

SEP 27 2006

Attorneys for Edwards Family LLC

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA

**Subcase Nos. 63-12, 63-13, 63-15, 63-31057,
63-31059, 63-31052, 63-30006, 63-31050, 63-31051,
63-31053, 63-31056, 63-31060, 63-31062,
63-31054, 63-27671, 63-27649, 63-3603, 63-7595**

Case 39576

**EDWARDS FAMILY LLC’S RESPONSE
TO THE TERTEILING COMPANY, INC
AND T-7, LLC’S MOTION TO COMPEL**

COMES NOW Edwards Family LLC (“Edwards Family”) by and through its counsel of record, Debra K. Ellers and Dana L. Hofstetter, and hereby responds to the The Terteling Company, Inc. and T-7, LLC’s (Claimants’) Motion to Compel. Claimants’ Motion should be

denied on the following grounds: (i) since only the Edwards Family's discovery responses for Subcase Nos. 63-12, 63-13 and 63-15 were filed in connection with the Motion to Compel, the Motion is procedurally defective for all subcases other than 63-12, 63-13, and 63-15, meriting a summary dismissal of the Motion to Compel as to all other subcases; and (ii) for Subcases 63-12, 63-13, and 63-15, Edwards Family has provided sufficient responses to Claimants' interrogatories and requests for production based on the information available at this early stage of the proceedings. Because Claimants' Motion to Compel is substantially unjustified, Edwards Family requests an award of its attorney fees and costs in responding to this Motion in accordance with I.R.C.P. 37(a)(4).

I. CLAIMANTS' FAILURE TO PROVIDE THE EDWARDS FAMILY DISCOVERY RESPONSES IN ALL SUBCASES OTHER THAN 63-12, 63-13, AND 63-15 MERITS DENIAL OF THE MOTION TO COMPEL IN THOSE SUBCASES.

I.R.C.P. 33(b)(2) requires a party who uses interrogatories and requests for production in support of a motion to submit the relevant portions thereof to the court upon the filing of the motion. The (un-notarized) Affidavit of Charles Honsinger attaches only the Edwards Family's Discovery Responses in subcases 63-12, 63-13, and 63-15, although the Motion to Compel covers numerous additional subcases. His conclusory statement in paragraph 7 of the Affidavit asserting that the Responses in the other subcases do not differ materially is inadequate under Rule 33(b)(2) to support the Motion as to subcases 63-31057, 63-31059, 63-31052, 63-30006, 63-31050, 63-31051, 63-31053, 63-31056, 63-31060, 63-31062, 63-31054, 63-27671, 63-27649, 63-3603, and 63-7595.¹

There are six sets of Discovery Responses from the Edwards Family covering the other

¹ Edwards Family also disputes that its other Responses do not differ materially. Many of Claimants' Discovery Requests in the other subcases differ materially, and likewise Edwards Family's respective Responses.

subcases that Claimants did not bother to submit. The Court cannot be expected to be psychic and rule on the adequacy of those Responses excluded from the record. The Motion to Compel therefore should be denied as to those subcases for which the subject Discovery Responses were not submitted as required, and Edwards Family should be awarded its costs and fees for having to prepare this Response.

II. THE EDWARDS FAMILY'S RESPONSES PROVIDED ALL DISCOVERABLE INFORMATION, NOT PRIVILEGED OR SUBJECT TO WORK PRODUCT DOCTRINE PROTECTION, THAT IS CURRENTLY AVAILABLE.

In its Responses to Claimants' discovery in subcases 63-12, 63-13, and 63-15, the Edwards Family has provided all information in response to Claimants' Requests that are properly within the scope of discovery and available to it at this early stage of the proceedings. As the basis for their Motion, Claimants have not pointed to any specific Response provided by the Edwards Family as deficient; rather, they seem to be upset because a number of the Responses included objections. Yet, Claimants should recognize the legitimacy of the Edwards Family's objections which were further explained in the August 21, 2006 letter of the Edwards Family's attorney. Affidavit of Charles L. Honsinger, Exhibit F. As described in that letter and for the purpose of reviewing this Motion, the Claimants' Requests can be divided into two categories: Requests seeking matters outside the scope of discovery, and Requests inquiring as to trial matters, such as witnesses or exhibits. Each of these categories is considered in turn, and as described in the August 21, 2006 letter and below, was properly responded to.

A. Claimants' Requests Seeking Purely Legal Analysis, Privileged Communications or Work Product Materials Were Improper.

A number of the interrogatories and requests ask for pure legal analysis. *See, e.g.*, Interrogatory No. 11 in the Discovery Responses, Exhibit D to the (un-notarized) Affidavit of Charles L. Honsinger, which provides: "Your objections in subcases 63-12, 63-13 and 63-15 state that "The Stewart Gulch Geothermal Aquifer should be managed as a separate source pursuant to *Silkey v. Tiegs*. Please set forth the basis for this objection." The Edwards Family objected to this request for legal analysis regarding a specific judicial decision on bases including, "Requests analysis of purely legal matters. Requests privileged attorney-client communications. Requests attorney work product. Requests information in the possession of and/or equally available to the propounder." Since this Interrogatory sought purely legal analysis, these objections were justified under the circumstances.

I.R.C.P. 26(b)(1) exempts privileged matters from discovery. Attorney work product prepared in anticipation of litigation is protected under I.R.C.P. 26(b)(3) unless the moving party makes the necessary showing of substantial need and undue hardship. Nothing in Claimants' Motion or supporting Affidavit remotely addresses issues of substantial need or undue hardship. Claimants' asking for an analysis of *Silkey v. Tiegs* clearly is seeking information that is privileged or subject to work-product doctrine protection. Counsel for Claimants should have a copy of this decree available, and can review and analyze it for the purposes of the relevant subcases. Similar Interrogatories are Nos. 12 and 15, and the associated requests for production (Requests for Production Nos. 6, 7 and 10) seeking documents regarding legal analyses,. The Edwards Family properly objected to these Requests seeking legal analyses, opinions of counsel, or other matters of a privileged or work product nature.

While contention interrogatories are permissible if they seek facts or application of law to fact pursuant to I.R.C.P. 33(b)(1), the requests noted above seek purely legal information. An example of a contention interrogatory might include Interrogatory No. 16 which asked for the “basis of your objections to the Quantity element as recommended in the Director’s Report....” In its Response, the Edwards Family stated: “Matters necessary to define or administer this element are improperly in the Explanatory Material Section.” The Edwards Family answered this Interrogatory since it requested information about a mixed question of law and fact relating to the Quantity element. The Edwards Family answered at this early stage although I.R.C.P. 33(b)(1) specifically recognizes that contention interrogatories are more properly answered after the case or discovery has further proceeded: “...the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or a later time.”

Thus, at this early stage, the Edwards Family LLC attempted to answer the Discovery Requests to the extent that they did not seek purely legal analysis or privileged and protected matters.

B. At this Early Stage of the Proceedings, the Edwards Family Has Not Determined Trial Matters Such as Witnesses, Experts and Exhibits.

While serving discovery after the Initial Hearing may not be a written requirement, it is a practice arising out of efficiency and cost concerns for the parties. If a party serves written discovery shortly after the case is underway, well before a trial setting, discovery cut-off, or other scheduling order is in effect, it should not be surprised that answers regarding trial matters such as witnesses and exhibits are not provided, with notation that the response will be supplemented once these determinations are made.

The Edwards Family recognizes its duty under I.R.C.P. 26(e) to supplement seasonably

its discovery responses as such matters as witnesses and exhibits, or face the possible exclusion of its witnesses or exhibits or other sanctions. “Seasonably” has received the flexible interpretation from the Idaho Supreme Court that a supplementation is “seasonable” so long as it affords the opposing party “*an opportunity for full cross-examination.*” See *Edmunds v. St. Alphonsus Medical Center*, 2006 Idaho 30862, slip op. at p. 7 (Idaho Supreme Court May 2, 2006), quoting *Hopkins v. Duo-Fast Corp.*, 123 Idaho 205, 213, 846 P.2d 207, 215 (1993) (Bakes, C.J., concurring) (emphasis the Court’s). The Edwards Family will supplement its Responses as required in adequate time to permit Claimants an opportunity for full cross-examination.

Claimants’ Motion to Compel does not change the preliminary stage of these subcases: the Edwards Family simply does not have responsive information at this time for Interrogatories Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, and associated Requests for Production Nos. 1, 2, 3, 4 and 5. These Interrogatories and Requests will be supplemented seasonably in accordance with scheduling orders, the Rules of Civil Procedure and further discovery in the subcases.

The underlying subcases’ posture merits a brief review to understand the limited nature of discoverable information currently within the Edwards Family’s possession. The Edwards Family has objected to a number of water rights Claimants filed in the SRBA. The bases are explained in detail in the Objections themselves. To assist counsel in preparing the Objections, the Edwards Family engaged a consultant who prepared materials regarding the subject water rights. See Affidavit of Dana L. Hofstetter in Response to Motion to Compel filed herewith. However, counsel for the Edwards Family has not decided whether this consultant will be called as an expert witness at trial, and has not determined whether the materials prepared by

the consultant potentially will be trial exhibits. *Id.* Accordingly, this information is not properly within the scope of discovery until counsel for the Edwards Family makes these trial-related decisions in accordance with scheduling orders in the subcases.

As the Idaho Supreme Court stated in *Smith v. Big Lost River Irrigation District*, 83 Idaho 374, 383, 364 P.2d 146 (1961), (rehearing denied): “The principal purpose of interrogatories provided for under said IRCP, Rule 33, is to afford parties information regarding facts involved in the issues in suit to enable the proposing party to prepare for trial and to reduce the possibility of surprise in the trial.” Finding no surprise or prejudice to the propounding party, the Supreme Court upheld the district court’s order that the responding party need not reply to extensive interrogatories. *Smith*, 83 Idaho at 383 that would have required the responding party to conduct a great deal of research and compile detailed information that the propounding party did not show was needed for trial. *Id.*

The focus in *Smith* on the need for interrogatories to seek discovery of facts, and to seek information to prevent surprise at trial is instructive to the subcases at bar. This established authority dictates that Claimants’ interrogatories are improper as premature, and as seeking information far beyond underlying facts. *See also Edmunds, supra*, at p. 5 (“the purpose of our discovery rules is to facilitate fair and expedient pretrial fact gathering.”).

III. CONCLUSION

Claimants’ Motion to Compel specifies no particular grounds or bases for contending the Edwards Family has failed to provide discoverable information. Rather, they express generalized disappointment that they did not get more complete answers to questions seeking trial information or any answers to the requests for legal analysis. As noted above, the Edwards Family will seasonably supplement its Responses in accordance with the Rules as

discoverable information becomes available to it. Legal analyses that improperly encroach upon protected privileged and work product matters were properly objected to, and are not subject to supplementation. The Edwards Family therefore respectfully requests that the Special Master deny the Motion to Compel, and order an award of its costs and attorneys fees pursuant to I.R.C.P. 37(a)(4).

DATED this 26th day of September, 2006.

DEBRA K. ELLERS
ATTORNEY AT LAW

By: 

Debra K. Ellers

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September, 2006, I caused to be served a copy of the foregoing document on the following persons by the postage pre-paid method below:

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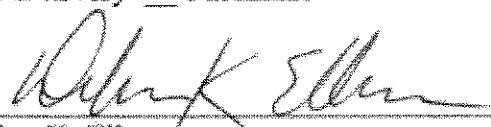
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Debra K. Ellers