLM in its Motion, under the heading "Transmission Notice." The cover sheet states that attached "notes" were being sent from counsel for BLM to a BLM employee (V. Mistarka). Following that cover sheet is a 2-page typewritten document, addressed to "Vickie." Both the cover sheet and attached notes (denoted as "Tab No. 1") were transmitted by facsimile on Dec. 20, 2005. It is clear that these are the notes to which BLM refers in its Motion.

notes should be protected.<sup>3/</sup> *Id.* at 3, 7. It requests that the Board issue a protective order “sealing the said communication and preventing any further disclosure or dissemination thereof,” and that we order appellants’ counsel to return the communication. *Id.* at 4. BLM does not ask that we exclude the document from the record in this case.

BLM states that, having become aware that appellants had acquired the document, it requested that the document be returned, but appellants refused to do so, stating that, while the document would be provided to the Board along with their Reply, it was “not a critical element of the Reply.” (Motion at 4.) BLM disputes appellants’ representation: “[T]he document of concern is not only discussed throughout the Reply, but the privileged nature of the document is not revealed to the Board. Furthermore, the contents of the document are taken out of context in an attempt to further arguments made by Appellants.” *Id.* To date, no objection or other response to BLM’s Motion has been filed by any other party to the proceeding.

The question posed by BLM’s Motion is a novel one. For the reasons stated below, we grant the Motion.

[1] The attorney-client communication and attorney work-product privileges are matters of common law. *See, e.g., Hickman v. Taylor*, 329 U.S. 495, 509-12 (1947); *Jordan v. U.S. Department of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978). It has long been recognized that those who adjudicate or decide appeals in public land cases may properly rule on the applicability of such privileges in deciding whether to consider evidence and documents submitted for the record. *E.g., Robb v. Howe*, 18 L.D. 31, 35 (1894); *cf. Hazel King*, 96 IBLA 216, 220 n.4, 94 I.D. 89, 91 n.4 (1987) (invocation of the attorney-client privilege by counsel for Office of Surface Mining deemed inappropriate where document in question had become a public record of the Department and thus a matter of which the Board may take official notice under 43 CFR 4.24(b)).<sup>4/</sup>

---

<sup>3/</sup> FOIA, *inter alia*, exempts from public disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5) (2000). Under this provision, documents subject to an attorney-client communication or attorney work-product privilege need not be disclosed. *See, e.g., National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975).

<sup>4/</sup> We note that in cases where BLM had excluded from case records material deemed privileged or not subject to disclosure, we repeatedly stated: “[N]o record of  
(continued...) ”

The matter before us involves an assertion of privilege triggered by appellants' filing of the document in question. In this instance, the Board can determine whether privilege has been properly asserted with respect to that document.

[2] We find that the attorney work-product privilege is applicable here.<sup>5/</sup> That privilege may be invoked when the material sought to be protected was prepared by an attorney in contemplation of litigation and contains the attorney's theory of the case or litigation strategy: "[T]he purpose of the privilege is to encourage effective legal representation *within the framework of the adversary system* by removing counsel's fears that his thoughts and information will be invaded by his adversary." Jordan v. U.S. Department of Justice, 591 F.2d at 775; see, e.g., National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. at 154; 4 Stein, Mitchell, Mezines, Administrative Law §§ 10.06[3], 29.03[1] (2005), at 29-23; 10 Fed Proc, LEd § 26:107 (1994). The document at issue clearly was prepared by BLM's counsel in contemplation of the present litigation for the purpose of guiding BLM in the preparation of a response to appellants' stay petition. It contains counsel's basic theory of the case and strategy for answering appellants' challenge to BLM's drilling approval, together with impressions as to the strength of BLM's position on certain legal issues. Accordingly, we hold that the document is covered by the attorney work-product privilege.

[3] To determine whether or not the privilege has been waived by inadvertent disclosure, we adopt the following five-part test, prevalent in the Federal courts, by looking at

- all of the circumstances surrounding the disclosure, including: (1) the reasonableness of precautions taken to prevent disclosure; (2) the amount of time taken to remedy the error; (3) the scope of discovery; (4) the extent of the disclosure; and (5) the overriding issue of fairness.

---

<sup>4/</sup> (...continued)

this Department may be treated as immune from Secretarial review on appeal." Craig Folson, 82 IBLA 294, 297 (1984); Ambra Oil and Gas Co., 75 IBLA 11, 15 (1983); Edward L. Johnson, 73 IBLA 253, 257 (1983). Such information properly is submitted to the Board pursuant to 43 CFR 4.31.

<sup>5/</sup> The attorney-client communication privilege also applies to the document in question. But, considering our disposition of this matter, there is no need for further analysis of that issue.

See, e.g., Allread v. City of Grenada, 988 F.2d 1425, 1433-35 (5th Cir. 1993); 10 Fed Proc, LEd § 26:155 (1994). BLM's counsel relates that typically, upon BLM's receipt of a FOIA request, the employees responding to the request scrutinize the relevant files and identify those documents that may be exempt from disclosure, subject to review by the agency FOIA officer. By this process BLM reasonably sought to avoid disclosure of privileged documents. (Motion at 5.) BLM's counsel reasonably relied upon this process and anticipated that her notes would not be released. Id. at 6. The disclosure of the privileged document occurred during BLM's response to a substantial FOIA request, and the document was disclosed only to appellants and not to other parties or to the public at large. Once aware of the disclosure, BLM promptly sought to retrieve the document from appellants. Id. In addition, we find no circumstance suggesting that fairness weighs in favor of disclosure of the document. Appellants have not responded to BLM's assertion that privilege has not been waived. Accordingly, we hold that BLM's inadvertent disclosure of the document did not effect a waiver of the attorney work-product privilege.<sup>6/</sup>

[4] BLM's counsel requests that the Board issue a protective order sealing the document, preventing further disclosure, and ordering appellants to return the document promptly to BLM's counsel. (Motion at 4).<sup>7/</sup> Notwithstanding BLM's careless disclosure of a privileged document, in light of our determination that the privilege has not been waived, we find that appellants' use of the privileged document in its Reply was singularly improper. Under these circumstances, issuance of a protective order is appropriate.

Accordingly, we hereby place the privileged document, identified as Exhibit 4, Tab No. 1 of appellants' Reply, together with appellants' Reply, under seal, to be retained in the official record of this case. In addition, we hereby strike all references and argument with respect to the privileged document in appellants' Reply, and will disregard those references and argument in our deliberations.

---

<sup>6/</sup> As noted previously, BLM has not sought to have the document in question removed from the administrative record before the Board.

<sup>7/</sup> "BLM counsel does hereby request that a protective order be issued forthwith, sealing the said communication and preventing any further disclosure or dissemination thereof. BLM's counsel also requests that the Board order Appellants' counsel to return the communication promptly." (Motion at 4.)

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's Motion for Protective Order is granted in part, as set forth herein.

---

H. Barry Holt  
Chief Administrative Judge

I concur:

---

Bruce R. Harris  
Deputy Chief Administrative Judge