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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	)	
	)	
	)	Subcase No. 63-12, 63-13, 63-14,
	)	63-15, 63-16, 63-308, 63-2103A,
Case 39576	)	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
	)	
	)	MOTION IN LIMINE AND
	)	MOTION TO SHORTEN TIME

Edwards Family, LLC, by and through counsel of record, Dana Hofstetter of Hofstetter Law Office, LLC, hereby submits this Motion In Limine and Motion to Shorten Time, pursuant to I.R.C.P., Rule 7(b)(3) and SRBA Administrative Order 1. These Motions are supported by the contemporaneously filed *Affidavit of Dana L.*

Hofstetter, the Memorandum below and the record. An expedited hearing is requested to allow for consideration of these matters prior to the September 27, 2010 scheduled trial commencement. As discussed further below, this Motion seeks an Order:

1.) limiting The Terteling Company Inc.'s direct evidence in Subcase 63-14 to the scope of its remaining Objection in that matter; and 2.) excluding the direct testimony of Ed Squires in Subcase Nos. 63-12, 63-13, 63-14, 63-15 and 63-31054 pursuant to a prior discovery agreement between counsel.

MEMORANDUM

1. Procedural Background Summary

At recent Status Conferences and Pre-Trial Conferences, the parties have limited the issues for trial. In this regard, The Terteling Company, Inc. has reserved for trial only the issue in its Objection for Subcase 63-14 based on the *Silkey v. Tiegs* seasonal quantity restrictions. The relevant portions of The Terteling Company Inc.'s 63-14 Objection state as follows:

3. X **Quantity**

Should be: Limited to quantities listed in decree in *Silkey v. Tiegs*, Ada County Case No. 11748 (June 13, 1930)

8. X **Period of Year**

Should be: As specified in decree in *Silkey v. Tiegs*, Ada County Case No. 11748 (June 13, 1930)

E. REASONS SUPPORTING OBJECTION(S): The water right is recommended outside of the parameters of the decree in *Silkey v. Tiegs*, Ada County Case no. 11748 (June 13, 1930) by which it was confirmed.

While the scope of The Terteling Company, Inc's remaining Objection in Subcase No. 63-14 is limited to the *Silkey v. Tiegs* restrictions, the evidence and witnesses The Terteling Company, Inc. has identified in support of its case in chief in its Lists of Witnesses and Exhibits served on September 16, 2010, indicate its apparent intent to present evidence in 63-14 broader than the scope of its Objection. For instance, the following exhibits identified by The Terteling Company, Inc. concern water measurement data and Water District 63-S operations, rather than the *Silkey v. Tiegs* seasonal restrictions on use of Water Right No. 63-14:

9. Stewart Gulch Geothermal Aquifer Watermaster's Reports – Years 2002-2009;
10. Watermaster's Monitoring Data Notebook for Water Right No. 63-14 – 1989-2009;
11. Watermaster's Monitoring Data for Water Right No. 63-14;
12. Watermaster's Report Ground Water District 63-S (Stewart Gulch) Years 2003-2010;
13. IDWR's December 5, 1989 Final Order Adopting Proposed Memorandum Decision and Order in Matter of Creation of Water District 63-S;
14. IDWR's December 1, 1992 Final Memorandum Decision and Order in Matter of Request for Groundwater Regulation: Decreed Right Nos. 63-00012, 63-00013, 63-00014, 63-00015 & 63-00016; Claim No. 63-4037P and Permit No. 63-9758;
15. IDWR's October 27, 1993 Order Denying Petitions for Rehearing and Amended Final Memorandum Decision and Order in Matter of Request for Groundwater Regulation: Decreed Right Nos. 63-00012, 63-00013, 63-00014, 63-00015 & 63-00016; Claim No. 63-4037P and Permit No. 63-9758.

Similarly, listed witness Ken Neely, District 63-S Watermaster, and expert, Ed Squires, identified by The Terteling Company, Inc., clearly appear outside the scope of The Terteling's Company's *Silkey v. Tiegs* based Objection in 63-14.

During the discovery phase of these proceedings, Edwards Family, LLC, scheduled the deposition of Ed Squires, an expert hydrogeologist that The Terteling Company, Inc. frequently had used and who had been listed in its Witness Disclosure filed on May 18, 2010. The day before the deposition of Mr. Squires was to begin on June 15, 2010, counsel for The Terteling Company, Inc., in written discovery responses, announced its intention to use Mr. Squires as a rebuttal witness only. *Affidavit of Dana L. Hofstetter*, Exhibit A, p. 8. At the scheduled deposition of Mr. Squires the next day, Terteling's counsel reiterated the intention to use Mr. Squires only as a rebuttal expert witness, if at all:

Mr. Honsinger: Okay Ms. Hofstetter, this witness, Mr. Squires, has not yet been proffered as any expert witness. If you read our discovery responses yesterday, which I know you may not have had a chance to do, you will notice that he is a rebuttal expert witness.

We do not yet know what your experts, if you even have an [*sic*] experts, opinions will be. So to that extent Mr. Squires won't be testifying about any opinions he may or may not hold until we know what your experts' opinions may be....

But as far as the opinions he holds, he doesn't know what opinions he may hold. We don't anticipate calling him, unless you proffer an expert witness. So I don't see that Mr. Squires' testimony will give much to us today.

Affidavit of Dana L. Hofstetter, Exhibit B, p. 4, L. 8 – p. 5, L. 5 (emphases added).

As a result of these representations, the deposition of Mr. Squires was limited to matters relating to his professional experience. *Affidavit of Dana L. Hofstetter*. At the end of the limited deposition of Mr. Squires, it again was confirmed by Terteling's counsel that Mr. Squires would only testify, if at all, as a rebuttal witness:

Ms. Hofstetter: ... Before we go off the record for today, I've spoken with Mr. Honsinger about marking as Exhibits E and F, excerpts from the discovery responses that T-7, LLC, and the Terteling Company, Inc. served yesterday. And the excerpts relate to the expert witness issue that we discussed earlier.

And indicate further, that Mr. Squires is not expected to testify at the trial in this matter, unless he is needed as a rebuttal witness. Is that correct, Mr. Honsinger?

Mr. Honsinger: That's correct at this time. I might also offer that the discovery deadline has not yet passed, but I don't anticipate changing these discovery responses, although we may.

Affidavit of Dana L. Hofstetter, Exhibit B, p. 31, L. 11 – p. 32, L. 1 (emphases added). Despite these prior representations that Mr. Squires would only testify as a rebuttal witness, if at all, Mr. Squires is listed on Terteling's, September 16, 2010, Witness List as a witness to be used in Terteling's case in chief.

2. There is good cause to expedite this hearing as the trial is scheduled to begin September 27, 2010.

Pursuant to I.R.C.P., Rule 7(b)(3), the Court may shorten the usual time for hearing on a Motion. Because trial is scheduled to begin September 27, 2010, there is the need for the Motion In Limine to be heard on an expedited basis at the earliest available opportunity.

3. There is good cause to limit the testimony of Mr. Squires to rebuttal only and, also, to prohibit Terteling's use of evidence beyond the scope of its Objection in 63-14.

A motion in limine seeks an advance ruling on the admissibility of evidence. *State v. Young*, 136 Idaho 113, 120, 29 P.3d 949, 856 (2001). Trial courts have broad discretion in determining the admissibility of evidence in cases before them and ruling on motions in limine. *Appel v. LePage*, 135 Idaho 133, 135, 15 P.3d 1141, 1143 (2000).

Even though motions in limine are predominantly used for the purpose of excluding potentially prejudicial evidence, such motions are also used to determine prior to trial whether certain evidence is admissible. *See generally*, 21 Wright and Graham, Federal Practice and Procedure, § 5037.1 – *Revised Rule 103; Motion in Limine*, pp. 93-94 (2002 Supplement, West Group) (Stating that historically the motion in limine took two forms. The “prophylactic” motion seeks to exclude evidence, while the “definitive” motion seeks to secure a final ruling on the admissibility of evidence). *See also*, Imwinkelried, Evidentiary Foundations, pg. 11 (4th ed., 1998, Lexis Law Publishing) (“The proponent may make a motion *in limine* to obtain an advance ruling of the evidence’s admissibility, but such motions are more frequently used by the opponent to suppress evidence before the trial begins.”)

The identification of Mr. Squires as a witness on Terteling’s Witness List is inconsistent with Terteling counsel’s prior representations that Mr. Squires would be used, if at all, as a rebuttal expert witness only. Based on these representations, the deposition of Mr. Squires was limited to matters relating to Mr. Squires’ professional experience involving Terteling as well as other similar kinds of matters. *Affidavit of*

Dana L. Hofstetter. Accordingly, for Mr. Squires to now be used in Terteling's case in chief in 63-14 would result in great prejudice to Edwards.

Further, the Terteling Exhibit List includes evidence that appears to be outside the scope of its *Silkey v. Tiegs* based Objection in 63-14. Specifically, the measurement records for 63-14, watermaster reports and water district Orders listed on Terteling's Exhibit List appear to be outside the scope of its Objection. This information concerns water diversions and District 63-S operations, rather than matters relating to *Silkey v. Tiegs*' limitations on the use of Water Right No. 63-14. To allow Terteling to effectively broaden the scope of its Objection at this late date by using this evidence in its case in chief also would cause great prejudice to Edwards.

4. Conclusion

For the foregoing reasons, Edwards respectfully requests that these Motions are granted and the Court issues an Order, 1. limiting Terteling's use at trial of Mr. Squires to a rebuttal witness only; and 2. prohibiting Terteling's use of the following evidence, and any other evidence beyond the scope of its Objection, in its case in chief in 63-14:

9. Stewart Gulch Geothermal Aquifer Watermaster's Reports – Years 2002-2009;
10. Watermaster's Monitoring Data Notebook for Water Right No. 63-14 – 1989-2009;
11. Watermaster's Monitoring Data for Water Right No. 63-14;
12. Watermaster's Report Ground Water District 63-S (Stewart Gulch) Years 2003-2010;
13. IDWR's December 5, 1989 Final Order Adopting Proposed Memorandum Decision and Order in Matter of Creation of Water

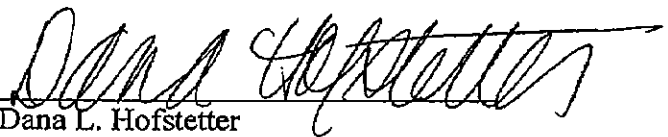
District 63-S;

14. IDWR's December 1, 1992 Final Memorandum Decision and Order in Matter of Request for Groundwater Regulation: Decreed Right Nos. 63-00012, 63-00013, 63-00014, 63-00015 & 63-00016; Claim No. 63-4037P and Permit No. 63-9758;

15. IDWR's October 27, 1993 Order Denying Petitions for Rehearing and Amended Final Memorandum Decision and Order in Matter of Request for Groundwater Regulation: Decreed Right Nos. 63-00012, 63-00013, 63-00014, 63-00015 & 63-00016; Claim No. 63-4037P and Permit No. 63-9758.

DATED this 22nd day of September, 2010.

HOFSTETTER LAW OFFICE, LLC



Dana L. Hofstetter

CERTIFICATE OF SERVICE

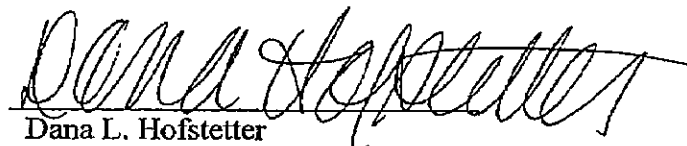
I hereby certify that on the 22nd day of September, 2010, I caused to be served a copy of the foregoing on the following person(s) by the method(s) indicated below:

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Dana L. Hofstetter