

6-18

DEPARTMENT OF
WATER RESOURCES

In Re SRBA
Case No. 39576

MEMORANDUM IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT

UNDISPUTED FACTS

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT - Page 1

MEMO

the geothermal aquifer known as the Stewart Gulch Geothermal Aquifer in North Boise for heating and other purposes. Each of the water rights recommended by IDWR in the above-captioned subcases entitles Terteling to divert water for various purposes, including domestic, stockwater, aesthetic, wildlife and irrigation, but not heating. Edwards filed *Objections* to each of the recommendations, checking the boxes indicating that it objected to the “Source” of the water right, and that the “water right should not exist.” In Section “E” of the objections, Edwards stated the reasons supporting its objections with language either exactly the same as, or remarkably similar to, the following:

To the extent that this water right authorizes the diversion of water from the Stewart Gulch Geothermal Aquifer it should not exist pursuant to *Silkey v. Tiegs*. Otherwise, the following provision should be listed under “Other Provisions Necessary for Definition or Administration of this Water Right:” The diversion and use of geothermal water is not authorized under this right. Also, the local name for the cold water well should be described.

Objection filed by Edwards Family, LLC (Subcase No. 63-30006). Thus, Edwards wishes to insert a provision in each of the water rights subject to this *Motion* stating that such rights do not authorize the diversion of geothermal water. Terteling contests the need for such a provision. No facts in the record indicate the need for such a provision.

STANDARDS

I.R.C.P. 56 provides in pertinent part that summary judgment “shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” I.R.C.P. 56(c); *Friel v. Boise City Housing Authority*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994). Generally, the decision maker must liberally construe the facts in the light most

favorable to the party opposing the motion, drawing all reasonable inferences and conclusions in that party's favor. *Friel*, 126 Idaho at 485, 887 P.2d at 30 (citing *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994); *Harris v. Dept. of Health and Welfare*, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992)). It is only when reasonable people could reach different conclusions or draw conflicting inferences from the evidence that a summary judgment motion must be denied. *Stevenson*, 125 Idaho at 272, 869 P.2d at 1367.

ARGUMENT

Edwards' objections that seek to insert a provision into certain water right decrees stating that the water right "does not authorize the diversion of geothermal water under this right" must be dismissed as there are no genuine issues of material fact, and there is no legal basis for insertion of such provision.

I.C. § 42-1412 provides that the district court in a general adjudication may enter a partial decree which "shall contain or incorporate a statement of each element of a water right as stated in subsections (2) and (3) of section 42-1411, Idaho Code, as applicable. I.C. §42-1411 (2) provides that the director of the Idaho Department of Water Resources is to determine the elements of each water right claimed in an adjudication for inclusion in the director's report to the Court, including such items as the quantity of water used, the date of priority, the purpose of use, the place of use, and "such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director." I.C. §42-1411(2)(j). Notably, there is nothing in chapter 14, title 42, Idaho Code that provides the director is to state in his recommendation that the water right is not authorized to divert "geothermal" water. The director's report is to be filed with the district court, constitutes prima facie evidence of the nature and extent

of the water right, and the unobjected-to portions are to be decreed as reported. I.C. §42-1411.

Because there is no specific requirement in the statutes or otherwise in Idaho law that water rights claimed in a general adjudication be defined as not “authorized to divert geothermal water,” the only possible legal justification for Edwards’ position is that the proposed remark is “necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director.” *See* I.C. §42-1411. There is no Idaho case interpreting the language of I.C. §42-1411 quoted immediately hereinabove.

There is however, some legal authority discussing the “general provision” language of I.C. §42-1412. That language provides that partial decrees entered by the district court “shall also contain an express statement that the partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights.” I.C. §42-1412(6). This language is remarkably similar to the language in I.C. §42-1411(2)(j) providing the bases for including a remark in the director’s report. In 1998, the Idaho Supreme Court held that for purposes of determining whether general provisions should be included in a partial decree pursuant to I.C. §42-1412(6), the District Court must determine “whether these provisions are necessary for the efficient administration of a water right or to define a water right.” *State v. Nelson (in Re Srba Case No. 39576)*, 131 Idaho 12, 16 (1998). Thus, the Idaho Supreme Court has provided guidance regarding the interpretation of very similar statutory language. The Court’s direction in *Nelson*, *supra* simply states that the language in the statute means what it says. This court should use the Supreme Court’s guidance to hold that the language in I.C. §42-1411(2)(j) likewise simply means what its clear language states.

None of the bases set forth in the statute are applicable to Edwards’ remark proposed in this

case. First, to “define” a water right by stating what is “not authorized” under the right is simply foolish. As an example, all water rights diverted solely for irrigation purposes in the Snake River Basin could be further “defined” by stating that the diversion of water for hydropower, domestic, municipal, commercial, wildlife and aesthetic purposes is “not authorized” under those rights. As another example, water rights diverted from surface water sources could be further “defined” by stating that the diversion of those rights from ground water is “not authorized.” However, defining a water right by explaining what it is not makes no sense whatsoever, and in fact only clouds the clear explanation of what the right is.

Second, there is no element of any of the water rights to which Edwards filed this objection that can possibly be “clarified” by stating that “the diversion of geothermal water is not authorized” thereunder. None of the rights authorize “heating” as a purpose of use, which might be the only description of any element that might be clarified by the remark proposed by Edwards.

Finally, there is nothing in the record that establishes that the administration of any of these rights will somehow be made easier or more efficient by stating that the same are “not authorized to divert geothermal water.” A remark in water rights that are authorized to divert geothermal water might make some sense, but that is not what Edwards has proposed. Instead it proposes to confuse the court, water right holders, and water right administrators by stating in the decrees that these water rights are “not authorized to divert geothermal water” when no reasonable person would assume otherwise by virtue of the fact that the rights contain no language that would lead the reader to even postulate that the water rights can divert “geothermal water.”

Beyond the fact that there is no statutory justification for the remark proposed to be added to the rights by Edwards, the fact is that the term “geothermal water” is not defined in Idaho statutes.

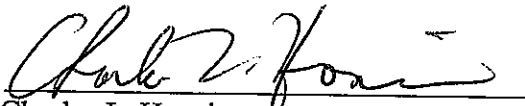
There are definitions of "low temperature geothermal resource" (defined as "ground water having a temperature of greater than eighty-five (85) degrees Fahrenheit and less than two hundred twelve (212) degree Fahrenheit in the bottom of a well) and "geothermal resource" (defined as "ground water having a temperature of two hundred twelve (212) degree Fahrenheit or more in the bottom of a well) contained in I.C. §42-230. There are also statutes that provide for administration of those resources in specific manners pursuant to I.C. §42-233 (low temperature geothermal resources) and Chapter 40, Title 42, Idaho Code (geothermal resources). There are, however, no statutes that in any way provide for administration of any kind for "geothermal water."

The fact is that Edwards is manufacturing a problem here where there is none. There is simply no reason to create confusion by decreeing these rights with the language requested by Edwards stating what the rights are not. There might be a good reason for decreeing rights with language describing what rights are. However, despite the fact that this approach would make more sense, that is not what has been proposed.

Accordingly, Terteling respectfully requests that the Court grant its *Motion for Summary Judgment*, and that the objections that request inclusion of a remark stating that the Terteling rights captioned hereinabove do "not authorize the diversion of geothermal water" simply be dismissed.

Dated this 18th day of June, 2010.

RINGERT LAW, CHARTERED

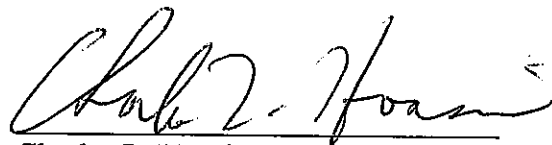
By: 
Charles L. Honsinger

CERTIFICATE OF MAILING

I hereby certify that service of the within and foregoing document was made this 18th day of June, 2010, by mailing a copy thereof, postage prepaid, to each of the parties listed below.

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