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DEPARTMENT OF
WATER RESOURCES

Attorney for Edwards Family, LLC

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
MEMORANDUM IN SUPPORT
OF MOTION FOR
SUMMARY JUDGMENT

EDWARDS FAMILY LLC'S MEMORANDUM IN SUPPORT
OF ITS MOTION FOR SUMMARY JUDGMENT-- 1

of law:

1. The Stewart Gulch Geothermal Aquifer ("SGGA") should be identified as a "separate source" in the SRBA;
2. Identification of which rights are diverted from the SGGA and which water rights are diverted from cold (non-geothermal) ground water is necessary for definition and administration of the rights;
3. SGGA rights junior to those decreed in *Silkey v. Tiegs* should not be recognized, or, in the alternative, the respective Partial Decrees should include language stating that administrative matters relating to distribution of such water rights are reserved;
4. The Terteling SGGA rights junior to 63-12 and 63-13 are subject to *Silkey v. Tiegs* and based on principles of res judicata, estoppel and contract law, are precluded from being diverted.

I. Statement of Pertinent Undisputed Facts

A. The Early Years – *Silkey v. Tiegs*.

Silkey v. Tiegs, Ada County Case No. 11748, *on review* 51 Idaho 344 (1931) and 54 Idaho 126 (1934) ("*Silkey v. Tiegs*") is a seminal early Idaho water right case in many respects, including the first instance in Idaho of administrative regulation of the use of ground water. Seventy-five years later, in the instant proceedings, several of the *Silkey v. Tiegs* water rights (63-12, 63-13, 63-14, 63-15 and 63-16), are at issue here along with administration of the associated geothermal aquifer.

The *Silkey* case was commenced when Silkey, the owner of senior rights, 63-12 ("Silkey Right I") and 63-13 ("Silkey Right II"), brought suit against the owners of junior rights in the

SGGA, 63-14 (the “Edwards Right”), 63-15 (the “Tiegs Right”) and 63-16 (the “Ryan Right”) for the diminishment of flows to Silkey’s senior artesian wells. *Id.*; *Affidavit of Dana L. Hofstetter, Exhibit A*. In *Silkey v. Tiegs*, the district court found that the subterranean waters involved were “subject to appropriation by the several parties hereto..., that the waters flowing from the artesian well of each party is derived from the same source, and the supply of said wells constitutes one interdependent and connected source of supply....” *Id.*

Consequently the *Silkey* Court decreed the following priority dates and quantities:

63-12 (Silkey Right I): July 1, 1921, 7 miner’s inches;
63-13 (Silkey Right II): July 1, 1922, 33 miner’s inches;
63-14 (Edwards Right): November 22, 1926, 42 miner’s inches;
63-15 (Tiegs Right): March 23, 1927, 40 miner’s inches; and
63-16 (Ryan Right): September 24, 1927, 40 miner’s inches.

Id., *Exhibit A*, at 2-4. However, to protect the artesian flows of the Silkey rights, the *Silkey* Court also “provisionally fixed and limited” the flow from the defendants’ wells as follows:

Edwards well: from October 1 to April 1 annually, 15 miner’s inches; and
from April 1 to October 1 annually, 20 miner’s inches (or so much as
would not deplete the Silkey wells below 40 miner’s inches);

The Tiegs and Ryan’s wells were completely shut off.

Id., at 5.

The *Silkey* Court also ruled that the enforcement of the decree was committed to the Commissioner of Reclamation [the predecessor to the Idaho Department of Water Resources (“IDWR”)], pending the creation “of a water district comprising the source of supply of the water rights herein decreed.” *Id.* The Commissioner was directed to regulate the flow of the wells of the parties to the case and make measurements of the flows, for which the parties were ordered to install valves and accurate measuring devices. *Id.* The *Silkey* Court also stated that, “It is hereby further determined and decreed that until further order of the court, no water can without injury to plaintiff’s prior right to the use of said water to the extent herein decreed be permitted to flow or be

used from the wells of any of the defendants in excess of the amount herein permitted to be used by the defendant Edwards.” *Id.*, at 5-7. Specifically, the decree provided as follows:

The enforcement of this decree is committed, in the first instance, pending the creation, as provided by law, by the Commissioner of Reclamation of the State of Idaho, of a water district comprising the source of supply of the water right herein decreed, to said Commissioner of Reclamation who is hereby appointed a commissioner of this court for that purpose, to serve without compensation, he having consented so to do. Said Commissioner is hereby directed to regulate the flow of the wells of the parties hereto in accordance with the terms hereof and to make from time to time measurements of the flow of the said wells and keep a record thereof, and for this purpose may open and close, regulate and measure the flow of said wells.

Each of the parties, their servants, attorneys, employees and successors in interest or were enjoined “from any and all use of the water from their respective wells, except in the manner and to the extent” provided in the decree except for retaining jurisdiction for two years “to adjust the allowance of water permitted to be used from the wells of the defendants” as necessary to protect the senior Silkey rights. *Id.* at 6-7. However, in all other respects, the decree was deemed final. *Id.*

The defendants appealed from this decree and also from the trial court’s denial of their motions to re-open the case and for a new trial. The Supreme Court in *Silkey v. Tiegs*, 51 Idaho 344, 5 P.2d 1049 (1931) (hereinafter referred to as “*Silkey I*”) affirmed the district court decree in all respects with supplementation of allowing Tiegs and Ryan to permanently close their wells in lieu of installing measurement devices. *Silkey I*, 51 Idaho at 359. Significantly, the reported opinion describes the case as a suit to “quiet title to certain waters appropriated by means of two artesian wells” and “to enjoin appellants from using their wells in such a manner as to deplete the flow in respondents’ said wells.” *Silkey I*, 51 Idaho at 347.

After remittitur from the Supreme Court on June 23, 1932, the defendants filed a motion to modify the decree as to the amount of water allotted to Silkey, and for the Court to retain jurisdiction over the cause indefinitely. Plaintiff Silkey filed a countermotion to have Edwards’

wells sealed or otherwise controlled from flowing. The Court denied both motions, and defendants again appealed to the Supreme Court. In *Silkey v. Tiegs*, 54 Idaho 126, at 28 P.2d 1037 (1937) (hereinafter referred to as “Silkey II”), the Supreme Court again affirmed the trial court’s rulings, and noted that upon its prior “affirmance became the law of the case and a final adjudication of her [Silkey’s] rights, as did the determination of appellants’ [Tiegs’, Edwards’ and Ryan’s] priorities.” *Silkey II*, 54 Idaho at 128.

B. Water District 63-S (“District”).

In 1989, the then owner of the Silkey Rights (63-12 and 63-13) instigated administrative proceedings before IDWR for formation of a water district and for a water call to obtain sufficient water under its senior rights delivered with artesian pressure (these proceedings are referred to hereinafter as the “Stewart Gulch IDWR Action”). These proceedings resulted in IDWR ordering the formation of Water District 63-S to administer water rights diverted from the Stewart Gulch Geothermal Aquifer. *Affidavit of Dana L. Hofstetter, Exhibits B, C, D and E.*

The original December 5, 1989, IDWR Order establishing Water District 63-S, found that in addition to the wells addressed in *Silkey v. Tiegs*, two wells operated by Quail Hollow Golf Course (under Water Right Nos. 63-4037P and 63-9758), wells owned by Terteling and the “Stralow” well also diverted water from the same geothermal source as the rights decreed in *Silkey v. Tiegs*. *Id.*, *Exhibit B*. While in this Order, IDWR reserved the legal issues as to whether rights junior to those decreed in *Silkey v. Tiegs* could be enjoined to protect senior water rights and the applicability of a reasonable pumping level, if any, IDWR established the District, defined its boundaries and required the owners of non-domestic wells diverting low temperature geothermal water within the District to install measuring devices. *Id.* As a result of the subsequent Petition to Modify the Boundaries filed by Terteling Trust No. 7, IDWR later revised the boundaries of the District on December 8, 1995. *Id.*, *Exhibit E*.

Two IDWR Orders (respectively the “1992 Order” and the “1993 Order”) also issued concerning limiting the diversion of water under the more recent ground water rights. *Id.*, *Exhibits C and D*. The 1992 Order specifically found that the following water rights and adjudication claims of record were associated with wells in the District:

<u>Owner</u>	<u>Adjudication Claim No.</u>	<u>Water Right No.</u>
Hunt Bros.	A63-0012	63-0012
	A63-0013	63-0013
	A63-0015	63-0015
Edwards Greenhouse	A63-0014	63-0014
M.E. or R.E. Ryan	A63-0016	63-0016
Quail Hollow		
a) Victor L. Nibler	A63-4037	63-04037
b) TEE Limited	(No. Claim Filed)	63-09758
J.A. Terteling	A63-03603	63-03603
	A63-07595	63-07595
Raymond Stralow	A63-05195	63-05195

Id., *Exhibit C at 4*. The 1992 Order further found that at least until the matter was addressed in the SRBA, the watermaster of District 63-S “must administer the waters of Stewart Gulch in accordance with the provisions of the *Silkey v. Tiegs* decree, including the protection of the artesian pressure necessary to deliver water to the prior appropriators.” *Id. at 6*. The 1992 Order further required that the watermaster “upon determination that there is not sufficient water that can be delivered by artesian pressure to fill a senior ground water right, limit or prohibit withdrawals from wells within the water district having a later priority.” *Id. at 7*.

In response to Petitions for Rehearing on the 1992 Order submitted by both Terteling and Quail Hollow, IDWR issued the 1993 Order. The Terteling and Quail Hollow Petitions requested *inter alia* exclusion of their wells from the District, elimination of protection for artesian pressure in the SGGA and establishment of reasonable ground water pumping levels. *Id.*, *Exhibit D at 2*.

The 1993 Order continued to find that “there appears to be a general interconnection between all the wells in the aquifer,” but recognized the option of excluding the Terteling wells

from regulation under the District if it could be demonstrated that there was no interconnection with the other wells in the aquifer. *Id. at 2*. However, IDWR continued to declare that it would regulate the District pursuant to the terms of *Silkey v. Tiegs*, “pending adjudication of the affected rights” in the SRBA. *Id. at 2-3*. IDWR specifically found that “legal issues involving the establishment of reasonable pumping levels and the protection of artesian pressure” can be raised before the SRBA Court. *Id.*

C. The Terteling Acquisition and Transfer of the Silkey and Tiegs Rights.

In 1997, The Terteling Company, Inc. (“TTCI”) purchased the Silkey (63-12 and 63-13) and Tiegs (63-15) rights. *Affidavit of Dana L. Hofstetter, Exhibit F*. On October 2, 2000, TTCI submitted an Application for Transfer for these rights to IDWR (“Terteling Transfer Application I”). *Id.* TTCI sought to add points of diversion to these rights including its “Windsock Well,” which was in the District and used for the diversion of TTCI’s other geothermal water rights. In Terteling Transfer Application I, TTCI also sought to change the place of use to the Terteling Ranch so the water rights could be used at this alternate location. *Id.*

Paul Edwards, the son of *Silkey v. Tiegs*’ Thomas Edwards and a predecessor in interest to Edwards Family, LLC, filed a Protest to Terteling Transfer Application I. In a subsequent settlement reached on Terteling Transfer Application I, TTCI and the then owner of the Edwards Right, the Edwards Family, LLC, entered into a Settlement Agreement dated January 24, 2002 (the “Settlement Agreement”), which contained the following pertinent terms:

The Parties estimate that the total sustainable volume of water that can be diverted annually from the Stewart Gulch Geothermal Aquifer is approximately between 650 AFA to 750 AFA. (Recital D).

Edwards suspended its protest, conditioned upon IDWR approval to cap the maximum combined annual diverted volume for the Silkey and Tiegs Rights at 400 AFA. (Para. 1).

Stewart Gulch Water District 63-S was to be reactivated, and the parties to the Agreement were to use all reasonable efforts to ensure the District's measurement and reporting included the use of meters "on all of their wells in the District for the purpose of measuring and recording total diverted volumes." The parties were to file quarterly reports to the watermaster for each well owned or used by them. (Paras. 2 & 3).

Terteling agreed to divert a combined maximum of 400 AFA under the Silkey and Tiegs rights, and Edwards agreed to divert a maximum of 250 AFA, with the proviso that each party could divert water at the rates ultimately authorized by the SRBA decrees for the Silkey and Edwards Rights. (Paras. 4 & 5).

The parties agreed to take steps to protect the Silkey and Edwards Rights pursuant to the *Silkey* decree, including reasonable efforts to ensure that a moratorium on new water rights was in effect, and to seek IDWR to have Stewart Gulch declared an area of drilling concern and designated critical ground water area to ensure volumes were available for the Silkey and Edwards Rights. (Para. 6).

As to the SRBA, the parties agreed that they would use reasonable efforts to establish the Stewart Gulch Geothermal Aquifer as a separate source, and that their respective SRBA claims would be consistent with the Agreement. Terteling expressly agreed not to assert or argue in the SRBA that the total combined annual diverted volume for the Silkey and Tiegs Rights is greater or less than 400 AFA, and that the total annual volume for the Edwards Right is greater or less than 250 AFA. Further, the parties agreed that they would use reasonable efforts to have the SRBA decree for the water rights at issue reference the Agreement. (Para. 8).

Finally, the parties agreed to utilize the water diverted under 63-12, 13 and 14 primarily for heating purposes; any other use, such as for irrigation, could only occur after heat was removed. (Para. 9).

Affidavit of Dana L. Hofstetter, Exhibit G. Both TTCI and Edwards were advised by respective legal counsel and technical experts in connection with the Settlement Agreement. *Id., Exhibit O, p. 27, L. 19 to p. 29, L. 2.; Affidavit of Garnette Edwards.*

Following the Settlement Agreement, IDWR issued a conditional approval for Terteling Transfer Application I. Terteling filed a Petition for Reconsideration objecting to condition 9 of the IDWR Transfer Approval which sought to protect artesian pressures for water rights diverted from the SGGA. *Id., Exhibit H.* Terteling argued that "the unique protection of artesian pressure in the *Silkey v. Tiegs* Decree.... applies only to applicant Terteling's Rights [63-12 and 63-13]." *Id.*

Finding that “[t]here is no language in the *Silkey v. Tiegs* Decree that states the court only intended to protect artesian pressure for Water Right Nos. 63-12 and 63-13,” IDWR denied Terteling’s Petition for Reconsideration including in the final Transfer Approval a condition providing in part, “Unless otherwise determined by the Snake River Adjudication, diversion from the Windsock Well shall not significantly reduce artesian pressure for water rights bearing priority dates earlier than December 20, 2000, describing points of diversion within Water District 63-S.” *Id.*, *Exhibits H at 3, and I at 3, 6, and 10*. Consistent with *Silkey v. Tiegs* and the Settlement Agreement, the Transfer Approval imposed a combined diversion rate of 0.86 cubic feet per second (“cfs”) [43 miner’s inches] and 400 acre feet per annum (“AFA”) for the Silkey and Tiegs Rights with the following condition included: “Water under Right 63-15 shall not be diverted or allowed to flow pending further direction from the court as described in the *Silkey v. Tiegs* decree dated 06-13-1930.” *Id.*, *Exhibit I at 9*. With IDWR’s approval of Terteling Transfer Application I, the Silkey Rights no longer would be diverted exclusively with artesian pressure. *Affidavit of Dana L. Hofstetter, Exhibit N, p. 123, L. 21 to p. 125, L. 10*.

In 2005, Terteling filed another Transfer Application (“Terteling Transfer Application II”) for the Silkey and Tiegs Rights. *Affidavit of Dana L. Hofstetter, Exhibit J*. Edwards filed a Protest to Terteling Transfer Application II and withdrew this Protest after submitting for the record the Affidavit of Norman C. Young on the basis that there were “no disputed issues of material fact and the matters at issue involved IDWR policy and rules.” *Affidavit of Dana L. Hofstetter, Exhibits K and L*. An IDWR decision on Terteling Transfer Application II remains pending SRBA determination of the rights at issue. *Affidavit of Dana L. Hofstetter, Exhibit M*.

D. SRBA.

In addition to the SGGA rights identified in *Silkey v. Tiegs* and in the prior District proceedings before IDWR, parties have claimed in the SRBA additional ground water (and spring) water rights diverted within the boundaries of the District. For instance, TTCI and its related entity T-7, LLC, have in addition to the Silkey and Tiegs Rights and its two other SGGA rights (63-3603 and 63-7595) identified in the Stewart Gulch IDWR Action, have also claimed the following ground water and spring rights which are or may be diverted within the boundaries of the District: 63-27649, 63-30006, 63-30007, 63-31050, 63-31051, 63-31052, 63-31053, 63-31055, 63-31056, 63-31057, 63-31059, and 63-31062. *See Exhibit 1* hereto.

Many of the SRBA Director's Report Recommendations for these rights only indicate the sources as "ground water" or "springs" and the locations of the points of diversion without an indication as to whether the water right diverts geothermal water. A particular well within the boundaries of the District can divert either geothermal water or non-geothermal "cold" water (and in certain instances a given well can divert both). *Affidavit of Dana L. Hofstetter, Exhibit N, p. 60, L. 9 to p. 63, L.20; p. 119, L. 2 to p. 121, L. 7.* It can be very confusing, even for the well owner, to determine whether a certain water right is associated with the diversion of geothermal water. *Id., p. 61, L. 21 to p. 67, L. 18.* However, whether a well within District boundaries diverts geothermal water or diverts "cold" water determines whether it is subject to District regulation. *See Affidavit of Dana L. Hofstetter, Exhibit E at 8.*

The Edwards Family LLC, the successor in interest to *Silkey v. Tiegs* party Thomas Edwards and the current owner of Water Right No. 63-14, continues to rely on use of the geothermal water for operation of its greenhouse business in Boise. *Affidavit of Garnette Edwards.* The business includes the growing and sale of gardening, landscaping and seasonal floral products year round: geraniums, petunias, and tomatoes in the spring and summer; mums in the fall; and poinsettias in

the middle of winter. *Id.* The geothermal water allows adequate temperatures to be maintained in the greenhouses year round at reasonable cost. *Id.* The business, which has provided employment for up to 135 members of the community during the height of the season, first started by Thomas Edwards in the 1920's, is now in the third generation of family ownership and operation with two more generations interested in continuing the beloved Boise institution. *Id.* Many employees work at Edwards Greenhouses year round with some working there as long as 18 years. *Id.* The artesian delivered geothermal heat (from the same well drilled in the 1920's) makes it possible to economically operate a business like this in the heart of Boise when typically such operations are in outlying locations. *Id.*

The Edwards Family recognizes the importance of the geothermal resource and has striven to protect the resource. *Id.* The *Silkey v. Tiegs* limits on the use of 63-14 have been observed by the Edwards Family to the present day and Edwards has made commitments to stay within these limits long term. *Id.* The current posture of the SRBA and the number of post-*Silkey* rights from the SGGA that have been claimed in the SRBA require that Edwards ask this Court to address certain matters of significance for this cherished resource.

II. Legal Argument

A. Standard of Review.

The purpose of summary judgment is to avoid unnecessary trials. *Bandelin v. Pietsch*, 98 Idaho 337, 340-41, 563 P.2d 395, 398-99 (1977). Summary judgment is appropriate if the pleadings, affidavits, and discovery documents on file with the court, read in a light most favorable to the nonmoving party, demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law. *Thomson v. City of Lewiston*, 137 Idaho 473, 476, 50 P.3d 488, 491 (2002).

The party moving for summary judgment initially carries the burden to establish that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. *Eliopulos v. Knox*, 123 Idaho 400, 404, 848 P.2d 984, 988 (Ct. App. 1992). This burden may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial. *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct.App.1994). Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of a required element is lacking. *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000).

Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial, or offers a valid justification for the failure to do so under I.R.C.P. 56(f). *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct. App. 1994).

B. As the SGGA has been managed as a "separate source" since *Silkey v. Tiegs*, in subsequent IDWR proceedings and by concurrence of the water users, its designation as a separate source in the SRBA is appropriate.

Silkey v. Tiegs concerned the administration of geothermal water rights in a limited geographic area and established that those rights would be administered together, and apart from other existing ground water rights, as diverted from an "interconnected" water supply. Some of those rights were limited so that other rights in the same source could be supplied. Administration of the rights from the SGGA as a separate source largely has continued to the present day, in IDWR administrative proceedings and with the acquiescence of water users. Separate source designation in the SRBA is largely recognized in instances where, as here, a source has been managed separately based on historic practices. In this way, the users of a separate source are protected from calls according to custom, rather than because of hydrologic principles.

Idaho Code § 42-1412(6) provides the applicable standard as to whether general provisions are necessary either to define or administer the water rights in the SRBA decree:

The decree 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.

Thus, the threshold question is whether designation of the SGGA as a “separate source” is “necessary for the definition of the [SGGA] rights or for the efficient administration of the [SGGA] rights.”

The Idaho Supreme Court has clarified that in determining whether a proposed general provision is “necessary” hinges on a two-step process:

Whether a general provision is “necessary” depends upon the specific general provision at issue and involves a question of fact, (defining the proposed general provision and the circumstances of its application), and a question of law, (determining whether the general provision facilitates the definition or efficient administration of water rights in a decree).

A & B Irrigation District v. Idaho Conservation League, 131 Idaho 411, 421, 958 P.2d 568, 578 (1998) (quoting *State v. Nelson*, 131 Idaho 12, 951 P.2d 943 (1998)). “A general provision is ‘necessary’ if it is required to define the water right being decreed or to efficiently administer water rights in a water right decree.” *Id.*

General provisions issues arising in the SRBA have been presented to the Idaho Supreme Court on a number of occasions. It was on the first such occasion that the Idaho Supreme Court established the “necessary” criterion as a constitutional test for ensuring that such general provisions would not run afoul of separation of powers principles. *State of Idaho v. United States*, 128 Idaho 246, 912 P.2d 614 (1995). This 1995 SRBA case addressed constitutional separation of powers issues in the context of the 1994 legislative amendments to the SRBA statutes. These

amendments included the general provision statute, Idaho Code § 42-1412(6). The Court concluded that the Idaho Legislature could amend the SRBA statutes when “necessary” even though the SRBA was underway and also found that the district court could decree general provisions when “necessary” for the executive branch to administer the water rights decreed.

When it turned to the matter of the constitutionality of the SRBA statutory amendment providing for general provisions, the Supreme Court applied the same “necessary” standard. The Court concluded that “the requirement that the district court include in its decree those provisions necessary for the executive to administer the rights decreed is not an impermissible delegation.” *Idaho v. U.S.*, 128 Idaho at 262, 912 P.2d at 630. It is noteworthy, that the Court’s holding with respect to the general provisions statute relied on two early cases, one of which was *Silkey v. Tiegs*, 51 Idaho 344, 358, 5 P.2d 1049 (1939), for the proposition that when the executive does not have the necessary statutory authority, it is permissible for administrative matters to be included in a water rights decree. At the time of *Silkey v. Tiegs*, it was necessary for the Court to decree administrative provisions concerning the ground water rights in the *Silkey* decree since without those provisions, the regulatory agency would have been without the necessary statutory authority to implement the distribution of ground water pursuant to the decree.

In *State v. Nelson*, 131 Idaho 12, 15-16, 951 P.2d 943, 946-47 (1998), the Court emphasized that both parts of the statutory standard (necessity for definition *or* administration) need to be evaluated as part of the constitutional necessity evaluation. A General Provision is to be included in a decree if it is necessary to define or to efficiently administer water rights:

In *A & B Irrigation Dist. v. Idaho Conservation League*, this Court held that a “general provision is ‘necessary’ if it is required to define the water right being decreed or to efficiently administer water rights in a water right decree.” *A & B Irrigation Dist.*, 97.20 ISCR at 972, 131 Idaho at 414, 958 P.2d at 571. Since these General Provisions regulated whether water is administered from a single or separate water source, it is possible that these provisions define the source

element or are necessary for the efficient administration of a water right. Considering this test was not employed by the SRBA Court, we remand this case for further factual findings as to whether these provisions are necessary for the efficient administration of a water right or to define a water right.

State v. Nelson, 131 Idaho at 15-16, 951 P.2d at 946-47.

A General Provision that defines one of the basic elements listed in I.C. § 42-1411(2) should be included in the SRBA decree pursuant to I.C. § 42-1412(6). Application of the definitional prong of the standard is important because in some instances, IDWR may be without authority to recognize certain kinds of water uses or without authority to adequately describe certain water right elements. *See A & B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 415, 958 P.2d 568, 572 (1998) (“The proposed provision regarding firefighting is necessary to define water rights being decreed. The firefighting provision recognizes a lawful use of water ‘with or without a water right’ and describes the circumstances in which water may be used. . . .”) (emphasis added).¹ In instances of water right definition as well as water right administration, general provisions may be necessary because of limited IDWR authorities.

The Idaho Supreme Court has repeatedly applied the “necessary” standard in each of its SRBA general provisions cases. Also, it has directed the SRBA Court in general provisions cases on remand to evaluate the necessity of the proposed general provisions either for water right definition or administration. Since the “necessary” standard derives from constitutional separation of powers principles, it is important to evaluate this standard in connection with IDWR’s regulatory authorities and whether there is the need to fill any regulatory voids in order to properly effectuate the SRBA decree consistent with the law.

¹ This relationship between definition of the firefighting use and administration also was recognized in a general provision case subsequent to the original firefighting decision: “Firefighting use is ancillary to existing water rights, and that provision is necessary to efficiently administer water rights.” *State v. Idaho Conservation League*, 131 Idaho at 334, 955 P.2d at 1113.

In certain instances, the Idaho Supreme Court has found that proposed general provisions are “necessary.” *A & B Irrigation District v. Idaho Conservation League*, 131 Idaho 411, 415, 958 P.2d 568, 573 (1998) (firefighting general provision); *State of Idaho v. Idaho Conservation League*, 131 Idaho 329, 334-35, 955 P.2d 1108, 1113-14 (1998) (Reynolds Creek general provision). As discussed previously, in evaluating the proposed firefighting general provision, the Idaho Supreme Court found that it was necessary to define the water rights being decreed. *A & B Irrigation*, 131 Idaho at 415, 958 P.2d at 572. The Court found that the firefighting general provision was required because it recognized a lawful use of water “with or without a water right.” *Id.* In contrast, with respect to the incidental stock watering general provision which was deemed unnecessary, the Court specifically found that under Idaho Code §§ 42-111, 42-113, and 42-114, which specifically provided for stock watering as a beneficial use of water, IDWR had existing authorities to recognize stock watering rights. *A & B Irr. Dist.*, 131 Idaho at 416, 958 P.2d at 573. Similar statutory provisions, however, were not identified for firefighting uses.

With respect to the Reynolds Creek general provision, the Idaho Supreme Court found that the provision was not necessary for definition of water rights but was necessary for administration. *See State v. Idaho Conservation League*, 131 Idaho at 333-35, 955 P.2d at 1112-14. The Idaho Supreme Court found that the Reynolds Creek general provision was not necessary from a definitional standpoint and, in fact, was inconsistent with establishing water rights to the “excess water” at issue: “[T]he elimination of all the elements of a water right, particularly the essential elements of priority date and quantity, vitiates the existence of a legal water right in the ‘excess’ water. . . . Thus, General Provision 2 does not establish a water right to ‘excess’ water.” *Id.*, 131 Idaho at 333, 955 P.2d at 1112. However, the principal reason the court gave for finding that the Reynolds Creek general provision was necessary for administration included the fact that the general provision described a long-standing system of historic practices in the Reynolds Creek

Basin. *Id.* Further, future controversies would be avoided by including these long-standing practices in the decree. *Id.* In the case of the Reynolds Creek general provision, the general provision was found to be necessary for administrative purposes based on longstanding historical practices, but it was not necessary from the standpoint of water right definition

In some instances, it may be necessary to establish permanent relationships among water rights by inclusion of these relationships in general provisions. This may be the case with certain longstanding and established historical practices for which the parties want assurance of their continuing effect. In a case concerning general provisions for the Big Lost River drainage, the Idaho Supreme Court concluded that in certain instances, historical practices may need to be memorialized in a decree despite the existence of rules because the historical practices may be unique and contrary to general water distribution rules. *State v. Nelson*, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998). “Including these General Provisions in a decree will provide finality to water rights, and avoid the possibility that the rules and regulations could be changed at the sole discretion of the Director of the IDWR. . . . [T]hese General Provisions describe common practices in the Big Lost which are unique and sometimes contrary to general water distribution rules.” *Id.*

Thus, if a proposed general provision is based on an historical custom or practice that IDWR otherwise may be without authority to recognize, the provision is “necessary.” The administration of the SGGA as separate from other water sources is based on longstanding historic practice and custom first established by *Silkey v. Tiegs*.. While, IDWR may now have the statutory authority to administer ground water sources along with surface water sources, it independently does not have the authority to recognize historic practices as establishing separate administration. As the SRBA Court is aware, separate source status has been determined in the SRBA in Basin 37, and 65, among other Basins, where historic practices (as frequently, but not always, confirmed in prior historic

decrees) establish that such sources were managed as separate. Likewise, historic practice and custom confirms that the SGGA has been managed as a separate source.

C. Since it is necessary for water right definition and administration for the source of the rights diverted within the boundaries of the District to be identified, each such Partial Decree should include a remark indicating whether the source is, or is not, the SGGA.

As discussed above, numerous ground water and spring rights at issue here have points of diversion within the boundaries of Water District 63-S. Therefore, it may be impossible, or at least ambiguous, from the standard “source” and “point of diversion” descriptions in an SRBA Partial Decree to determine which rights actually are included in District 63-S and are subject to administration in District 63-S.

It is well established that watermasters are directed to administer water rights based on the decree. *State v. Nelson*, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998) (“A decree is important to the continued efficient administration of a water right. The watermaster must look to the decree for instructions as to the source of the water.... If the provisions define a water right, it is essential that the provisions are in the decree, since the watermaster is to distribute water according to the adjudication or decree.”)

If the subject water rights were to be decreed with the source and point of diversion descriptions in the current Director’s Report Recommendations, in many instances, the respective Partial Decrees would not provide definitive information about whether the source was the SGGA. *See Exhibit I* hereto. In other instances, while a heating use might suggest diversion from the SGGA, not all rights diverted from the SGGA include a heating use. *See e.g., Affidavit of Dana L. Hofstetter, Exhibit N, p. 160, L. 20 to p. 169, L. 1.* Further complicating the issue are that some wells, even include both cold and hot sources. *Id., Exhibit N, p. 60, L. 9 to p. 63, L.20; p. 119, L. 2*

to p. 121, L. 7. Without some indication of which points of diversion are in District 63-S and which are not, the watermaster would not be able to effectively administer the rights, or even determine which rights are subject to administration.

Clearly identifying the points of diversion subject to District administration in this instance also requires the identification of which rights are not subject to district administration. For instance, if no remark is included on the “cold” water rights diverted within District boundaries, these Partial Decrees would continue to raise the question as to whether the SGGA was the source. Therefore, it is necessary for all ground water and spring fed rights diverted within the boundaries of the District to include a remark as to whether such right is (or is not) subject to District administration.

D. Under Idaho law, the artesian pressure under which the Edwards Right is delivered is legally protected and any junior rights to the SGGA decreed in the SRBA should include a remark to this effect or be disallowed; In the alternative, a remark should be added to the Partial Decrees for the junior rights in the SGGA specifically reserving this issue for later proceedings.

1. As a general adjudication, *Silkey v. Tiegs* established that the artesian pressure under which the Edwards Right continues to be diverted today is protectable vis a vis junior rights diverted from the SGGA.

Silkey v. Tiegs involved a call by Silkey against junior users of the SGGA. As such, it constituted a general adjudication of that source. *Silkey I* expressly categorized *Silkey v. Tiegs* as a “quiet title action.” *Silkey v. Tiegs*, 51 Idaho 344, 347 (“This suit was brought by respondent to quiet title to certain waters appropriated by means of two artesian wells bored on her farm”) Further, the district court’s findings became law of the case, effectively determining that 60 miner’s inches was the maximum amount of water that could be diverted from the artesian basin without depleting the supply available to Silkey’s wells. *Id.*, 51 Idaho at 353. IDWR has interpreted *Silkey v. Tiegs* as an adjudication encompassing the SGGA source. For example, in the Stewart Gulch IDWR Action, IDWR issued a Conclusion of Law that, “The watermaster of Water District 63-S

must administer the waters of Stewart Gulch in accordance with the *Silkey v. Tiegs* decree, including the protection of the artesian pressure necessary to deliver water to the prior appropriators. I.C. §§ 42-237a and 42-607.” *Affidavit of Dana L. Hofstetter, Exhibit D at 7.*

As a “general adjudication,” *Silkey v. Tiegs* is conclusive as to the nature of all rights to the use of water in the adjudicated water system and governs the use of the SGGA. I.C. § 42-1401A. Accordingly, consistent with *Silkey v. Tiegs*, SGGA rights junior to the Edwards Right cannot be diverted to the extent they would affect the artesian pressure under which the Edwards Right is delivered or, at least, the SRBA Partial Decrees for such junior rights must include a remark stating that the artesian pressure of the Edwards Right is protected pursuant to *Silkey v. Tiegs*.

2. I.C. § 42-226 protects the artesian pressure of the Edwards Right.

I.C. § 42-226, part of the Ground Water Act first enacted in 1951, protects the artesian pressure of the Edwards Right. The pertinent portion of I.C. § 42-226 provides:

The traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined and, while the doctrine of “first in time is first in right” is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources. Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the director of the department of water resources as herein provided. *In determining a reasonable ground water pumping level or levels, the director of the department of water resources shall consider and protect the thermal and/or artesian pressure values for low temperature geothermal resources and for geothermal resources to the extent that he determines such protection is in the public interest.* All ground waters in this state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same for beneficial use. *This act shall not affect the rights to the use of ground water in this state acquired before its enactment....*

(Emphases added).

I.C. § 42-226 appears to provide that ground water rights appropriated prior to enactment of the Ground Water Act are exempt from the Act’s reasonable pumping level requirement and are

protectable at historic levels. The Edwards Right with its 1926 priority would fall within the relatively few Idaho ground water rights developed prior to the Ground Water Act and under such an interpretation of I.C. § 42-226 its historic artesian pressure would be protected. It is noted, however, that in a May 4, 2010 decision, the SRBA Judge determined that the Ground Water Act, when evaluated in its entirety, applied retroactively with respect to the administration of ground water rights, including the management of ground water levels. *A & B Irrigation District v. IDWR*, Memorandum Decision and Order on Petition for Judicial Review, Minidoka County Case No. 2009-000647 (May 4, 2010).

Even if the Ground Water Act's reasonable pumping level were to apply retroactively to pre-1951 priority rights, I.C. § 42-226 further recognizes that for artesian low temperature geothermal rights, such artesian pressures are protectable when determined to be in the "public interest." Therefore, even if the Ground Water Act applied retroactively, the Edwards Right's artesian pressure would be protected as it is key to maintaining the viability of a local business that employs a significant number of local employees and provides great benefit to the local community. *Affidavit of Garnette Edwards*.

Even with the SRBA Judge's May 4, 2010 decision, it remains likely that rights like the Edwards Right, with a historic domestic use may remain protectable at historic levels under the Ground Water Act. *See Parker v. Wallentine*, 103 Idaho 506, 512, 650 P.2d 648, 654 (1982). It should also be noted that *Parker v. Wallentine* found that independently of the Ground Water Act, there was a common-law vested right "to have the water available at the historic pumping level or to be compensated for expenses incurred if a subsequent appropriator is allowed to lower the water table and [the senior appropriator] is required to change his method or means of diversion in order to maintain his right to use the water." Therefore, at a minimum, Edwards may need to be

compensated by junior SGGA users to the degree that artesian pressure is affected and pumping becomes necessary.

3. I.C. § 42-237(a)(g) requires the protection of Edwards' artesian pressure.

I.C. §42-237a(g) generally prohibits the “mining” of aquifers by the diversion of water “at a rate beyond the reasonably anticipated average rate of future natural recharge. I.C. §42-237a(g) provides in pertinent part that:

Water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge. However, the director may allow withdrawal at a rate exceeding the reasonably anticipated rate of future natural recharge if the director finds it is in the public interest and if it satisfies the following criteria:

1. A program exists or likely will exist which will increase recharge or decrease withdrawals within a time period acceptable to the director to bring withdrawals into balance with recharge.
2. Holders of senior rights to use ground water will not be caused thereby to pump water from below the established reasonable pumping level or levels.

See also, Baker v. Ore-Ida Foods, Inc., 95 Idaho 575, 583, 513 P.2d 627 (1973) (“mining” of groundwater is not permitted).

Silkey v. Tiegs first recognized the effect on water levels resulting from overuse of the SGGA and regulated withdrawals accordingly. Again in the Stewart Gulch IDWR Action, the effect on artesian pressure caused by by junior uses for irrigation and other purposes was confirmed and addressed by establishment of the District and the regulation of withdrawals. *Affidavit of Dana L. Hofstetter, Exhibits B, C, D and E*. More recently, in the 2002 Settlement Agreement it was agreed, “The Parties estimate that the total sustainable volume of water that can be diverted

annually from the Stewart Gulch Geothermal Aquifer is approximately between 650 AFA to 750 AFA.” *Id.*, *Exhibit G at 1; Affidavit of Garnette Edwards*. Further, the Terteling parties (TTCI and T-7, LLC) have acknowledged that in recent years aquifer levels appear to be declining. *Id.*, *Exhibit P*.

SGGA Water Right Nos. 63-12, 63-13, 63-14 and 63-15 alone have been recommended in the SRBA for a total of 650 AFA which leaves about a maximum of 100 AFA more that can be sustainably diverted from the SGGA. Yet, the Director’s Report Recommendations for the other SGGA rights appear to total greatly in excess of this. In accordance with I.C. §42-237a(g), some, if not all, of the junior uses of the SGGA cannot continue to be allowed without mining the aquifer.

4. To the extent that the Court determines, on the other hand, that it is not necessary to establish in the SRBA whether the Edwards Right’s artesian pressure is protectable, a remark should be included in the respective junior SGGA SRBA Partial Decrees to preserve the issue.

Silkey v. Tiegs both confirmed the historic nature and extent of the subject water rights and also included administrative provisions necessary to resolve the dispute at hand. In the 1990’s, water distribution issues in the SGGA were handled through administrative IDWR proceedings and, therefore, also may be so addressed, at least in the first instance, that way in the future, with possible judicial appeals of IDWR action brought as necessary. On the other hand, if SRBA Partial Decrees were to issue without language specifically reserving water distribution issues, including the protection of artesian pressure, a possible implication would be that the issuance of Partial Decrees for the junior SGGA rights constituted a rejection of the principles of *Silkey v. Tiegs* and relinquishment of the protection of artesian pressure for the Edwards Right. Therefore, if the SRBA Court does not deem it necessary to address the protection of the Edwards Right’s artesian pressure at the present time, an appropriate remark should be included in the Partial Decrees for the junior SGGA rights preserving such matters for determination in future proceedings.

E. Water Right Nos. 63-12, 63-13, 63-14, 63-15, 63-16 are subject to the administrative limitations in *Silkey v. Tiegs* as a matter of *res judicata* and the post *Silkey v. Tiegs* Terteling Rights are bound by collateral estoppel, judicial estoppel, quasi estoppel and contract principles to the protection of the Edwards Right's artesian pressure.

As discussed above, the district court case, *Silkey v. Tiegs*, imposed certain administrative limitations on the exercise of Water Right Nos. 63-14, 63-15 and 63-16 in the interest of ensuring for the senior Silkey Rights, 63-12 and 63-13, delivery under artesian pressure. While the Edwards Right, 63-14, was recognized as having been beneficially used to a greater extent, it was administratively limited in *Silkey v. Tiegs* to a lesser quantity. See *Affidavit of Dana L. Hofstetter, Exhibit A*. Continuance of the two year provisional administrative supervision was at issue in *Silkey II*, and *Silkey II* affirmed the lower court's decision, making the administrative limitations permanent. *Silkey II*, 54 Idaho at 129.

It is fundamental that a prior water right decree is binding as *res judicata* upon those who are parties and privies to that decree. *State v. Hagerman Water Right Owners*, 130 Idaho 736, 742, 947 P.2d 409, 415 (1997). Further, successors in interest to the decreed water rights would also be bound by the *res judicata* effect of the prior decree:

It must be remembered that Stanfield was the successor to the land and water right of McAnulty, and appellants the successor of Stanfield thereto, and as between Stanfield and McGinness, and appellants and McGinness, the decree in the McGinness-McAnulty case is binding. So far as the suit at bar is concerned, the trial court could not change or annul that decree. The water rights litigated in the McGinness-McAnulty suit are the identical water rights litigated between McGinness and Stanfield in the McGinness-Stanfield [***13] suit, [**1006] and the decree of August 10, 1891, has not been set aside, and is binding on McGinness as to his point of diversion.

Walker v. McGinness 8 Idaho 540, 546, 69P.1003, 1005-6 (1902). See *Nettleton v. Higginson*, 98 Idaho 87, 101, 558 P.2d 1048, 1061 (1977). Accordingly, the water rights decreed in *Silkey v. Tiegs* and their owners are bound by the *res judicata* effect of that proceeding.

In the 2002 Settlement Agreement between Terteling and Edwards, the continuing effect of *Silkey v. Tiegs* was recognized as it was re-affirmed there that Water Right No. 63-15 (Tiegs Right) would not be diverted. *Affidavit of Dana Hofstetter, Exhibit G*. The IDWR Transfer Approval which ensued likewise allowed the diversion of no additional water under 63-15 besides what had been approved under Water Right Nos. 63-12 and 63-13. *Id., Exhibit I*. The SRBA Director's Report Recommendations for 63-12, 63-13, and 63-15 also are based on the principles established in *Silkey v. Tiegs*, reaffirmed in the 2002 Settlement Agreement and ratified in the Transfer Approval.

TTCI, and related Terteling entity T-7, LLC, now own the Silkey and Tiegs Rights along with numerous other junior rights diverted from the Stewart Gulch Geothermal Aquifer. *See Exhibit 1 hereto*. While TTCI and its related Terteling parties had taken positions in the Stewart Gulch IDWR Action of the early 1990's to exclude the Terteling wells from administration in District 63-S and avoid protection of artesian pressure in the SGGA, that was before TTCI purchased the Silkey and Tiegs Rights. *See Affidavit of Dana L. Hofstetter, Exhibits D and Q*. As successors in interest to the Silkey and Tiegs Rights the Terteling parties now are bound by *res judicata* and estoppel principles to the determinations in *Silkey v. Tiegs*.

Collateral estoppel bars parties from re-litigating issues actually litigated and decided in a prior proceeding. *Sagewillow v. Idaho Department of Water Resources*, 138 Idaho 831, 845, 70 P.3d 669, 683 (2003). The elements for collateral estoppel (issue preclusion) have been stated as follows:

- (1) Did the party "against whom the earlier decision is asserted ... have a 'full and fair opportunity to litigate that issue in the earlier case?'"
- (2) Was the issue decided in the prior litigation "identical with the one presented in the action in question?"
- (3) Was the issue actually decided in the prior litigation? This may be dependent on whether deciding the issue was "necessary to [the prior] judgment."
- (4) "Was there a final judgment on the merits?"
- (5) "Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?"

Magic Valley Radiology v. Kolouch, 123 Idaho 434, 439, 849P.d 107, 112 (1993).

There can be no question that Silkey (and Tiegs), predecessors in interest to the Terteling entities, had the opportunity to litigate the issue of artesian pressure in *Silkey v. Tiegs* and the issue was decided in favor of the protection of artesian pressure. Likewise, the continued protection of artesian pressure, to the extent it is presented in the SRBA, is the same issue decided in *Silkey v. Tiegs*. *Silkey v. Tiegs* resulted in permanent limitations on the uses of certain rights and these same rights (and their respective limitations) are also involved in the SRBA. There clearly was a final judgment on the merits in *Silkey v. Tiegs* and by the purchase of the Silkey and Tiegs Rights, TTCI, T-7 and the Terteling parties generally have become successors-in-interest to Silkey and Tiegs in the prior adjudication. Therefore, applying collateral estoppel, just as the Tiegs Right, 63-15, cannot be diverted according to *Silkey v. Tiegs*, any other SGGA right junior to 63-15 that is held by TTCI, or T-7, should be subject to the same administrative use limitation as 63-15 in order to protect the senior Edwards Right which continues to be diverted under artesian pressure under restrictions first imposed by *Silkey v. Tiegs*. *Affidavit of Garnette Edwards*.

Likewise, both quasi and judicial estoppel should preclude the Terteling parties from successfully asserting junior rights to the Stewart Gulch Geothermal Aquifer in the SRBA. Quasi estoppel applies when it would be unconscionable to allow a party to assert a right that is inconsistent with a prior position. *Sagewillow v. IDWR*, 138 Idaho 831, 845, 70 P.3d 669, 683 (2003). *Silkey v. Tiegs* limited junior users in the Stewart Gulch Geothermal Aquifer for the benefit of more senior users. Over the years, Edwards has observed use restrictions though clearly such restrictions were burdensome. *Affidavit of Garnette Edwards*. When TTCI purchased the Silkey and Tiegs Rights in 1997, the Terteling parties were well aware of *Silkey v. Tiegs* since the purchase occurred after the Stewart Gulch IDWR Action in which they were involved. *Affidavit of Dana L.*

Hofstetter, Exhibit F; Exhibit N, p. 192, L. 19 to p. 194, L.19. They specifically purchased the property for business reasons, including for securing the senior rights to the SGGA. *Id.* It would be unconscionable to allow the Terteling parties to divert water under its much junior rights from the SGGA when over the years Edwards and other parties to *Silkey v. Tiegs* have been restricted in their uses.

Similarly, the doctrine of judicial estoppel prohibits a party from assuming a position in one proceeding and then taking an inconsistent position in a subsequent proceeding. *Riley v. W.R. Holdings*, 143 Idaho 116, 121-22, 138 P.3d 316, 321-322 (2006). Judicial estoppel is an equitable doctrine existing to protect the dignity of the judicial process. *Indian Springs LLC v. Indian Springs Land Investment*, 147 Idaho 737, 748, 215 P.3d 457, 468 (2009). It is fundamentally inconsistent for the Terteling entities, the successors in interest to the Silkey and Tiegs Rights, to claim legal entitlement to continue to divert rights in the SGGA even more junior than the curtailed Tiegs Right. *Silkey v. Tiegs* limited the use of rights much senior to some of the junior rights claimed in the SRBA by the Terteling parties; yet now, the Terteling parties themselves are claiming entitlement to both the Silkey Rights and additional very junior SGGA rights.

The 2002 Settlement Agreement which reaffirmed by contract the principles in *Silkey v. Tiegs* also requires as a matter of good faith, protection of the estimated 650-750 AFA sustained yield of the SGGA and protection of the Edwards Right's artesian pressure. Thus, the Terteling parties should be limited to a total combined amount of 400 acre feet per annum under all of their rights from the SGGA as this is the allowed diverted volume of their Silkey Rights 63-12 and 63-13, which together with the limited Edwards Right, were determined under *Silkey v. Tiegs* as what could be legally withdrawn from the SGGA.

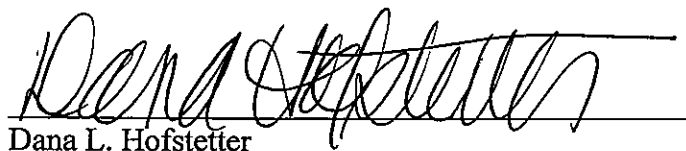
III. Conclusion

For the foregoing reasons, the Court should grant summary judgment as to the following matters:

1. The SGGA will be administered as a "separate source;"
2. At least for the ground water and spring-based rights diverted within District 63-S, the identification in the Partial Decrees of which rights (or points of diversion) are diverted from the SGGA and which rights (or points of diversion) are diverted from cold (non-geothermal) sources is necessary for definition and administration of the rights;
3. SGGA rights junior to those decreed in *Silkey v. Tiegs* should not be decreed, or, in the alternative, the respective SRBA Partial Decrees for such rights should include language reserving administrative matters for other proceedings; and
4. The Terteling SGGA rights junior to the Silkey Rights are subject to *Silkey v. Tiegs* and based on principles of *res judicata*, estoppel and contract law, are precluded from being diverted and should not be decreed.

Dated this 18th day of June, 2010

HOFSTETTER LAW OFFICE, LLC


Dana L. Hofstetter

CERTIFICATE OF SERVICE

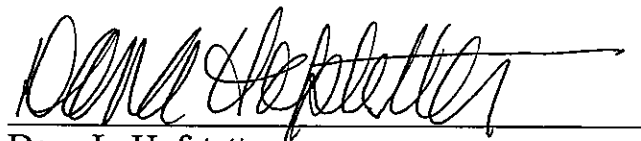
I hereby certify that I caused to be served a copy of the foregoing (with attachment) this 18th day of June, 2010, by U.S. Mail postage pre-paid (or by the pre-paid method as otherwise indicated below) to:

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Dana L. Hofstetter

3006.3/9340

Water Right No.	Claimant	Source	Uses	POD in 63-S?
63-12	TTCI	ground water	Heating/Domestic/Domestic/Irrigation	Yes
63-13	TTCI	ground water	Heating/Domestic/Irrigation	Yes
63-14	Edwards	ground water	Commercial/Heating/Irrigation	Yes
63-15	TTCI	ground water	Domestic/Irrigation/Heating	Yes
63-16	Ryans	ground water	Domestic	Yes
63-2103A	Bluegrass	springs	Domestic	Yes
63-2103B	Bluegrass	springs	Irrigation/Domestic	Yes
63-3603	TTCI	ground water	Irrigation	Yes
63-4037	Bluegrass	ground water	Irrigation	Yes
63-5067	Edwards	ground water	Commercial/Irrigation	Yes
63-5195	Niznik	ground water	Heating/Domestic	Yes
63-7595	TTCI	ground water	Stock/Irrigation	Yes
63-9758	Quail Hollow	ground water	Irrigation/Aesthetic	Yes
63-21875	Bluegrass	Stewart Creek	Irrigation	Yes
63-27649	T-7	springs	Irrigation/Recreation/Aesthetics	?
63-27671	T-7	ground water	Fish Propagation/Irrigation	No, but water is geothermal
63-30006	T-7	ground water	Aesthetic/Recreation	?
63-30007	T-7	spring	Irrigation	?
63-31050	T-7	ground water	Aesthetic/Irrigation/Stock	?
63-31051	TTCI	ground water	Commercial	Yes
63-31052	T-7	ground water	Aesthetic/Irrigation/Recreation/Heating	?
63-31053	T-7	ground water	Domestic/Irrigation	?
63-31054	T-7	ground water	Irrigation/Fire/Stock/Aesthetic/Recreation	No, but water is geothermal
63-31055	T-7	Stewart Creek	Stock/Aesthetic/Irrigation	?
63-31056	T-7	ground water	Irrigation/Stock/Domestic	?
63-31057	T-7	ground water	Domestic	?
63-31058	TTCI	spring Stewart Creek	Stock/Irrigation	No
63-31059	TTCI	ground water	Domestic	Yes
63-31060	TTCI	ground water	Domestic/Stock	No
63-31062	TTCI	ground water	Stock/Domestic/Irrigation	?
63-32895	Steve Terteling	ground water	Domestic	Yes