

RECEIVED

JUL 12 2010

DEPARTMENT OF
WATER RESOURCES

Dana L. Hofstetter, ISB #3867
HOFSTETTER LAW OFFICE, LLC
608 West Franklin Street
Boise, Idaho 83702
Telephone (208) 424-7800
Facsimile: (208) 424-8774
Email: Dana@IdahoWaterLaw.com

Attorney 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

Case 39576

)
) Subcase Nos. 63-12, 63-13, 63-14,
) 63-15, 63-16, 63-308, 63-2103A,
) 63-2103B, 63-3603, 63-4037, 63-5067,
) 63-5195, 63-7595, 63-9758, 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, and
) 63-32895
)

) EDWARDS FAMILY, LLC'S RESPONSE
) MEMORANDUM IN OPPOSITION
) TO TERTELING MOTION TO
) STRIKE PORTION OF HOFSTETTER
) AFFIDAVIT
)

Edwards Family, LLC ("Edwards") respectfully submits this *Response Memorandum in Opposition to Terteling Motion to Strike Portion of Hofstetter Affidavit*. For the reasons discussed more fully below, the *Terteling Motion to Strike Portion of Hofstetter Affidavit* should be denied.

This *Response* is supported by the *Affidavit of Dana L. Hofstetter* filed in these Subcases on June 18, 2010, (hereinafter “*Hofstetter Affidavit #1*”) and other matters of record.

I. Statement of Pertinent Facts

Edwards filed its Motion for Summary Judgment, along with supporting documents, on June 18, 2010. One of the supporting documents was *Hofstetter Affidavit #1*. *Hofstetter Affidavit #1* included a number of Exhibits, A through Q; the target of the *Terteling Motion to Strike* is Exhibit P to *Hofstetter Affidavit #1*, based on inapposite reliance on I.R.E. 408.

Hofstetter Affidavit #1, Exhibit P, is a January 29, 2010, letter from Charles L. Honsinger to counsel, and Mr. Niznik who is *pro se*. The bulk of the letter discusses water level data, and, indeed, includes a graph of water level information, compiled by Terteling expert, Ed Squires. The letter asserts that water levels in the Stewart Gulch Geothermal Aquifer (“SGGA”) are declining at current usage volumes. Nowhere in this letter is Idaho Rule of Evidence 408 referenced. The purpose of the letter, as stated in its culminating paragraph, is to terminate any settlement discussions and inform the other parties of Terteling’s decision to proceed with litigation:

Thus, based upon this regression analysis and the Terteling Company, Inc.’s position resulting therefrom, settlement in the Snake River Basin Adjudication of the overriding issue raised by Edwards’ objections (the protection of aquifer pressures) seems to be impossible. We thank you all for your participation in the settlement discussions. Unfortunately, it appears that the only method of resolving these objections is through litigation.

Hofstetter Affidavit #1, Exhibit P at 2 (emphasis added). Thus, this letter’s objective is not to further settlement, but, rather, to announce Terteling’s decision to proceed with litigation.

II. Legal Argument

A. I.R.E. 408 protects statements made in furtherance of settlement, not a document like *Hofstetter Affidavit #1*, Exhibit P, a letter terminating settlement negotiations.

I.R.E. 408 clearly protects only settlement offers, settlement agreements and other statements made in pursuit of reaching settlement:

Evidence of (1) furnishing, offering, or promising to furnish, or (2) accepting, offering, or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to provide liability for, invalidity of, or amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule does not require exclusion if the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution....

I.R.E. 408 (emphases added).

Hofstetter Affidavit #1, Exhibit P, is not “evidence of furnishing, offering, or promising to furnish, or accepting, offering, or promising to accept, a valuable consideration in compromising or attempting to compromise a claim” within the scope of I.R.E. 408. Exhibit P contains no offer of settlement or acceptance of a settlement offer. Further, Exhibit P is not “evidence of conduct or statements made in compromise negotiations.” Rather, Exhibit P announces the decision to terminate settlement discussions and proceed with litigation. Since Exhibit P neither involves any possible exchange of valuable consideration in settlement of a claim nor constitutes statements made in settlement negotiations, Rule of Evidence 408 does not apply.

Terteling cites the case of *Jorgensen v. Coppedge*, 148 Idaho 536, 224 P.3d 1125 (2010) as support for its contention that Exhibit P contains inadmissible settlement negotiations under I.R.E. 408. That case addressed considering settlement negotiation information in the attorneys

fees determination. Thus, *Jorgensen v. Coppedge* involved the use of settlement negotiation information in evaluating an award of attorneys fees. Here, however, Exhibit P itself was not part of the settlement negotiation process and, therefore, Rule of Evidence 408 is not even triggered.

B. Even if I.R.E. 408 applied, it would not rule out the admissibility of Exhibit P to challenge contrary positions taken and for other purposes besides proving invalidity of a claim.

I.R.E. 408 expressly allows the use of settlement negotiation evidence for purposes besides proving “liability for, invalidity of, or amount of the claim.” For example, the Rule does not require exclusion if the evidence is offered for another purpose, “such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.” I.R.E. 408. Where a statement in a settlement letter was contrary to a party’s testimony, Rule 408 does not bar admissibility. *Davidson v. Beco Corp.*, 114 Idaho 107, 111, 753 P.2d 1254, 1258 (1987) (“The probative value of the statement in the settlement letter was great in that it tends to show [the defendant’s] testimony is unreliable.”)

Likewise, here, Terteling has taken a position in these summary judgment proceedings directly at odds with its position on aquifer levels described in Exhibit P. In its *Memorandum Opposing Edwards Family LLC’s Motion for Summary Judgment*, Terteling questions the legitimacy of the 650-750 acre foot per annum (“afa”) estimate of the total sustainable volume that can be diverted annually from the Stewart Gulch Geothermal Aquifer (“SGGA”):

To the extent that the parties’ agreement on an “estimate” of the “total sustainable volume of water that can be diverted annually from the Stewart Gulch Geothermal Aquifer” (see *Edwards’ Memorandum*, pp. 22-23) is in any way relevant to the issue of administration of the water rights at issue here, Edwards can certainly attempt to raise that agreed-upon “estimate” before the director at the time of administration. However, any argument that an “estimate” contained within a settlement agreement dated eight years ago that involved an administrative transfer proceeding involving only three of the rights at issue herein is now somehow a

conclusively established fact that prevents any other water rights from being diverted certainly bears some examination and skepticism.

Terteling Memorandum Opposing Edwards Family LLC's Motion for Summary Judgment

at 12. The 650 AFA figure is the total diverted volume for the senior rights, 63-12, 63-13 and 63-14 that were authorized to be diverted under *Silkey v. Tiegs*. See *Hofstetter*

Affidavit, Exhibits A, G, and I. When the Director's Report recommended volumes for the numerous junior SGGA rights to these three *Silkey v. Tiegs* rights are added to this base 650 afa figure, the 650-750 afa estimated sustained yield of the SGGA is vastly exceeded.

See *Hofstetter Affidavit #1, Exhibit N (Terteling Deposition at Exhibits C and R)*.

The declining water level information in *Hofstetter Affidavit #1, Exhibit P*, therefore, is directly at odds with Terteling's suggestion in its *Summary Judgment Memorandum* that the total sustainable aquifer volume is not being exceeded by diversion of the junior SGGA rights:

The regression analysis establishes that water levels in the Stewart Gulch geothermal wells have been (and are) dropping at an average rate of about 0.63 feet per year. These declines are occurring at an overall withdrawal volume that is significantly less than the cumulative diversion rate of the licensed water right holders; they are also occurring even though the overall withdrawal rate from the aquifer is currently decreasing by about 2.8 acre-feet per year. In the event of future colder winters and drier summers necessitating additional withdrawals, or in the event of District 63-S water users otherwise producing a greater percentage of their water rights, further aquifer pressure declines are expected to be significant.

Hofstetter Affidavit #1, Exhibit P at 1.

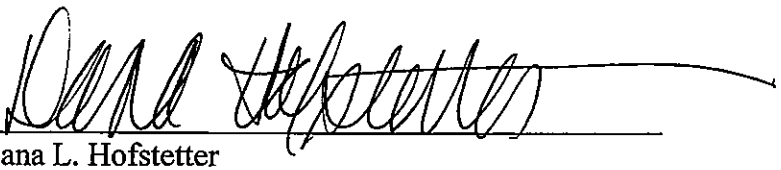
Accordingly, Exhibit P refutes the suggestion in *Terteling's Memorandum in Opposition* that the diversion of rights junior to 63-12, 63-13 and 63-14 from the SGGA do not violate the sustained yield of the SGGA. Therefore, even if I.R.E. applied to Exhibit P (which it does not), I.R.E. would not prevent the consideration of Exhibit P in the contrasting an apparently inconsistent Terteling position.

III. Conclusion

For the foregoing reasons, the Court should deny the *Terteling Motion to Strike Portion of Hofstetter Affidavit*.

Dated this 9th day of July, 2010

HOFSTETTER LAW OFFICE, LLC



A handwritten signature in black ink, appearing to read 'Dana Hofstetter', is written over a horizontal line. The signature is stylized and cursive.

Dana L. Hofstetter

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of the foregoing (with any attachments) this 9th day of July, 2010, by the pre-paid method indicated below to:

Charles Honsinger

Ringert Law

P.O. Box 2773

Boise, Idaho 83701-2773

☐ U.S. Mail ☐ Overnight Delivery ☐ Hand-Delivery ☒ Facsimile

Director IDWR

P.O. Box 83720

Boise, Idaho 83702

☒ U.S. Mail ☐ Overnight Delivery ☐ Hand-Delivery ☐ Facsimile

Andrew Waldera

Moffatt Thomas

P.O. Box 829

Boise, Idaho 83701

☐ U.S. Mail ☐ Overnight Delivery ☐ Hand-Delivery ☒ Facsimile

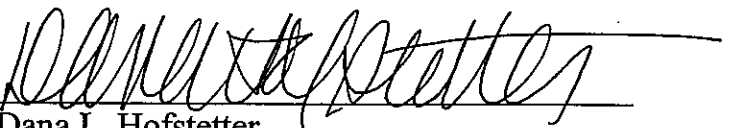
David Niznik

Diane Peck-Niznik

3911 Whitehead

Boise, Idaho 83703

☐ U.S. Mail ☐ Overnight Delivery ☒ Hand-Delivery ☐ Facsimile


Dana L. Hofstetter

3006.3/9397