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DEPARTMENT OF
WATER RESOURCES

CHARLES L. HONSINGER (ISB #5240)
RINGERT CLARK CHARTERED
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Boise, Idaho 83701-2773
Telephone: (208) 342-4591
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Attorneys for Objector The Terteling Company, Inc.

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 No. 63-5195

MOTION TO FILE LATE OBJECTION

COMES NOW the Objector The Terteling Company, Inc. (hereinafter "TTCI"), by and through its attorneys, Ringert Law, Chartered, and hereby files this *Motion to File Late Objection* to the recommendation of water right number 63-5195 claimed in the SRBA by David Niznik and Diane Peck-Niznik. This *Motion* is filed pursuant to I.R.C.P. 7(b). The grounds for this *Motion* are that TTCI has good cause pursuant to the standards of I.R.C.P. 55(c) for not having filed their objection earlier. A copy of the Objection that TTCI seeks to file is attached hereto as Exhibit "A". This *Motion* is supported by the *Affidavit of Charles L. Honsinger in Support of Motion to File Late Objection*, and the *Stipulation to Granting of Motion to File Late Objection* filed concurrently herewith and by the argument herein.

COPY

FACTS

Niznik owns water right no. 63-5165 claimed in the Snake River Basin Adjudication. Water right number 63-5195 was recommended by IDWR in the SRBA with a priority date of June 1, 1921. TTCI owns water right number 63-12 which was recommended by IDWR in the SRBA with a priority date of July 1, 1921. A memorandum in IDWR's claim file for water right no. 63-5195 indicates that the priority date was recommended as 1921 based upon an "affidavit by Mr. Cantwell, grandson of Mrs. Silkey and son the well driller and former resident of the home where the well is located." See Exhibit A to *Affidavit of Charles L. Honsinger in Support of Motion to File Late Objection* (hereinafter "*Honsinger Affidavit*"). As discussed by Vicky Music in her e-mail message to Andy Terteling, no such affidavit appears in the file. See Exhibit B to *Honsinger Affidavit*. However, the statements that discuss the date the well was drilled both indicate that the well was drilled after the first Silkey well was drilled. See Exhibits C and D to *Honsinger Affidavit*. TTCI is the successor in interest to the Silkey well and to water right no. 63-12 associated with that well.

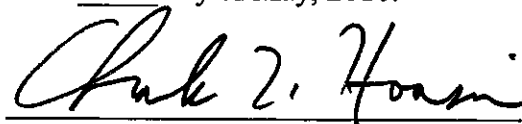
ARGUMENT

The legal standard for filing a late objection to a water right recommended in the SRBA is set forth in the *Order on Motion to Set Aside Partial Decrees and File Late Objections*, Subcase Nos. 65-19812 et. al. (January 31, 2001) (hereinafter "*A.L. Cattle Decision*"). That decision holds that motions to file late objections should be reviewed under the standards by which a default judgment may be set aside pursuant to I.R.C.P. 55(c). *Id.*, at p. 6. "The I.R.C.P. 55(c) Standard takes into account the following factors: 1) whether the default was willful; 2) whether setting aside the judgment would prejudice the opponent; and 3) as with a Rule 60(b)

motion, whether a meritorious position has been presented.” *Id.*, at p. 7. TTCI’s *Motion to File a Late Objection* meets all three criteria.

First, TTCI’s failure to file an objection was not willful - it was simply unaware of the facts related to the priority date recommended for the water right, and only became aware of those facts when it had spent time reviewing the claim file for water right no. 63-5195 in an effort to understand the objections filed by Edwards Family, LLC to many of the water rights, including those held by TTCI, in the area. Second, no prejudice will occur to Niznik or any other party; in fact, Niznik has stipulated to the granting of TTCI’s Motion. Niznik and TTCI intend to resolve their issues as soon as possible by filing a stipulation to partially resolve the subcase that provides that the priority date for water right no. 63-5195 is July 2, 1921 as is requested in the Objection. Likewise, no prejudice will occur to Edwards Family, LLC, as this issue does not in any way impact the dispute between Niznik and Edwards Family, LLC. Third, as is apparent from a review of the IDWR claim file, the evidence convincingly establishes that the priority date for water right no. 63-5195 should be after the July 1, 1921 priority date recommended for TTCI’s water right no. 63-12. Niznik has indicated his agreement with this position by stipulating to the filing of the objection. Therefore, TTCI has presented a meritorious position. Accordingly, the Court should grant this motion, and TTCI respectfully requests the same.

Respectfully submitted this 5th day of May, 2010.

A handwritten signature in black ink, appearing to read "Charles L. Honsinger", written over a horizontal line.

Charles L. Honsinger
Ringert Law, Chartered

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of May, 2010, a true and correct copy of the foregoing document was served by U.S. mail to the following:

Nick Spencer
Deputy Attorney General
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098
Fax: (208)287-6700

Ms. Dana Hofstetter
Hofstetter Law Office, LLC
608 W. Franklin Street
Boise, ID 83702
Fax: (208)424-8744

David Niznik
Diane Peck-Niznik
3911 Whitehead
Boise, ID 83703

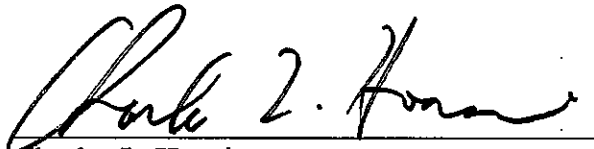

Charles L. Honsinger

Exhibit A

**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 No. 39576

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A. Subcase 63-5195
(Insert water right no.)

**STANDARD FORM 1
OBJECTION**

Please fill in the following information:

B. NAME AND ADDRESS OF PERSON OBJECTING

Name: THE TERTELING CO INC.

Address: 3858 Garden Center Way, Suite 300
Boise, Idaho 83703

Daytime Phone: 208 338-5200

Name & Address of Attorney, if any:
Charles L. Honsinger
Ringert Law, Chartered
P.O. Box 2773
Boise, ID 83701

C. CLAIMANT OF WATER RIGHT AS LISTED IN DIRECTORS'S REPORT

Name: David Niznik
Diane Peck-Niznik

Address: 3911 Whitehead
Boise, Idaho 83703

D. I object to the following elements as recommended in the Director's Report. (Please check the

Appropriate box(es)).

1. ☐ **Name and Address**
Should be: _____
2. ☐ **Source**
Should be: _____
3. ☐ **Quantity**
Should be: _____
4. ☒ **Priority Date**
Should be: July 2, 1921
5. ☐ **Point(s) of Diversion**
Should be: _____
6. ☐ **Instream Flow Description**
Should be: _____
7. ☐ **Purpose(s) of Use**
Should be: _____
8. ☐ **Period of Year**
Should be: _____
9. ☐ **Place of Use**
Should be: _____
10. ☐ **I object because:**
 - ☐ This water right should not exist.
 - ☐ This water right was not recommended, but should be recommended with the elements described above.

E. REASONS SUPPORTING OBJECTION (S):

The proof submitted to establish the priority date of this water right states that the well that is the point of diversion for this water right was drilled after the first Silkey well was drilled. Because the priority date for the first Silkey water right no. 63-12 is July 1, 1921, the priority date of June 1, 1921 recommended for this water right no. 63-5195 is in error. Please see attached statements of Raymond F. Stralow and Clifton W. Johnson that were used as proof of priority by IDWR when recommending this water right.

F. VERIFICATION (must be completed)

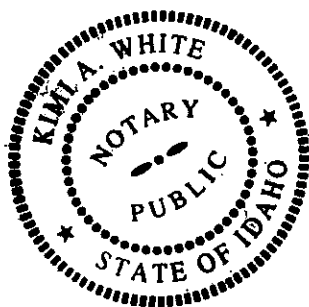
State of Idaho)
) ss.
County of Ada)

Charles L. Honsinger, duly sworn, upon oath, deposes and says:

That I am the party/claimant filing this objection, as defined by I. C. §§ 42-1401A (1) and/or that I am the attorney for the party/claimant objecting and that I have read this objection, know its contents and believe that the statements are true to the best of my knowledge.

Charles L. Honsinger

Charles L. Honsinger



Subscribed and sworn to before me on: May 5th, 2010

Kim A. White

Notary Public for Idaho

Residing at: Boise, Idaho

My Commission Expires: 01/01/11

INSTRUCTIONS FOR MAILING

You must mail the objection, to the Clerk of the Court. **FAX filings will no be accepted.**
You must also send a copy to all the parties listed below in the Certificate of Mailing.

CERTIFICATE OF MAILING

I certify that on the 5th of May, 2010 I mailed the original and copies of this objection, including all attachments, to the following by Federal Express:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

2. One copy to the Claimant of the water right at the following address by U.S. Mail:

Name: David Niznik
Diane Peck-Niznik

Address: 3911 Whitehead
Boise, Idaho 83703

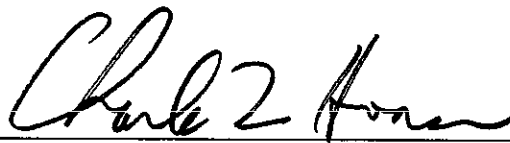
3. Copies by U.S. Mail to:

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

United States Department of Justice
Environment and Natural Resource Division
550 West Fort Street, MSC 033
Boise, ID 83724

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
PO Box 44449
Boise, ID 83711-4449

Ms. Dana Hofstetter
Hofstetter Law Office, LLC
608 W. Franklin Street
Boise, ID 83702
Fax: (208)424-8744

A handwritten signature in cursive script, appearing to read "Charles Z. Horn", written in black ink.

Signature of Objector or attorney
mailing on Objector's behalf