

RECEIVED

JUN 30 2010

DEPARTMENT OF
WATER RESOURCES

Attorneys for Quail Hollow, LLC, Bluegrass, LLC,
David Hendrickson, and Robert and Kathleen Donnelly

Scott L. Campbell, ISB No. 2251
Andrew J. Waldera, ISB No. 6608
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Boulevard, 10th Floor
Post Office Box 829
Boise, Idaho 83701-0829
Telephone: (208) 345-2000
Facsimile: (208) 385-5384
22798.0000

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

Subcase Nos.	63-00012	63-00013
63-00014	63-00015	63-00016
63-00308	63-02103A	63-02103B
63-03603	63-04037	63-05067
63-05195	63-07595	63-09758
63-21875	63-27649	63-27671
63-30006	63-30007	63-31050
63-31051	63-31052	63-31053
63-31054	63-31055	63-31056
63-31057	63-31058	63-31059
63-31060	63-31062	63-32895

RULE 56(f) MOTION FOR CONTINUANCE
AND IMMEDIATE DISCOVERY REQUEST

EXPEDITED HEARING REQUESTED

COME NOW Quail Hollow, LLC and David Hendrickson (collectively “Quail Hollow”), Bluegrass, LLC and Robert and Kathleen Donnelly (collectively “Donnelly”), by and through undersigned counsel of record and pursuant to Idaho Rule of Civil Procedure 56(f), and hereby move the Court for an Order vacating and continuing the present summary judgment response deadline (currently set for July 2, 2010), and ordering the immediate Rule 30(b)(6) depositions of the Idaho Department of Water Resources and of the Edwards Family, LLC.

This motion is supported by the points and authorities discussed herein, and by the Affidavit of Andrew J. Waldera (“Waldera Aff.”) filed contemporaneously herewith. Further, Quail Hollow and Donnelly respectfully request that this motion be heard on an expedited basis on any available date and time between July 6 and July 15, 2010.

I. LEGAL STANDARD

Pursuant to Idaho Rule of Civil Procedure 56(f), a party may request from the court more time to respond to a pending motion for summary judgment. I.R.C.P. 56(f); *see also*, *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 239 (2005) and *Golay v. Loomis*, 118 Idaho 387, 389 (1990). However, the requesting party is charged with articulating what additional discovery is necessary and how it is relevant to responding to the pending motion. *Jenkins*, 141 Idaho at 239. The party seeking to invoke the protections of Rule 56(f) must do so in good faith. *Id.*

II. ARGUMENT

As stated within the Waldera Affidavit, Quail Hollow, Donnelly, and Edwards Family, LLC settled in principle on or about April 26, 2010. Waldera Aff. at ¶ 3. Due to that agreement, the parties suspended all litigation between them (including discovery) in order to

focus upon final documentation of settlement terms. *Id.* at ¶ 4. Counsel for Edwards was to take the lead on providing draft settlement documents. *Id.*

On a number of occasions, counsel for Edwards stated that the draft settlement documents would be forthcoming. *See, e.g.,* Waldera Aff. at ¶¶ 5-7. To date, no such documents have been received. *Id.* at ¶ 7. Instead, counsel for Quail Hollow and Donnelly received a voicemail from counsel for Edwards on June 18, 2010, announcing that Edwards had filed summary judgment papers against them, among others. *Id.* Given the parties suspension of all litigation between them based upon the April settlement in principle, Quail Hollow and Donnelly need to conduct immediate discovery (via Rule 30(b)(6) depositions) of both the Idaho Department of Water Resources and of the Edwards Family, LLC in order to respond to and to rebut arguments contained within the Edwards summary judgment papers.

In particular, development of the following evidence will be instrumental in responding to Edwards' summary judgment papers:

- The position of the Idaho Department of Water Resources ("IDWR") with respect to the *Silkey v. Tiegs* decree; whether the decree is treated as a general or as a private adjudication, and the reasons therefor;
- IDWR's position or policy regarding treatment of the Stewart Gulch Geothermal Aquifer as a separate source for administration purposes; whether IDWR considers the aquifer to be a separate source, and the reasons therefor;
- IDWR's position regarding the subsequent development of several junior groundwater-based rights subsequent to *Silkey v. Tiegs*, and the grounds supporting that position;
- Edwards participation, protest, or resolution of the same, if any, regarding the creation and/or administrative licensing of any of water right nos. 63-02103A, 63-02103B, 63-04037, 63-09758, and 63-21875;
- Examination of Edwards' "public interest" arguments, *i.e.*, examination of Edwards' employment and payroll history for purposes of comparing that information against the economic impacts derived from other businesses who rely upon the aquifer (such as Quail Hollow Golf Course);

- The design, nature, and condition of Edwards' water diversion infrastructure, the economics of upgrading that infrastructure, and whether the infrastructure is efficient or impermissibly wasteful—this bears upon water availability for others;
- The extent of Edwards' actual historic beneficial use of water to operate the greenhouse business, not some desired future use, but actual historical beneficial use of the resource; which bears upon water availability for others;
- Examination of the 2002 settlement agreement between Edwards and the Terteling entities, and the technical consultant data generated underpinning that agreement (namely the 650-750 AFA "sustainable" cap underpinning that agreement); and
- The factual grounds supporting Edwards' objections to each of water right nos. 63-02103A, 63-02103B, 63-04037, 63-09758, and 63-21875, and particularly right nos. 63-02103A, 63-02103B in light of correspondence between counsel for Edwards and the IDWR stating that Edwards' only grounds for objection was a quantity discrepancy between underlying license and the Department's subsequent recommendation of the rights that has since been corrected by the Department.

In addition to the foregoing discovery issues, Quail Hollow and Donnelly take this opportunity to inform the Court that Donnelly is no longer the owner of water right nos. 63-02103A or 63-02103B. Waldera Aff. at ¶ 8. Current Donnelly counsel of record has been in contact with the real estate agents involved in the Donnelly property and appurtenant water right transactions, and will follow-up with those agents in writing to keep them apprised of these SRBA proceedings. *Id.*

It remains to be seen what action, if any, the new water right owners will take with respect to these proceedings. Current counsel for Donnelly may need to withdraw from subcase nos. 63-02103A and 63-02103B, and is prepared to do so after issuing its written correspondence to the new owners of the above-referenced water rights. In fairness to the new water right owners, the Court may want to vacate and continue the current trial setting, and all corresponding pretrial deadlines (including these summary judgment proceedings) with respect to all of the above-captioned subcases. At the least, and in an effort not to hold up the Terteling

entities any further in this process, the Court may want to simply vacate and continue the trial setting and current pretrial deadlines only for the former Donnelly subcases (63-02103A and 63-02103B) by removing those subcases from the current, above-captioned bundle of subcases. Counsel for Quail Hollow and Donnelly will keep the Court apprised of any new information it receives after issuing its written correspondence to the current (new) water right owners the week of July 5, 2010.

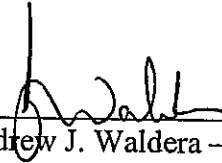
III. CONCLUSION

Quail Hollow and Donnelly are frustrated by their need to pursue this continuance, but have been forced to do so by Edwards' ambush—a tactic that should not be rewarded by the Court. Suffice it to say that Quail Hollow and Donnelly are frustrated and disappointed with Edwards' June 18, 2010 filing in light of the parties' longstanding mutual agreement to lay down their respective swords under the auspices of settlement. Quail Hollow and Donnelly relied in good faith upon Edwards' representations of settlement in an effort to best serve the interests and resources of all involved. Settlement may yet occur, but no such documents have materialized to date as discussed in the Waldera Affidavit. Regardless, Quail Hollow and Donnelly regretfully find themselves in need of the requested continuance and discovery Order discussed herein to remedy Edwards' actions, and to meaningfully respond to the summary judgment papers at issue.

DATED this 29th day of June, 2010.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By



Andrew J. Waldera – Of the Firm
Attorneys for Quail Hollow, LLC,
Bluegrass, LLC, David Hendrickson, and
Robert and Kathleen Donnelly

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of June, 2010, I caused a true and correct copy of the foregoing **RULE 56(f) MOTION FOR CONTINUANCE AND IMMEDIATE DISCOVERY REQUEST** to be served by the method indicated below, and addressed to the following:

Dana L. Hofstetter
HOFSTETTER LAW OFFICE, LLC
608 W. Franklin St.
Boise, ID 83702-5509

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Charles L. Honsinger
RINGERT LAW, CHTD.
455 S. Third Street
P.O. Box 2773
Boise, ID 83701-2773

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

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

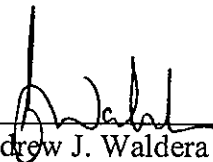
☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Nick Spencer
OFFICE OF THE ATTORNEY GENERAL, STATE OF
IDAHO
322 E. Front Street
P.O. Box 83720
Boise, ID 83720-0098

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Director
IDAHO DEPARTMENT OF WATER RESOURCES
322 E. Front Street, 6th Floor
P.O. Box 83720
Boise, ID 83720

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile



Andrew J. Waldera