IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 05-CV-329-TCK-SAJ**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

WITHDRAWN

STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO
DEFENDANT COBB-VANTRESS, INC.'S FIRST MOTION TO COMPEL DISCOVERY

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COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, ("the State"), and for its Response in Opposition to Defendant Cobb-Vantress, Inc.'s ("Defendant") First Motion to Compel Discovery (DKT # 743) submits the following:

I. INTRODUCTION

Defendant has served discovery on the State seeking a broad array of information pertaining to sampling, testing, and analysis of data of the Illinois River Watershed ("IRW"). The State responded that it would produce non-privileged, non-protected information, but objected to the production of such information generated in anticipation of this litigation both under the work-product doctrine and on the basis that the facts known and opinions held were gathered and formulated by a specially retained expert not yet designated to testify at trial. The State provided a privilege log of the materials it was withholding pursuant to LCivR 26.4. (Def.'s Mot. Ex. 3.) Defendant has moved to compel disclosure of all information and documents requested in its interrogatory and requests for production, which are attached to Defendant's Motion as Exhibit 1.

In the opening pages of its Motion to Compel, Defendant makes two statements that illustrate the errors in its argument. First, it claims that "Plaintiffs seek to withhold all information relating to their environmental sampling under a claim of 'attorney work product'" (Def.'s Mot. at 2), and second, "Plaintiffs responded to the First Set of Discovery on May 5, 2006 with wholesale objections and the flat refusal to provide any of the information sought or to

produce any of the documents requested" (Def.'s Mot. at 3).[1] These assertions are simply incorrect.

In response to Defendant's sweeping interrogatory and requests for production, the State explained that it had not yet decided which experts will testify at trial, that the time for disclosing expert reports had not yet been determined, and that "[t]he State will comply with the order of the Court establishing the time of expert disclosures as required by Fed. R. Civ. P. 26." (State's Objection & Resp. to Interrog. No. 1 [Def.'s Mot. Ex. 2].) Moreover, the State informed Defendant that "[p]ursuant to Fed. R. Civ. P. 33(d), information sought in this Interrogatory, and whose production is not objected to herein, may be found in the business records of the State which shall be provided to Defendant . . . in the State's initial document disclosures as agreed by the Parties on May 26, 2006 (or any such later date as may be mutually agreed upon by the parties).[2] At that time, the State shall produce to Defendant . . . an index of the responsive documents within the document production scheduled for that case." Id.

The State's counsel and its consultants have performed environmental sampling and analysis to characterize the impact of poultry waste and the Poultry Integrator Defendants' disposal practices on the IRW (the "Information"). As discussed below, the Information is protected by the attorney work product doctrine. In addition, the experts who performed this

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[1] Defendant also claims that "[i]n accordance with Fed. R. Civ. P. 37(a)(2)(B), Cobb-Vantress has made good faith efforts to resolve this matter without the necessity of intervention by this Court, but Plaintiffs refuse to provide the requested information and documents." (Def.'s Mot. at 3.) However, Defendant did not attempt to discuss with the State its intent to file its Motion to Compel.

[2] The parties have subsequently mutually agreed that their Rule 26(a)(1)(B) initial disclosures of documents will occur on June 15, 2006. It is anticipated that included within the State's initial disclosure of documents will be non-privileged documents relating to the sampling activities conducted by the State and the other entities (e.g., the USGS) in connection with their usual governmental functions.

investigation and who are evaluating this Information have not been designated as testifying experts. Thus, the Information is entitled to the protection extended to non-testifying experts until the decision is made to designate the experts as testifying experts pursuant to Rule 26(a)(2).

II. ARGUMENT

The Information sought by Defendant need not be disclosed or produced in response to Defendant's discovery requests because the information sought reflects the strategy of the State's counsel and thus: (1) the Information is trial preparation material – opinion work product – and not discoverable until the State makes its expert disclosures under Rule 26; (2) even if the Information could be divided into "fact" and opinion work product, Defendant has not shown a substantial need of such facts or that it is unable without undue hardship to obtain the substantial equivalent of them by other means; (3) the Information comprises facts known or opinions held by the State's expert consultants who have not yet been designated to testify at trial; (4) Defendant has failed to show any exceptional circumstances under which it would be impracticable for it to obtain facts or opinions on the same subject by other means; (5) the identities of the State's consulting undesignated experts are protected as opinion work product; (6) the cases on which Defendant relies in support of its Motion are from districts that specifically opted out of the 1993 amendments to Rule 26 requiring expert disclosures and reports before discovery could be taken on expert discovery issues; and (7) the State has not waived any applicable work-product or consulting expert protections.

A. The Information and Documents Sought Are Protected Under the Work-Product Doctrine of Rule 26(b)(3)

Federal Rule of Civil Procedure 26(b)(3) provides in part:

> (3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, 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 . . . 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. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative or a party concerning the litigation.

Fed. R. Civ. P. 26(b)(3). Defendant does not meet any of the conditions imposed by Rule 26(b)(3) that would allow discovery of the Information.

First, the Information sought would provide to Defendant the State's attorneys' mental impressions, conclusions, opinions, and theories of the case. The Information is opinion work product because the methods and means of environmental sampling and analysis provide insight into the State's theory of how to prove its case. The Information is not, as Defendant contends, simple facts. Second, Defendant has not shown that it has a substantial need of the materials in the preparation of its case. Third, Defendant can obtain the substantial equivalent of the Information without undue hardship.

1. The Information Is Trial Preparation Material That Contains Opinion Work Product

Defendant claims its "narrow set" of discovery requests only "facts relating to the nature, extent, manner and results of sampling and investigations conducted by Plaintiffs with respect to environmental conditions in the IRW." (Def.'s Mot. at 2) (emphasis added). An examination of the requests, however, shows that they are neither narrow nor seek simple facts. The requests seek:

- the dates of any sampling, monitoring, or testing;
- the specific locations of any sampling, monitoring, or testing;
- the name, address, and telephone number of each person or entity involved in any sampling, monitoring, or testing;

- a description of the nature of each such person's relationship with the State;
- the types of media or materials sampled, monitored, or tested during each event;
- a description of all tests or laboratory analysis performed or conducted on the media or material being sampled, monitored, or tested during each event;
- the results of all such tests or laboratory analysis;
- all documents relating to sampling plans;
- all documents relating to laboratory results;
- all documents relating to assay reports;
- all documents relating to quality assurance or quality control;
- all documents relating to sampling protocols;
- all photographs and site sketches;
- all documents relating to scientific investigations of groundwater contamination in the IRW; and
- all documents relating to Plaintiffs' investigation of "Poultry Integrator Defendants' waste disposal practices."

(Def.'s Mot. Ex. 1) (emphasis added). Defendant's expansive definition of "fact" thus includes not just raw data, but the identity, methodology, plan, strategy, location, number, relationships, and description of the environmental media, analyses, testing results, and persons involved with the Information.

Contrary to Defendant's position, the environmental sampling work and analysis performed by the State's consulting experts – and the fact that counsel chose to perform this work – reveal the mental impressions and strategy of the State's counsel preparing its case for trial. In this case, attorneys for the State have worked closely with its experts, and in so doing, counsel has discussed evidentiary objectives and trial strategy with its experts as part of the

process of designing and planning collection of the Information. Thus, the sampling work and analyses are not simple "facts." The only simple facts are contained in the State's privilege log, which gives information on the dates of the sampling, who wrote the report related to the testing, who received the results, the type of document, and the general subject matter of the document. (Def.'s Mot. Ex. 2.)

The environmental testing and analysis performed by the State in this case contains the imprint of its attorneys' mental impressions and theory of the case. In Shoemaker v. General Motors Corp., 154 F.R.D. 235 (W.D. Mo. 1994), the issue before the court was whether the plaintiff would be allowed to attend all litigation testing performed by the defendant. Id. at 236. The plaintiff requested to be present at all testing because it was afraid the defendant would perform tests by itself and later claim discovery of the tests would be barred by the work product doctrine. Id. Plaintiff also claimed that its attendance was necessary to insure the integrity of the test at issue, its foundation, and its results, and also to allay its fear that the defendant would conduct numerous tests to get the result it wanted. Id.

The defendant argued that the presence of plaintiff's attorney "will reveal protected attorney work product and consulting expert information." Id. The court agreed: "The decision of what to test and how is essentially a working-out of the [party's] interpretation of facts and testing of its [case]. Those processes involve either the attorney's mental processes or the opinions of consulting experts. Both are protected." Id. The court reiterated that "the decision about what to test and how is the embodiment of the attorney's legal theories." Id. Finally, the court recognized that lawyers need the assistance of experts to design and conduct tests, and if the experts were designated to testify, the plaintiff would be able to conduct discovery on the tests later. Id. If the experts were retained for consultation only, however, the facts known and

opinions held by them would not be disclosed because the plaintiff had not shown any "exceptional circumstances." Id.; see also AK Steel Corp. v. Sollac & Ugine, 234 F. Supp. 2d 711, 714 n.2 (N.D. Ohio 2002) (recognizing that testing data and results of gas composition tests "could reflect opinions and mental impressions of counsel").

The recognition that testing, sampling, and their analysis provide a window for a party to gain insight into the opposing party's mental impressions and theory of the case is based on the truism that the mere order or selection of documents can represent the mental impressions and legal theories of a party's attorney. In Sporck v. Peil, 759 F.2d 312 (3d Cir. 1985), the court confronted the issue of "whether the selection process of defense counsel in grouping certain documents together out of the thousands produced in this litigation is work product entitled to protection under Federal Rule of Civil Procedure 26(b)(3) and the principles of Hickman v. Taylor, 329 U.S. 495 (1947)." Sporck, 759 F.2d at 315. The court determined that it was.

The court agreed with the petitioner's argument that "the selection process itself represents [party] counsel's mental impressions and legal opinions as to how the evidence in the documents relates to the issues and defenses in the litigation." Id. Moreover, the court determined that such a selection or compilation was entitled to the "highly-protected category of opinion work product," not just the protection afforded to "ordinary," or "fact," work product. Id. at 316.[3] Relying on Hickman, the court realized that "[p]roper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless

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[3] Opinion work product is either entitled to absolute protection or discoverable only under compelling circumstances. Frontier Ref., Inc. v. Gorman-Rupp Co., 136 F.3d 695, 704 n.12 (10th Cir. 1998). The Tenth Circuit has not yet decided the issue. Id. At any rate, Defendant had not provided any compelling circumstances for discovery of the Information. Also, as the State argues below, it is doubtful that it can even meet the lesser "substantial need" and "undue burden" test that would allow discovery of "ordinary" or "fact" work product.

interference." Id. The Eighth Circuit stated succinctly the rationale for this legal tenet: answers to questions concerning the selection and compilation of documents can "reveal more than the mere existence of documents." Shelton v. American Motors Corp., 805 F.2d 1323, 1329 (8th Cir. 1987).

Such is the case here. Counsel for the State chose the experts to do the Information gathering (sampling, testing, analysis, etc.) and worked with these experts to develop the plan to gather and evaluate the Information. These are pieces of a puzzle that the State has had to arrange, and the arrangement of these pieces reflects the mental impressions, strategy, opinions, and theories of the State's attorneys. Thus, the requested Information comprises opinion work product, deserving the highest degree of protection.

2. Defendant Has Not Shown a Substantial Need for the Information and Documents It Seeks

Even assuming arguendo that the Information (or elements of the Information) comprises "fact" work product rather than "opinion" work product, Defendant has not met its burden for obtaining even "fact" work product. The only time a party may discover "fact" or "ordinary" work product is when it shows it has "substantial need of the materials in the preparation of its case." Fed. R. Civ. P. 26(b)(3). Here, Defendant merely asserts that "raw factual information is discoverable upon a lesser showing of need than is opinion work product." (Def.'s Mot. at 10.) Defendant's entire argument of substantial need is that it cannot go back in time and get the exact same samples, and, because "Plaintiffs chose not to notify Cobb-Vantress of the times, dates, locations and extent of their sampling activities in the IRW," it is "clearly entitled to the information and documents."[4]

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[4] Defendant's claim that Plaintiffs "chose not to notify" Defendant about the sampling and testing at issue is perplexing. The State is unaware of any legal authority that a

Defendant's "substantial need" argument is insufficient for several reasons. First, negotiations between the State and the Poultry Integrators about the issues in this law suit have been going on for years. Defendant knew by early fall 2004 that the State had hired lawyers to help prosecute the case. Prefiling settlement negotiations occurred in late 2004, and Defendant was told by the Attorney General that a case would be filed. Defendant apparently has taken no action to conduct its own environmental testing. Now it simply wants the fruits of the State's efforts.

A party cannot make a showing of substantial need when it could have conducted exactly the same testing or investigation at the same time as its adversary. See, e.g., Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 190 F.R.D. 532, 539 (S.D. Ind. 1999) (rejecting discovery of witness statements provided three years earlier because the requesting party could have begun its own investigation much earlier if it had wanted to); Martin v. Monfort, Inc., 150 F.R.D. 172, 174 (D. Colo. 1993) (ruling no substantial need existed when "[n]o showing has been made as to why the [party] could not have performed similar studies" during the same time frame); Almaguer v. Chicago, Rock Island, & Pac. R.R., 55 F.R.D. 147, 149 (D. Neb. 1972) (finding that unexplained failure to interview witnesses immediately after an incident does not create substantial need for discovery of opponent's information about and statements from those witnesses). Defendant has been aware of the adverse environmental impacts of its waste disposal practices for many years. It could have easily performed the same type of investigation.

Moreover, Defendant's bald assertion that it needs the Information because conditions have changed and it will never be able to get similar sampling and results from those exact times and conditions is incorrect. The pollution of the IRW by Defendant has been occurring for many

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plaintiff must inform possible defendants in a suit yet to be filed that it will be undertaking any investigations or testing.

years. The Information (or similar data) has been and continues to be readily available to Defendant should it care to do its own investigation to monitor the effects of its waste disposal practices. Defendant provides no support for the position that similar data is not available to it.

3. Defendant Has Not Shown It Is Unable Without Undue Hardship to Obtain the Substantial Equivalent of the Materials Sought

Again, assuming arguendo that the Information (or elements of the Information) comprises "fact" work product rather than "opinion" work product, Defendant also fails completely to address the "undue hardship" and "substantial equivalent" test of Rule 26(b)(3) that, in some limited conditions, could allow discovery of fact or ordinary work product. This is because it cannot. Defendant certainly has the resources to conduct the sampling and testing that the State has undertaken. Defendant could have hired experts and performed its own investigation to monitor the impact its waste disposal practices have had. Defendant has set forth no facts verifying that it would suffer undue hardship. Its statements are only conclusory.

To discover fact or ordinary work product under a claim of undue hardship, a party has to do more than make conclusory allegations of hardship. See, e.g., Martin v. Bally's Park Place Hotel & Casino, 983 F.2d 1252, 1263 (3d Cir. 1993) (refusing discovery request based on undue hardship when the requesting party had the capability and resources to conduct similar testing and never explored the option of conducting its own tests); Hendrick v. Avis Rent A Car Sys., Inc., 916 F. Supp. 256, 260-61 (W.D.N.Y. 1996) (refusing discovery request when requesting party failed to delineate the efforts made to have its own expert conduct testing, the cost of such testing, and the extent of its financial resources). As noted above, Defendant could have done investigations that would have provided information substantially equivalent to the Information it seeks from the State. Defendant has provided no convincing argument why it cannot do such investigations now.

4. Raw Data Can be "Opinion" Work Product, and is, at a Minimum, "Ordinary" or "Fact" Work Product

Defendant claims that all "facts" discovered by a party during its investigation of its case are unprotected as "fact" or "ordinary" work product. (Def.'s Mot. at 4.) It also claims that its interrogatories and requests for production seek only such "facts." Both of these assertions are incorrect. First, as noted above, the data can be -- and in the present case is -- "opinion" work product.

Second, even assuming arguendo that the raw data does not constitute "opinion" work product, but rather "fact" work product, the case law is clear that ordinary work product includes "raw factual information." Baker v. General Motors Corp., 209 F.3d 1051, 1054 (8th Cir. 2000) ("Ordinary work product includes raw factual information."); Hollinger Int'l Inc. v. Hollinger Inc., 230 F.R.D. 508, 511 (N.D. Ill. 2005) (same); O'Connor v. Boeing N.A., Inc., 216 F.R.D. 640, 642 (C.D. Cal. 2003) (same). Thus, "[o]rdinary work-product generally consists of 'primary information, such as verbatim witness testimony or objective data' collected by or for a party or a party's representative." Robinson v. Texas Auto. Dealers Ass'n, 214 F.R.D. 432, 441 (E.D. Tex. 2003) (quoting Kent Corp. v. NLRB, 530 F.2d 612, 624 (5th Cir. 1976)) (emphasis added), vacated in part sub nom. In re Texas Auto. Dealers Ass'n, 2003 WL 21911333 (5th Cir. July 25, 2003).

Furthermore, the cases Defendant cites are not on point. For example, Defendant leans heavily on Feldman v. Pioneer Petroleum, Inc., 87 F.R.D. 86 (W.D. Okla. 1980) (which in turn relies almost entirely on 8 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2023 (1970)). But the fact at issue in Feldman was not gathered by a consulting expert working with counsel. The fact was not related to expert analysis and testing. It was

whether a witness had discovered that a party had acquired certain payments from another company. 87 F.R.D. at 89.

An examination of the cases cited by Wright and Miller also makes clear that the sort of facts at issue in those cases are not the results of empirical, fact-gathering investigations such as environmental sampling, testing, and analysis. Rather, the factual information unprotected as "ordinary" or "fact" work product has to do with whether certain people or documents exist, whether something happened, or the names and addresses of witnesses.[5] None of this relates to facts gathered by experts.

Likewise, the information sought in Resolution Trust Corp. v. Dabney, 73 F.3d 262 (10th Cir. 1995), cited by Defendant, bears no similarity to the sort of data and analysis Defendant seeks here. In Resolution Trust, the court, relying on Feldman, held that "work product does not preclude inquiry into the mere fact of an investigation." 73 F.3d at 266. The privilege log provided by the State discloses the fact that environmental investigations have occurred.

In summary, Defendant's argument that the information and documents it seeks are not protected work product under Rule 26(b)(3) fails on all counts. First, the information and documents are opinion work product, entitled to the highest degree of protection. Second, Defendant has not shown a "substantial need" for the information and documents. Third, it has not shown it is unable without undue hardship to obtain the substantial equivalent of the

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[5] See 8 Wright & Miller, supra, at § 2023 n.20 (citing LaRocca v. State Farm Mut. Auto. Ins. Co., 47 F.R.D. 278, 282 (W.D. Pa. 1969) (whether particular papers or documents exist); United States v. Glaxo Group Ltd., 302 F. Supp. 1, 17 (D.D.C. 1969) (names and addresses of parties to communications); McCall v. Overseas Tankship Corp., 16 F.R.D. 467, 469 (S.D.N.Y. 1954) (work-product doctrine does not apply to information sought as to whether there was such work product but only to the product itself); Cedolia v. C.S. Hill Saw Mills, Inc., 41 F.R.D. 524, 527 (M.D.N.C. 1967) (information concerning the existence of statements and pictures); Harvey v. Eimco Corp., 28 F.R.D. 380, 380-81 (E.D. Pa. 1961) (information as to the existence and whereabouts of reports, statements, and opinions); Taylor v. Atchison, T. & S.F. Ry. Co., 33 F.R.D. 283, 284 (W.D. Mo. 1962) (names of witnesses to occurrence)).

information and documents. And fourth, even if, as Defendant erroneously claims, the information and documents comprise mere facts or raw information, they are protected as "ordinary" or "fact" work product. Therefore, the Court should deny Defendant's Motion under Rule 26(b)(3).

B. The Information and Documents Sought Are Strictly Protected Under Rule 26(b)(4)(B) Because They Are Facts Known and Opinions Held by Retained Experts Who Have Not Yet Been Designated as Testifying Experts

The information and documents sought by Defendant are also strictly protected under Federal Rule of Civil Procedure 26(b)(4)(B), which provides:

> A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Fed. R. Civ. P. 26(b)(4)(B) (emphasis added).

1. The Facts Known and Opinions Held By a Retained Expert Who Has Not Been Designated a Testifying Expert Are Entitled to the Same Protections Afforded Those Of a Non-Testifying Expert

Defendant first attempts to evade the ambit of Rule 26(b)(4)(B) by complaining that the State has not yet designated its expert witnesses for trial, despite the fact that Rule 26(a)(2)(C) dictates that disclosure of expert testimony "shall be made at the times and in the sequence directed by the court," or at least 90 days before the trial date. Fed. R. Civ. P. 26(a)(2)(C). The Court has not yet directed when the parties must disclosure their expert witnesses, by a scheduling order or otherwise, and trial has not yet been set. Defendant's position apparently is

that a party can seek all facts and opinions gathered by any expert when the discovery gun goes off. But that position is squarely contradicted by the Federal Rules of Civil Procedure.

The rationale for the protection of non-testifying expert witnesses from discovery is threefold: (1) such discovery is not essential for cross examination; (2) allowing routine discovery of non-testifying experts "would tend to deter thorough preparation of the case and reward those whose adversaries were most enterprising"; and (3) allowing access to the opinions of retained non-testifying experts would provide an opportunity for the opponent "to call them as witnesses to attest to views that the opponent found congenial." 8 Charles Alan Wright et al., Federal Practice and Procedure § 2032 (2d ed. 1994); see also Ager v. Jane C. Stormont Hosp. & Training Sch. for Nurses, 622 F.2d 496, 502 (10th Cir. 1980) (noting that Rule 26 was designed to "prevent a party from building his own case by means of his opponent's financial resources, superior diligence and more aggressive preparation").

Despite the rationale for the protection of non-testifying experts and the fact that the State is not yet required to designate its testifying experts, Defendant claims – with absolutely no citation to authority – that "Plaintiffs should not be permitted to sandbag Cobb-Vantress by withholding documents or information under a rule that only applies to non-testifying experts while simultaneously reserving the ability to designate the relevant experts as testifying experts at some point in the future." (Def.'s Mot. at 10.) Defendant's position is, however, directly contrary to the decisions of courts that have examined this very issue and to the advisory committee notes to Rule 26.

For example, the Kansas district court recently addressed the issue whether an affidavit submitted by an undesignated expert was entitled to protection under Rule 26(b)(4)(B). Employer's Reinsurance Corp. v. Clarendon Nat'l Ins. Co., 213 F.R.D. 422, 424 (D. Kan. 2003).

The court framed the issue as whether the facts known and opinions held by a party's expert are discoverable if the expert has not been identified as an expert expected to testify at trial. Id. It noted that the intention to call an expert to testify at trial "may fluctuate from time to time depending upon whether that party perceives the expert's opinion will help or harm its case." Id. "Thus," the court determined, "whether a specially retained expert is regarded as a testifying expert or a consulting expert depends upon whether the party who retained the expert has designated the expert as one who is expected to be called as a witness at trial." Id. at 424-25. The court concluded that because the party never identified the expert as a testifying expert, his affidavit was accorded the protection of Rule 26(b)(4)(B). Id. at 425.

Similarly, in Moore U.S.A. Inc. v. Standard Register Co., 206 F.R.D. 72 (W.D.N.Y. 2001), the defendant filed a motion to compel production of documents gathered by plaintiff's expert consultant. Plaintiff contended – as the State does here – that the discovery sought was protected under the non-testifying expert provision of Rule 26(b)(4)(B) because the expert had not been designated as an expert expected to testify at trial. Id. at 75. The court agreed. First, it rejected the defendant's claim that the party seeking to invoke the protection "bears the burden of establishing the fact that [the expert] is a non-testifying expert in this case." Id. Then, in language directly applicable to the issue before this Court, the Moore court recognized that "[w]hile it is true that [plaintiff] has not yet designated [the expert] as a testifying or a non-testifying expert, neither has the court entered a scheduling order regarding the deadline for the disclosure of the parties' respective trial experts." Id. Finally, the court observed that until the court set a date by which the plaintiff must decide whether to identify the expert as one of its trial experts, the expert "'is entitled to the protection afforded by Rule 26(b)(4)(B).'" Id. (quoting Bank Brussels Lambert v. Chase Manhattan Bank, 175 F.R.D. 34, 43 (S.D.N.Y. 1997)).

The court in Hartford Fire Ins. Co. v. Pure Air on the Lake Ltd., 154 F.R.D. 202 (N.D. Ind. 1993), reached the same conclusion: "Until such time as [the party claiming the protection] affirmatively has to identify a testifying expert, they are entitled to assert that [the expert] will not be a witness. In doing so they operate within the spirit of Federal Rule of Civil Procedure 26(b)(4)(B)." Id. at 207 n.8.

Even the advisory committee note to Rule 26(b)(4) makes clear the error of Defendant's position. "Discovery is limited to trial witnesses, and may be obtained only at a time when the parties know who their expert witnesses will be." Fed. R. Civ. P. 26 Advisory Committee Note, 1970 Amendment, subdivision (b)(4) (emphasis added). See also Hoover v. United States Dep't of Interior, 611 F.2d 1132, 1141 n.12 (5th Cir. 1980) ("The Rule is clear that the test for whether a particular expert should be treated under Rule 26(b)(4)(A) or Rule 26(b)(4)(B) is determined by whether the expert is "expected to testify," and not by whether he "may testify."); In re Shell Oil Refinery, 132 F.R.D. 437, 440 (E.D. La. 1990). Defendant's position that any expert's work should be discoverable before a court has set a schedule for disclosure of expert witnesses and testimony runs contrary to the rationale of the Federal Rules and to the decisions of courts that have considered the issue. The Court should reject Defendant's Motion because, as the case law makes clear, the facts know and opinions held by a retained expert who has not been designated as a testifying expert are afforded the same protections as the facts and opinions of a non-testifying expert.

2. Defendant Cannot Make a Showing of Exceptional Circumstances

"The party seeking discovery from non-testifying retained experts faces a heavy burden." Ager, 622 F.2d at 503 (citing Hoover, 611 F.2d at 1142 n.13); 8 Charles Alan Wright et al., supra, § 2032. The exceptional circumstances requirement "has been interpreted by the courts to

mean an inability to obtain equivalent information from other sources." In re Shell Oil Refinery, 132 F.R.D. at 442. The party seeking discovery from a non-testifying expert may meet the exceptional circumstances standard in one of two ways. "First, the moving party may show that the object or condition at issue is destroyed or has deteriorated after the non-testifying expert observes it but before the moving party's expert has an opportunity to observe it. Second, the moving party may show there are no other available experts in the same field or subject area." Spearman Indus., Inc. v. St. Paul Fire & Marine Ins. Co., 128 F. Supp. 2d 1148, 1152 (N.D. Ill. 2001).

Here, Defendant cannot argue either condition exists. First, the condition of the IRW caused by Defendant's waste disposal practices is a continuing problem which, unfortunately, is likely to exist for many years to come. Defendant is aware of the environmental consequences of its actions and can conduct its own evaluation of the pollution it has caused at any time. Second, environmental consultants and experts in the same field or subject area are obviously available. Also, Defendant could have hired (and still can hire) experts to do any sampling, testing, and analysis that the State did (and is still doing); it has just chosen not to, but now complains that it needs it. Courts are particularly reluctant to grant discovery of non-testifying experts to a party when it, like Defendant here, has made no timely effort to get the information itself. Hoffman v. Owens-Illinois Glass Co., 107 F.R.D. 793, 795 (D. Mass. 1985) (finding no exceptional circumstances because "any impracticality which the defendant . . . now faces is a result of its own counsel's tardiness in seeking to inspect the machine"); Spearman, 128 F. Supp. 2d at 1152 ("Defendant had ample opportunity to conduct whatever investigations it desired . . . .").

Defendant cannot meet the very strict standards of the "exceptional circumstances" requirement of Rule 26(b)(4)(B) for the same reasons it cannot meet the "substantial need" requirement of Rule 26(b)(3). Therefore, the State's Information is not discoverable under Rule 26(b)(4)(B) and the Court should deny Defendant's Motion to Compel.

3. The Identities of the State's Non-Testifying Experts are Not Discoverable

Defendant's discovery requests ask for, and Defendant claims it is entitled to, the identities of the persons involved in gathering the Information. (Def.'s Mot. at 3; Def.'s Ex. 1.) Defendant ignores controlling Tenth Circuit law directly on point: "[W]e hold that the identity, and other collateral information concerning an expert who is retained or specially employed in anticipation of litigation, but not expected to be called as a witness at trial, is not discoverable . . . except upon a showing of exceptional circumstances . . . ." Ager, 622 F.2d at 503. As Wright and Miller note, "[s]ince 1980, the Tenth Circuit's approach has become predominant among courts." 8 Charles Alan Wright et al., supra, § 2032 n.17. The bar on discovery is applicable to all experts prior to the time the Court sets for expert witness disclosures.

The reasons for the Ager court's holding are cogently explained by a California district court, which determined that information about the identity of non-testifying experts deserves protection equivalent to "opinion" work product: "A lawyer's decisions about which people to use in confidence for which purposes in preparing a case for trial is as central to lawyering strategy as one can get. When these decisions relate to the identity of experts who will not testify, they should be disclosed only after a very substantial showing of need." In re Pizza Time Theatre Secs. Litig., 113 F.R.D. 94, 98 (N.D. Cal. 1986). Therefore, not only are the facts and opinions of the State's non-testifying or undesignated experts protected from discovery, but also

the identity of those experts is protected as opinion work product, deserving the highest degree of protection.

4. The Cases on Which Defendant Relies Were Not Governed By the Current Federal Rule Regarding Expert Disclosures

Defendant claims that Horan v. Sun, 152 F.R.D. 437 (D.R.I. 1993) – a case that has remained uncited by any court for thirteen years – supports the proposition that "[d]iscovery regarding investigations and sampling conducted in connection with environment litigation is clearly appropriate." (Def.'s Mot. at 5.) However, what Defendant fails to tell the Court is that the District of Rhode Island opted out of the 1993 Rule 26(a)(1)-(4) amendments regarding expert disclosures until it became mandatory in the 2000 Amendments. Morris Graphics, Inc. v. Casey Printing, Inc., 1999 WL 726958, at *5 n.2 (D.R.I. Feb. 12, 1999) (noting that "this District has opted out of Rule 26(a)(1)-(4)" pursuant to General Order of May 9, 1994).[6] The Horan court's order was based on the absence of the expert disclosure requirements that are now in effect. The Defendant's attempt to jump-start the expert discovery phase runs contrary to Rule 26 and should be rejected.

The same infirmity infects Atlantic Richfield Co. v. Current Controls, Inc., 1997 WL 538876 (W.D.N.Y. Aug. 21, 1997), another case relied on by Defendant. Again, the Western District of New York opted out of the expert disclosure requirements of Rule 26.[7] Thus, the Atlantic Richfield decision that a party seeking facts "may obtain them through other means of discovery, such as through depositions and interrogatories" is correct, but in the context of

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[6] See also Donna Stienstra, Implementation of Disclosure in United States District Courts, With Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Procedure 26, Federal Judicial Center, March 30, 1998, available at: http://www.fjc.gov/library/fjc_catalog.nsf.

[7] See Stienstra, supra, note 6.

current Rule 26 expert disclosures, such interrogatories and requests for production are premature.[8]

C. The Information and Documents Sought Are Not Subject to "At Issue Waiver"

Defendant's argument that the State waived its work product privilege for the information and documents sought is meritless because the circumstances fail to satisfy the three-part Hearn analysis for "at issue waiver" adopted by this Court. For a party to waive an otherwise applicable privilege by placing information "at issue," three factors must be satisfied:

1. the assertion of the privilege must be the result of some affirmative act, such as filing suit or asserting an affirmative defense, by the asserting party;

2. the asserting party, through the affirmative act, must have put the protected information at issue by making it relevant to the case; and

3. if the privilege was applied, would it deny the opposing party access to information that was vital to the opposing party's defense.

Sinclair Oil Corp. v. Texaco, Inc., 208 F.R.D. 329, 335 (N.D. Okla. 2002) (citing Hearn v. Rhay, 68 F.R.D. 574, 580 (E.D. Wash. 1975)); Cardtoons L.C. v. Major League Baseball Players Ass'n, 199 F.R.D. 677, 681 (N.D. Okla. 2001) (citing Hearn, 68 F.R.D. at 580); see also Frontier Ref. Inc. v. Gorman Rupp Co., 136 F.3d 695, 699 (10th Cir. 1998).

The circumstances in this case do not satisfy the second and third Hearn factors. Because the State filed the instant action, the "affirmative act" required by the first factor is arguably satisfied. However, filing an action alone is insufficient to create a waiver of privilege. See, e.g., Remington Arms Co. v. Liberty Mut. Ins. Co., 142 F.R.D. 408, 416 (D. Del. 1992) (finding

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[8] It is odd that Defendant relies on the Atlantic Richfield case because it squarely rejects Defendant's position that it is entitled to the production of documents regarding the State's sampling, testing, and analysis: "If a document constitutes protected work product, the party possessing that document generally need not produce it – even if the document contains only factual information." 1997 WL 538876, at *3.

that "at issue waiver" cannot be implied merely because one party instituted an action against another party).

Regarding the second Hearn factor, Defendant asserts that the State placed the information and documents sought "at issue" in this case by mentioning the existence of sampling information in Plaintiffs' Motion for Leave to Conduct Limited Expedited Discovery. (Def.'s Mot. at 7-8.) The fact that the State mentions the existence of sampling information in a motion for discovery is insufficient to place the information "at issue." Under the second factor of the Hearn analysis, whether information is "at issue" is determined by whether it is relevant to a party proving the elements of its case, defending a case, or addressing affirmative defenses. See, e.g., Sinclair Oil, 208 F.R.D. at 335 (addressing whether information allegedly relevant to the elements of a cause of action was "at issue"); Cardtoons, 199 F.R.D. at 682 (discussing whether information relevant to an alleged affirmative defense was "at issue"). A mention of the existence of sampling information in a peripheral matter such as a motion for limited discovery is not the type of event contemplated in the second factor of the Hearn analysis.

The third factor of the Hearn analysis is not satisfied in this case because the information and documents sought are not vital to Defendant's ability to defend the case, and similar information is available from sources other than the State. In Frontier Refining the Tenth Circuit reviewed a decision of a district court involving the Hearn analysis. 136 F.3d at 701-03. The district court had failed to conduct any analysis of whether the information allegedly subject to "at issue waiver" was available from any source other than the materials over which the plaintiff claimed privilege. Id.

The Frontier Refining court explained that for privileged information to be subject to "at issue waiver" the information must not be available from another source. Id. at 701 (citing

Hearn, 68 F.R.D. at 581; Greater Newburyport Clamshell Alliance v. Public Serv. Co., 838 F.2d 13, 20 (1st Cir. 1988)). The court held that because the defendant had access to information from fact and expert witnesses, the privileged information and communications defendant was seeking from the plaintiff were not "vital" to its defense, and reversed the district court's ruling that "at issue waiver" existed. Id. at 702 (reversing the district court based on an erroneous interpretation of "vital" and finding that an abuse of discretion occurred).

Defendant seeks results of sampling that the State's counsel and their consultants designed and undertook in anticipation of litigation and as part of the State's trial preparation. It argues that it has "no other means" of obtaining sampling information. (Def.'s Mot. at 8.) As noted above, this argument is unconvincing. Defendant has had and continues to have the ability to collect similar information. In the event the State intends to have any expert witnesses who will be called at trial rely upon the information and documents sought, Defendant will have access to that information at that time.[9]

Defendant states it "needs to know as soon as possible what constituents Plaintiffs believe they have found in elevated levels in the IRW and where in the IRW the relevant samples were taken so that it can conduct its own investigation and, if necessary, environmental sampling to determine the extent of the alleged contamination and the likely source of any such contamination." (Def.'s Mot. at 8.) Defendant does not need to wait for the conclusion of the State's investigation. It can do the same investigation now. There is no connection between Defendant's desire to know immediately what the State has found and Defendant's ability to conduct its own investigation.

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[9] As mentioned previously, in the event any of the State's experts were to rely on the information and documents at issue in forming their opinions that would be offered at trial, the State will be required to disclose this information to Defendant pursuant to deadlines scheduled by the Court.

Finally, any implied claim by Defendant that the Information will "ease" its defense provides no support for the claim that the Information is "vital" to Defendant's defense, as required by the third Hearn factor. See, e.g., Cardtoons, 199 F.R.D. at 681-82 ("The Court will not compel the discovery of otherwise privileged documents simply to permit a party to more easily prove the elements of his cause of action."); Sinclair Oil, 208 F.R.D. at 335-36 (holding that the court would not compel discovery of otherwise privileged documents simply to permit a party to more easily prove its case).

Defendant has failed to establish the second and third elements of the Hearn "at issue waiver" test. Therefore, the Court should reject Defendant's "at issue waiver" argument and deny Defendant's Motion to Compel.

III. CONCLUSION

For all of the above reasons, the State respectfully requests that the Court deny Defendant Cobb-Vantress, Inc.'s First Motion to Compel Discovery.

Respectfully submitted,

W.A. Drew Edmondson (OBA #2628)
Attorney General
Kelly H. Burch (OBA #17067)
J. Trevor Hammons (OBA #20234)
Assistant Attorneys General
State of Oklahoma
2300 North Lincoln Boulevard, Suite 112
Oklahoma City, OK 73105
(405) 521-3921

s/ M. David Riggs

M. David Riggs (OBA #7583)
Joseph P. Lennart (OBA #5371)
Richard T. Garren (OBA #3253)
Douglas A. Wilson (OBA #13128)
Sharon K. Weaver (OBA #19010)
Riggs, Abney, Neal, Turpen, Orbison & Lewis
502 West Sixth Street
Tulsa, OK 74119
(918) 587-3161

Attorneys for the State of Oklahoma

June 12, 2006

CERTIFICATE OF MAILING

I hereby certify that on this 12th day of June, 2006, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants.

- **Jo Nan Allen**
  jonanallen@yahoo.com bacaviola@yahoo.com
- **Frederick C Baker**
  fbaker@motleyrice.com mcarr@motleyrice.com;fhmorgan@motleyrice.com
- **Tim Keith Baker**
  tbakerlaw@sbcglobal.net
- **Douglas L Boyd**
  dboyd31244@aol.com
- **Vicki Bronson**
  vbronson@cwlaw.com lphillips@cwlaw.com
- **Paula M Buchwald**
  pbuchwald@ryanwhaley.com loelke@ryanwhaley.com
- **Louis Werner Bullock**
  LBULLOCK@MKBLAW.NET
  NHODGE@MKBLAW.NET;BDEJONG@MKBLAW.NET
- **Bobby Jay Coffman**
  bcoffman@loganlowry.com
- **Lloyd E Cole, Jr**
  colelaw@alltel.net gloriaeubanks@alltel.net;amy_colelaw@alltel.net
- **Angela Diane Cotner**
  AngelaCotnerEsq@yahoo.com
- **Reuben Davis**
  rdavis@boonesmith.com
- **John Brian DesBarres**
  mrjbdb@msn.com JohnD@wcalaw.com
- **W A Drew Edmondson**
  fc_docket@oag.state.ok.us
  drew_edmondson@oag.state.ok.us;suzy_thrash@oag.state.ok.us.
- **Delmar R Ehrich**
  dehrich@faegre.com kcarney@faegre.com;;qsperrazza@faegre.com
- **John R Elrod**
  jelrod@cwlaw.com vmorgan@cwlaw.com
- **William Bernard Federman**
  wfederman@aol.com law@federmanlaw.com;ngb@federmanlaw.com
- **Bruce Wayne Freeman**
  bfreeman@cwlaw.com lclark@cwlaw.com

- **Ronnie Jack Freeman**
  jfreeman@grahamfreeman.com
- **Richard T Garren**
  rgarren@riggsabney.com dellis@riggsabney.com
- **Dorothy Sharon Gentry**
  sgentry@riggsabney.com jzielinski@riggsabney.com
- **Robert W George**
  robert.george@kutakrock.com donna.sinclair@kutakrock.com
- **Tony Michael Graham**
  tgraham@grahamfreeman.com
- **James Martin Graves**
  jgraves@bassettlawfirm.com
- **Michael D Graves**
  mgraves@hallestill.com jspring@hallestill.com;smurphy@hallestill.com
- **Thomas James Grever**
  tgrever@lathropgage.com
- **Jennifer Stockton Griffin**
  jgriffin@lathropgage.com
- **Carrie Griffith**
  griffithlawoffice@yahoo.com
- **John Trevor Hammons**
  thammons@oag.state.ok.us
  Trevor_Hammons@oag.state.ok.us;Jean_Burnett@oag.state.ok.us
- **Michael Todd Hembree**
  hembreelaw1@aol.com traesmom_mdl@yahoo.com
- **Theresa Noble Hill**
  thillcourts@rhodesokla.com mnave@rhodesokla.com
- **Philip D Hixon**
  Phixon@jpm-law.com
- **Mark D Hopson**
  mhopson@sidley.com dwetmore@sidley.com;joraker@sidley.com
- **Kelly S Hunter Burch**
  fc.docket@oag.state.ok.us kelly_burch@oag.state.ok.us;jean_burnett@oag.state.ok.us
- **Thomas Janer**
  SCMJ@sbcglobal.net tjaner@cableone.net;lanaphillips@sbcglobal.net
- **Stephen L Jantzen**
  sjantzen@ryanwhaley.com mantene@ryanwhaley.com;loelke@ryanwhaley.com
- **Mackenzie Lea Hamilton Jessie**
  maci.tbakerlaw@sbcglobal.net tbakerlaw@sbcglobal.net;macijessie@yahoo.com
- **Bruce Jones**
  bjones@faegre.com jintermill@faegre.com;bnallick@faegre.com
- **Jay Thomas Jorgensen**
  jjorgensen@sidley.com noman@sidley.com
- **Krisann C. Kleibacker Lee**
  kklee@faegre.com mlokken@faegre.com

- **Raymond Thomas Lay**
  rtl@kiralaw.com dianna@kiralaw.com;niccilay@cox.net
- **Nicole Marie Longwell**
  Nlongwell@jpm-law.com ahubler@jpm-law.com
- **Dara D Mann**
  dmann@faegre.com kolmscheid@faegre.com
- **Teresa Brown Marks**
  teresa.marks@arkansasag.gov dennis.hansen@arkansasag.gov
- **Linda C Martin**
  lmartin@dsda.com mschooling@dsda.com
- **Archer Scott McDaniel**
  Smcdaniel@jpm-law.com jwaller@jpm-law.com
- **Robert Park Medearis, Jr**
  medearislawfirm@sbcglobal.net
- **James Randall Miller**
  rmiller@mkblaw.net smilata@mkblaw.net;clagrone@mkblaw.net
- **Charles Livingston Moulton**
  Charles.Moulton@arkansasag.gov Kendra.Jones@arkansasag.gov
- **Robert Allen Nance**
  rnance@riggsabney.com jzielinski@riggsabney.com
- **William H Narwold**
  bnarwold@motleyrice.com
- **John Stephen Neas**
  steve_neas@yahoo.com
- **George W Owens**
  gwo@owenslawfirmpc.com ka@owenslawfirmpc.com
- **David Phillip Page**
  dpage@mkblaw.net smilata@mkblaw.net
- **K Clark Phipps**
  ECF@ahn-law.com cphipps@ahn-law.com
- **Marcus N Ratcliff**
  mratcliff@lswsl.com sshanks@lswsl.com
- **Robert Paul Redemann**
  rredemann@pmrlaw.net scouch@pmrlaw.net
- **Melvin David Riggs**
  driggs@riggsabney.com pmurta@riggsabney.com
- **Randall Eugene Rose**
  rer@owenslawfirmpc.com ka@owenslawfirmpc.com
- **Patrick Michael Ryan**
  pryan@ryanwhaley.com jmickle@ryanwhaley.com;kshocks@ryanwhaley.com
- **Laura E Samuelson**
  lsamuelson@lswsl.com lsamuelson@gmail.com
- **Robert E Sanders**
  rsanders@youngwilliams.com
- **David Charles Senger**
  dsenger@pmrlaw.net scouch@pmrlaw.net

- **Jennifer Faith Sherrill**
  jfs@federmanlaw.com law@federmanlaw.com;ngb@federmanlaw.com
- **William Francis Smith**
  bsmith@grahamfreeman.com
- **Monte W Strout**
  strout@xtremeinet.net
- **Colin Hampton Tucker**
  chtucker@rhodesokla.com scottom@rhodesokla.com
- **John H Tucker**
  jtuckercourts@rhodesokla.com mbryce@rhodesokla.com
- **R Pope Van Cleef, Jr**
  popevan@robertsonwilliams.com
  kirby@robertsonwilliams.com;kmo@robertsonwilliams.com
- **Kenneth Edward Wagner**
  kwagner@lswsl.com sshanks@lswsl.com
- **David Alden Walls**
  wallsd@wwhwlaw.com lloyda@wwhwlaw.com
- **Elizabeth C Ward**
  lward@motleyrice.com
- **Sharon K Weaver**
  sweaver@riggsabney.com lpearson@riggsabney.com
- **Timothy K Webster**
  twebster@sidley.com jwedeking@sidley.com;ahorner@sidley.com
- **Gary V Weeks**
- **Terry Wayen West**
  terry@thewestlawfirm.com
- **Dale Kenyon Williams, Jr**
  kwilliams@hallestill.com jspring@hallestill.com;smurphy@hallestill.com
- **Edwin Stephen Williams**
  steve.williams@youngwilliams.com
- **Douglas Allen Wilson**
  Doug_Wilson@riggsabney.com pmurta@riggsabney.com
- **J Ron Wright**
  ron@wsfw-ok.com susan@wsfw-ok.com
- **Lawrence W Zeringue**
  lzeringue@pmrlaw.net scouch@pmrlaw.net

I further certify that on this 12th day of June, 2006, a true and correct copy of the above and foregoing will be mailed via first class U.S. Mail, postage prepaid, on the following who are not registered participants of the ECF System:

Jim Bagby
RR 2, Box 1711
Westville, OK 74965

Gordon W. Clinton
23605 S GOODNIGHT LN
WELLING, OK 74471

Susann Clinton
23605 S GOODNIGHT LN
WELLING, OK 74471

Eugene Dill
P O BOX 46
COOKSON, OK 74424

Marjorie Garman
5116 Highway 10
Tahlequah, OK 74464

James C Geiger
address unknown

Thomas C Green
Sidley Austin Brown & Wood LLP
1501 K ST NW
WASHINGTON, DC 20005

G Craig Heffington
20144 W SIXSHOOTER RD
COOKSON, OK 74427

Cherrie House
P O BOX 1097
STILWELL, OK 74960

William House
P O BOX 1097
STILWELL, OK 74960

John E. and Virginia W. Adair Family Trust
RT 2 BOX 1160
STILWELL, OK 74960

Dorothy Gene Lamb
Route 1, Box 253
Gore, OK 74435

James Lamb
Route 1, Box 253
Gore, OK 74435

Jerry M Maddux
Selby Connor Maddux Janer
P O BOX Z
BARTLESVILLE, OK 74005-5025

Doris Mares
P O BOX 46
COOKSON, OK 74424

Donna S Parker
34996 S 502 RD
PARK HILL, OK 74451

Richard E Parker
34996 S 502 RD
PARK HILL, OK 74451

C Miles Tolbert
Secretary of the Environment
State of Oklahoma
3800 NORTH CLASSEN
OKLAHOMA CITY, OK 73118

Robin L. Wofford
Rt 2, Box 370
Watts, OK 74964

s/ M. David Riggs