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DEPARTMENT OF
WATER RESOURCES

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**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	)	
	)	
Case 38576	)	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
	)	
	)	REPLY TO EDWARDS FAMILY LLC'S
	)	RESPONSE TO THE TERTELING COMPANY,
	)	INC.'S AND T-7, LLC'S MOTION TO COMPEL
	)	
	)	

COMES NOW, The Terteling Company, Inc. and T-7, LLC and, by and through its attorneys of record, Ringert Clark, Chartered, hereby reply to the Edwards Family LLC (hereinafter "Edwards") Response to the Terteling Company, Inc.'s and T-7, LLC's (hereinafter "Terteling") Motion to Compel filed with the Court on September 26, 2006.

SUMMARY

Edwards has filed a response to Terteling's Motion to Compel that attempts to defend its failure to provide any information whatsoever. Edwards' argument is essentially two-fold: first, that some of the information sought by Terteling is protected by the attorney-client privilege or

by the attorney work product doctrine; second, that discovery is “premature” at this stage of the proceedings. Both defenses fail.

FACTS

Edwards filed its objections to Terteling’s water rights on April 21, 2006. As an example, Edwards objection to recommended water right no. 63-12 lists the following objected-to elements: General Provisions, Source, Quantity, Point of Diversion, Purpose of Use, Period of Year and Place of Use. *See* Edwards’ *Objection* to water right nos. 63-12. Edwards listed the following “Reasons Supporting Objection(s)”:

The Stewart Gulch Geothermal Aquifer should be managed as a separate source pursuant to *Silkey v. Tiegs*. Heating is not a year round use. The provisions listed under “Explanatory Material” (except for “Basis of Claim”) should be listed under “Other Provisions.” The reference to “Water District 63-S in the 2nd, 5th, and 8th provisions under “Explanatory Material” should read “Water District 63-S or successor regulatory entity.” The reference to “geothermal water” in the 10th provision under “Explanatory Material” should read “low-temperature geothermal water.” A statement that this right is no longer diverted under artesian conditions without pumping should be included in “Other Provisions.” Duplicate 63-31054 should be corrected.

Id. Terteling served its discovery requests upon Edwards on June 29, 2006 seeking not only witnesses and exhibits that Edwards may use at trial (as is alleged by Edwards in its briefing), but also information regarding facts that are the basis for Edwards’ objections such as the names of individuals with information and documents that support or are related to the objections. *See Honsinger Affidavit*, Ex. D, Interrogatory Nos. 1 - 10, Requests for Production 1 - 5. Because Edwards cited the *Silkey v. Tiegs* decree in support of its objections, Terteling requested both that Edwards set forth the basis for its statement that its objections were supported by *Silkey v. Tiegs*, and requested that Edwards identify what it believes to be the language in that decree supporting

its objections. *See Id*, Interrogatory Nos. 11, 12, Requests for Production Nos. 6, 7. Terteling also submitted interrogatories that sought the basis for Edwards' statements in its objections to the recommendations of Terteling's water rights. *See Id*, Interrogatory Nos. 13 - 19, Requests for Production Nos. 8 - 14. Edwards served its completely deficient Responses on August 3, 2006.

Id. Edwards in no manner answered any of the discovery propounded to it by Terteling other than to object on numerous bases. Edwards' typical response was as follows:

Objection. Premature. Compound. Overbroad. Burdensome. Ambiguous. Vague. Requests information beyond the proper scope of discovery. 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.

Id, Response to Interrogatory No. 11. In fact, Edwards in no way answered any of the discovery submitted to it other than in the manner illustrated above. Now, in its briefing, Edwards explains that it should not have to answer discovery because it seeks information regarding trial witnesses and exhibits that Edwards has not yet decided on; because it seeks information allegedly protected by privilege or by the work product doctrine; and because Terteling's propoundment of discovery at this point is premature. Notably, the date of the hearing on the Motion to Compel is October 3, 2006, more than five full months after Edwards filed its objections. The Initial Hearings in these subcases are scheduled for December 6, 2006, more than seven full months after Edwards filed its objections.

ARGUMENT

A. Subcases Other than 63-12, 63-13 and 63-15

As an initial point, it is true that no discovery responses from Edwards other than those addressing subcases nos. 63-12, 63-13 and 63-15 were included with the *Affidavit of Charles L. Honsinger in Support of the Motion to Compel*. However, despite Edwards' protestations to the contrary, Terteling takes the position that it is decidedly not true that such other Responses differ materially from the Responses submitted in subcase nos. 63-12, 63-13 and 63-15.

Moreover, the only fact before the court regarding these other Responses is the statement in the *Honsinger Affidavit* that the Responses that are provided are exemplary of all other Responses in other subcases, and that the attached Responses do not differ materially from those not provided. The reasoning behind Terteling's failure to include such responses was that Terteling did not wish to clutter the Court's files in each subcase with numerous copies of discovery responses unrelated to that subcase. Notably, Edwards provides only a bare statement in their brief about the similarities between Responses in other subcases. No facts rebutting the factual statement in the Honsinger Affidavit regarding the similarities between the Responses are submitted with the briefing.

To the extent that the Court denies Terteling's Motion to Compel for subcases other than 63-12, 63-13 and 63-15 on procedural grounds for failure to submit other Responses, Terteling will submit the necessary Affidavits, and will file new Motions to Compel. It would be a regrettable waste of the Court's time and the parties' resources if such became necessary.

B. Discovery is Appropriate Prior to Initial Hearings

Edwards argues that Terteling should “not be surprised” that Edwards’ answers are not provided because it is apparently “too early” in these proceedings. *Edwards’ Response*, p. 5. Edwards first justifies this argument by implying that it has not made decisions regarding the witnesses or exhibits it may or may not present at trial. Terteling certainly recognizes that it may be premature for Edwards to disclose the witnesses it may call at trial, or the evidence it may present at trial. However, Terteling’s Interrogatories and Requests for Production requested more than simply those witnesses and information to be presented at trial - it also requested the names of persons with knowledge, names of experts with whom Edwards has consulted, the identification of communications and documents, etc. Edwards’ arguments regarding trial witnesses and exhibits certainly do not apply to these discovery requests made by Terteling.

Edwards also implies that its argument that discovery is premature is justified by the fact that the Initial Hearings have not yet been held. Nothing in the Idaho Rules of Civil Procedure prevent the propoundment and responses to discovery prior to the Initial Hearings in these subcases, which, as stated above, are being held more than seven months after Edwards’ objections completed the pleadings in these subcases. In Idaho civil litigation, it is not uncommon that discovery is occurring at this point in the proceedings. Moreover, the purposes of the Initial Hearing are better served if the parties have some information regarding the bases for the other party’s objections:

At the Initial Hearing, each claimant and/or objector shall be given an opportunity to meet with IDWR in an attempt to reconcile the difference between the Director’s Report, the claim and the objection(s) for each subcase. If the objection(s) cannot be reconciled, the court shall set the matter for trial.

SRBA Administrative Order No. 1, §10(e)(1)(a). From this language, it is apparent that one of the purposes of an Initial Hearing is to give the parties an opportunity to reconcile their differences. The Initial Hearings in these subcases are due to be held December 6, 2006 - more than seven months after objections were filed. To the extent that any meaningful negotiations over Edwards' objections can be held at that time, Terteling must have some idea of what they are about. In order to have this information, it is necessary that Edwards be compelled to respond to Terteling's discovery.

C. The Basis of Edwards' Objections is Discoverable

Terteling requested that Edwards set forth the basis for its objections to specific elements of the water rights, and requested that Edwards set forth the basis for certain statements in its objections (Terteling also requested that Edwards identify the portions of the *Silkey v. Tiegs* decree upon which it is relying to substantiate its objections.) Edwards argues that it should not be required to respond to these interrogatories and related requests for production because they seek "purely legal analysis." *Edwards' Response*, p. 4. What Edwards apparently fails to recognize is that it has subjected itself to discovery of the basis of its objections by making such objections and then supporting them with statements such as its objections are "pursuant to *Silkey v. Tiegs*." See *Edwards' Response*, p. 4.

Moreover, it is difficult to understand Edwards' argument that the information sought is "attorney work product." The fact of the matter is that Edwards has made objections to Terteling's water rights - some of which are apparently based upon legal theories that are supported by facts. Yet Edwards has provided nothing, not the legal theory nor the facts. This is

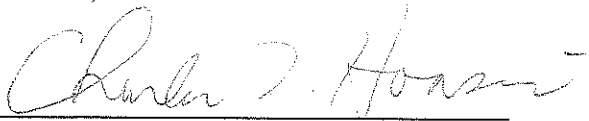
unacceptable in litigation of any kind. To illustrate, if Edwards' theory is that Terteling has forfeited one of its water rights, it would be required to state so, and would be required to list the facts supporting forfeiture. Any other requirement defies the Idaho Rules of Civil Procedure.

Forcing Terteling to parse through the *Silkey v. Tiegs* decree and "guess" at the language that Edwards believes supports its objections is both unfair and ridiculous. Similarly, Edwards' argument that Terteling's attempts to discover the basis of Edwards' objections to elements of Terteling's water rights are out of bounds simply because such objections have a legal basis are also ridiculous - all objections in the SRBA, and all claims and defenses in any civil litigation have a legal basis. Any litigant in any civil matter is entitled to discover the same. Those theories and the facts supporting them are not protected by any "privilege" or by the attorney "work product doctrine."

CONCLUSION

Edwards has forced Terteling to file a Motion to Compel to get any kind of discovery whatsoever. Edwards has failed to provide any meaningful discovery responses and its arguments in support of its failure to so provide are both nonsensical and illogical. The Court should force Edwards to stop playing this game and provide meaningful responses to the discovery propounded by Terteling three months ago by granting the Motion to Compel. Further, the Court should grant to Terteling its costs and attorney fees incurred to bring this Motion to Compel pursuant to I.R.C.P. 37(a)(4).

DATED this 29th day of September, 2006.

By: 
Charles L. Honsinger

CERTIFICATE OF MAILING

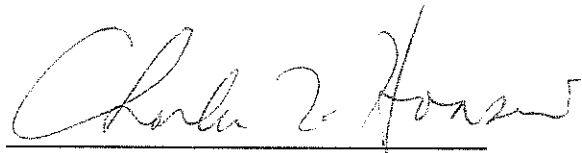
I hereby certify that service of the within and foregoing document was made this 29th day of September, 2006, by mailing a copy thereof, postage prepaid, to each of the parties listed below.

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A handwritten signature in cursive script, reading "Charles L. Honsinger", written in dark ink over a horizontal line.

Charles L. Honsinger