

7-2

RECEIVED

JUL 06 2010

DEPARTMENT OF
WATER RESOURCES

CHARLES L. HONSINGER (ISB #5240)
RINGERT CLARK CHARTERED
455 S. Third Street, P.O. Box 455
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
Attorneys for Claimants The Terteling Company, Inc.,
T-7, LLC, and the Estate of Steve Terteling

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	
	)	
Case No. 39576	)	Subcase Nos. 63-12, 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, 6331051, 63-31052, 63-31053, 63-31054,
	)	63-31055, 63-31056, 63-31057, 63-31058, 63-
	)	31059, 63-31060, 63-31062, 63-32895
	)	
	)	MEMORANDUM OPPOSING EDWARDS
	)	FAMILY, LLC'S MOTION FOR SUMMARY
	)	JUDGMENT
	)	
	)	

COMES NOW Claimants The Terteling Company, Inc, T-7, LLC, the Estate of Steve Terteling (hereinafter collectively "Terteling"), and Mary and Rose Ryan, by and through their attorneys of record, Ringert Law, Chartered, and hereby submit this *Memorandum Opposing Edwards Family, LLC's Motion for Summary Judgment* filed in the above-captioned subcases on June 18, 2010. This *Memorandum* is supported by the record herein.

SUMMARY

Edwards Family, LLC (hereinafter “Edwards”) seeks summary judgment as to four separate issues:

1. That the Stewart Gulch Geothermal Aquifer (“SGGA”) should be identified as a “separate source” in the SRBA;
2. That water rights diverted from the SGGA and water rights not diverted from the SGGA both be identified as such;
3. That rights diverted from the SGGA with priority dates junior to the Silkey v. Tiegs decreed rights be disallowed; and
4. That Terteling rights diverted from the SGGA (other than water right nos. 63-12 and 63-13) be disallowed.

As an initial matter, it should be noted that Terteling and Ryan do not generally object to the identification of the SGGA as a “separate source”; they also might not object to their water rights diverted from the SGGA being identified as such provided that appropriate language is proposed and used - which is not the case here. Terteling does oppose the insertion of confusing, unnecessary identification of language into their “cold” water rights specifying that they are “not diverted from the SGGA” or other such language, and it does oppose what is Edwards’ transparent attempts to divest Terteling of their other rights to divert low-temperature geothermal water.

STANDARDS

The Standards under which a court determines whether Summary Judgment is warranted in a specific case are well-known. 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). 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)). “[M]otions for summary judgment should be granted with caution. If the record contains conflicting inferences or reasonable minds might reach different conclusions, a summary judgment must be denied.” *Bonz v. Sudweeks*, 119 Idaho 539, 541 (1991) (citations omitted).

ARGUMENT

Edwards Family, LLC’s Memorandum in Support of Motion for Summary Judgment is confused, does not refer to enough material facts to even consider granting summary judgment, and contains flawed and incomplete legal reasoning. Accordingly, Edwards’ *Motion for Summary Judgment* must be denied, and the parties and court must proceed to trial as to all issues in the above-captioned subcases.

1. **Separate Basin**

Edwards requests that a General Provision be included in the SRBA decree that is to, apparently, state that the Stewart Gulch Geothermal Aquifer (hereinafter sometimes referred to as “SGGA”) is a “separate basin.” Terteling and Ryan do not generally oppose such request, but simply point out to the Court and parties that Edwards has not proposed any General Provision language for evaluation by the parties and by the Court. Without proposed language, it appears to Terteling and Ryan that, perhaps, there are material issues of genuine fact regarding the proposed “separate basin.”

2. **There is no Need to Decree Water Rights With a Remark Identifying Them as “Cold”**

Edwards’ request that remarks be added to certain rights for identification of those water rights that are and are not diverted from the SGGA must be denied both because the language of such remarks has not been proposed, and because the remarks are unnecessary.

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 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) (underlined emphasis added). Accordingly, only a proposed remark that is “necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director” is to be included in the Partial Decree of a water right. *See* I.C. §42-1411.

A. No Language is Proposed for Water Rights that Are Diverted from the SGGA

Edwards does not actually propose a remark in its *Motion for Summary Judgment* or supporting *Memorandum* to be included in the descriptions of either water rights that are diverted from the SGGA, or water rights that are not diverted from the SGGA.¹ Accordingly, because there is no proposed language to evaluate and determine whether the same is suitable, Edwards' *Motion for Summary Judgment* on that point must be denied for the reason that there are material issues of genuine fact regarding this request - there are truly no "facts" to evaluate.

Despite the fact that it proposes no remark for the parties and the Court to evaluate, Edwards asserts that such a remark is "necessary for water right definition and administration for the source of the right diverted within the boundaries" of the SGGA to be identified. *Edwards Family LLC's Memorandum in Support of its Motion for Summary Judgment*, p. 18. In fact, the source is identified for each of the rights for which Edwards seeks summary judgment. But what Edwards apparently seeks is some further definition as to whether the source is a "low-temperature geothermal" water source or not. IDWR's recommendations already clearly identify rights that are diverted from a low-temperature geothermal aquifer. Each of those rights either has "heating" listed as a purpose of use (see *i.e. Director's Report* - Subcase No. 63-00012), or states in the Explanatory Material section that "[w]ater is 120 degrees F geothermal water" or some other similar language (see *i.e. Director's*

¹In its SRBA *Objections* to various rights claimed by Terteling, Edwards asserted that the following language should be included: "The diversion and use of geothermal water is not authorized under this right." See *i.e. Edward's Objections* filed in SRBA Subcase Nos. 63-30006, 63-31050, 63-31051. Edwards does not, in its *Memorandum in Support of its Motion for Summary Judgment*, adopt this language or any other language as that to be included in water rights that do not divert water from the Stewart Gulch Geothermal Aquifer. No similar remark is proposed in the record at any point whatsoever for rights that are diverted from the Stewart Gulch Geothermal Aquifer.

Report - Subcase No. 63-03603). Thus, it is not “necessary” for the inclusion of additional language to that effect in each of the *Partial Decrees* for those rights. It is also notable that Edwards failed to file objections to Terteling water rights that do authorize the diversion of low-temperature geothermal water requesting that the rights be identified as such (*see i.e.* Edwards’ *Objections* in Subcase Nos. 63-12, 63-13, 63-31052, etc.). Notwithstanding all of these facts, Terteling might not object to further identification of the rights that do divert water from the SGGA if some language to that effect had been proposed by Edwards. However, given the current status of the litigation, Terteling must oppose the insertion of general, unspecified language into its water rights.

B. No Remark in “Cold” Water Rights is Necessary for Definition or Administration

While Terteling might not generally object to a remark in its rights that are diverted from the SGGA specifying the same (again, provided such a remark had been proposed for proper analysis), it does object to the insertion of a remark in its rights that are not diverted from the SGGA. First, other than in Edwards’ *Objections* (which were filed more than four years ago), no such remark has been provided for analysis. Accordingly, there are again, no “material facts” that form the basis of a properly proposed *Motion for Summary Judgment*, and again, for that reason alone the *Motion* must be denied as there are genuine issues related to the material facts in this case (or more properly, the lack thereof).

Additionally, there is no evidence submitted suggesting that the remark proposed by Edwards is in any way “necessary” for definition or administration of these “cold” water rights. Edwards asserts the conclusory statement that “if no remark is included on the “cold” water rights diverted within District” 63-S boundaries, that Partial Decrees for those rights “would continue to raise the

question as to whether the SGGA was the source.” *Edwards Family LLC’s Memorandum in Support of its Motion for Summary Judgment*, p. 19. However, Edwards points to no facts that establish that there has ever been a question as to “whether the SGGA was the source” for these “cold” water rights.

The simple fact is that this situation about which Edwards is allegedly so concerned already exists. There are already *Partial Decrees* of ground water and spring water rights with points of diversion that are within the District 63-S boundaries, and that do not contain any kind of a remark as is requested by Edwards. *See i.e. Partial Decrees* in Subcase Nos. 63-31061 and 63-28364. To place “remarks” specifying that water rights are not diverted from the SGGA into some *Partial Decrees* pursuant to Edwards’ *Motion for Summary Judgment*, while others that similarly do not divert from the SGGA have no such remarks will certainly confuse and hinder administration, not assist in the same.²

The simple fact is that Edwards has not done its homework with respect to this issue: it has not proposed language for any of the *Partial Decrees* in which it seeks to have such language included, it has failed to recognize the existence of identifying language in the water rights that are diverted from the SGGA, it has provided no testimony or evidence of any kind that such identifying language is necessary for any reason, and it fails to recognize that with a hodge-podge of language in the rights, administration will become more confused, not less so.

²Although Edwards conceivably could file *Motions to Set Aside Partial Decrees* in such subcases as Nos. 63-31061 and 63-28364, there is no guarantee that it would, and thus no way to ensure consistency as between all “cold” water rights diverting from within the boundaries of the SGGA. Beyond that, at least with respect to water right nos. 63-31061 and 63-28364, the *Partial Decrees* for those rights have long been issued, making a *Motion to Set Aside* the same a difficult proposition at best. *See* I.R.C.P. 60.

3. **Junior Rights Diverted from the SGGA are Valid**

Edwards asserts its “artesian pressure” is legally protected and that therefore any junior rights in the SRBA must either be disallowed or must contain some (again) unspecified language protecting Edwards’ water right no. 63-00014. Edwards asserts a veritable grab-bag of bases for its argument, none of which are valid, and all of which must be disregarded.

A. **Silkey v. Tiegs was not a “General Adjudication”**

Edwards makes the argument that *Silkey v. Tiegs* was a “general” adjudication, and that, as such, it is “conclusive as to the nature of all rights to the use of water in the” SGGA, and that junior rights cannot be diverted to the extent that “they would affect the artesian pressure under which” Edwards’ right no. 63-00014 is diverted. One glaring problem with Edwards’ argument on this point is that *Silkey v. Tiegs* was not a “general” adjudication. The term “general adjudication” is defined by Idaho law as follows:

an action both for the judicial determination of the extent and priority of the rights of all persons to use water from any water system within the state of Idaho that is conclusive as to the nature of all rights to the use of water in the adjudicated water system, except as provided in section 42-1420, Idaho Code, and for the administration of those rights.

I.C. §42-1401A(5) (underlined emphasis added). Conversely, a “private adjudication” is defined by Idaho law as follows:

an action commenced in accordance with section 42-1404, Idaho Code, for the judicial determination of both the extent and priority of the rights of named persons to the use of water from any water system within the state of Idaho, for which a general adjudication has not been commenced or completed, that binds only those persons joined in the action and for the administration of such rights.

I.C. §42-1401A(8) (underlined emphasis added). Without citing any evidence to support its assertions, Edwards is making the argument that *Silkey v. Tiegs* was a “general” and not a “private”

adjudication.

Fortunately, the facts tell us otherwise. If it were a “general adjudication,” the *Silkey v. Tiegs* case would have included all parties with rights to divert geothermal water within the immediate area. Nothing in the *Silkey v. Tiegs* decree issued by the district court indicates that it was a general adjudication over a private adjudication. *See Exhibit A to Hofstetter Affidavit*. There is no evidence whatsoever that parties other than the named parties to the lawsuit were notified of the purported “general adjudication”, and no evidence that parties other than the named parties were required to file claims as part of the lawsuit. Moreover, this was certainly not a general adjudication because at least one water right with a priority date earlier than the date of the *Silkey v. Tiegs* decree exists. Water right No. 63-5195 has been recommended by the Idaho Department of Water Resources in the SRBA. This water right is recommended for heating purposes, notes that the water diverted is 120 degrees F geothermal water, has a recommended point of diversion in the same ¼¼ section as Edwards’ water right no. 63-00014, and a recommended priority date of June 1, 1921 - well before the trial date in *Silkey v. Tiegs* of January, 1930. *See Exhibit A to Hofstetter Affidavit*. If *Silkey v. Tiegs* were a “general adjudication” of all rights to divert water from the geothermal aquifer in the immediate area, it would have certainly included as a party the owner of water right no. 63-5195. The fact that it did not, together with the fact that there is no evidence of the inclusion of any parties in *Silkey v. Tiegs* other than those named therein, establishes that there is a material issue of fact on that point, and that summary judgment must be denied.

B. The Ground Water Act Does Not Protect the Water Levels Under Which Edwards Believes it is Entitled to Divert Geothermal Water

Edwards asserts that the language of Idaho's Ground Water Act protects the water levels under which it diverts its water right no. 63-00014. Specifically, it appears that the argument Edwards makes is related to the language of I.C. §42-226 specifying that the act "shall not affect the rights to the use of ground water in this state acquired before its enactment." *Edwards Family LLC's Memorandum in Support of its Motion for Summary Judgment*, p. 20. Unfortunately for Edwards (and to be fair, as noted by Edwards), the Presiding Judge in the SRBA has previously determined that the Ground Water Act does in fact apply to water rights such as Edwards' right no. 63-00014 acquired before enactment of the Act. *A & B Irrigation District v. IDWR, Memorandum Decision and Order on Petition for Judicial Review*, County Case No. 2009-000647 (May 4, 2010).

Edwards next asserts that I.C. §42-226 states that low temperature geothermal artesian pressures "are protectable when determined to be in the "public interest." *Edwards Family LLC's Memorandum in Support of its Motion for Summary Judgment*, p. 21. What Edwards neglects to point out is that under I.C. §42-226, it is the director of the department of water resources that is to determine what a "reasonable pumping level" for any groundwater right is, and in his determination of that level may "consider and protect the thermal and/or artesian geothermal resources to the extent that he determines such protection is in the public interest." I.C. §42-226 (underlined emphasis added). Accordingly, it is the director, not the SRBA District Court that determines how to administer ground water rights such as those to which Edwards' motion for summary judgment is directed, including whether "reasonable pumping levels" should be set, and what those levels should be - which may include a determination of whether protection of water levels for geothermal

resources is in the “public interest.”

The simple fact illustrated by the language of I.C. §42-226 is that the issue of protection of water levels and/or artesian pressures is an issue of administration of water rights by the department of water resources, not an issue of the elements of a water right to be claimed in the SRBA and included in a partial decree by the SRBA District Court. The Court should not undertake a determination of what water levels are, and what they should be - that is an issue of administration of water rights. The issue should instead be left for the agency with the expertise to address the same - the Idaho Department of Water Resources.

C. The Court Must Decline Edwards’ Invitation to Insert Itself into the Shoes of the Director for Purposes of the Administration of Water Rights

Edwards argues that pursuant to certain language in I.C. §42-237a(g) that protects Idaho aquifers, “some, if not all, of the junior uses of the SGGA cannot continue to be allowed.” *Edwards Family LLC’s Memorandum in Support of its Motion for Summary Judgment*, p. 23. Edwards again quotes the statute out of context, attempting to mislead the SRBA District Court to step into the shoes of the director of the Department of Water Resources. The statutory language missing from that quoted in *Edwards Family LLC’s Memorandum in Support of its Motion for Summary Judgment* actually provides as follows:

In the administration and enforcement of this act and in the effectuation of the policy of this state to conserve its ground water resources, the director of the department of water resources in his sole discretion, is empowered:

* * * *

g. To supervise and control the use of ground water and in the exercise of this discretionary power he may initiate administrative proceedings to prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available. To assist the director of the

department of water resources in the administration and enforcement of this act, and in making determinations upon which said orders shall be based, he may establish a ground water pumping level or levels in an area or areas having a common ground water supply as determined by him as hereinafter provided.

I.C. §42-237a(g).

The language quoted by Edwards at page 22 of its *Memorandum* is placed in the statute immediately after the statutory language above-quoted. Again, when the statutory language is read in its entirety, it is obvious that it is the Director of the Idaho Department of Water Resources, not the SRBA District Court, that is to administer water rights under the Ground Water Act, which may include the establishment of “a ground water pumping level or levels.” There is simply no viable argument that the protection of water levels in the SGGA is within the ambit of the SRBA District Court’s authority when it is a matter of administration of water rights that is so clearly delegated to the director of the Department of Water Resources.

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. This argument, as with all of Edwards’ arguments, fails.

D. No Remark “Preserving the Issue” of Whether Water Levels/Pressures are Protectable Can be Included in Junior SGGA SRBA Partial Decrees

Edwards asserts that if SRBA Partial Decrees are issued “without language specifically reserving water distribution issues,” it is possible that such issuance would imply a rejection of “the protection of artesian pressure for the Edwards Right.” Thus, according to Edwards, a remark should be included in all Partial Decrees for “junior SGGA rights preserving such matters for determination in future proceedings.” *Edwards’ Memorandum*, p. 23. The simple fact of the matter is, as discussed above, the “water distribution issues” about which Edwards is so concerned are specifically reserved to the director of the Department of Water Resources. *See* I.C. §42-237a(g), *supra*; *see also* I.C. §42-602 (“The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district.”) As discussed herein and in Terteling’s *Memorandum in Support of Motion for Summary Judgment* filed in Subcase Nos. 63-30006, 63-31050, 63- 31051, 63- 31053, 63-31056, 63-31060, 63-31062, 63-32895, the Court may only add an additional remark in the *Partial Decree* to the extent the 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.” I.C. §42-1411(2)(j). Edwards has submitted no facts establishing that the proposed remark is necessary for any of these reasons, and in fact has again not submitted any proposed remark for the parties and court to evaluate and determine if it is necessary. Accordingly there are certainly material issues of fact with respect to the requested remarks, and summary judgment must be denied on this point.

Edwards does not even argue that the remark is necessary for any of the specific reasons set forth in the statute, although presumably it would argue the remark is necessary for administration

of the rights. If so, it is difficult to see how. Edwards will certainly have the opportunity to raise the issue in future administrative proceedings - if the director declines to address it for the reason that no unspecified "remark" was included in the Partial Decrees, Edwards will have the opportunity to appeal that decision. Edwards itself states that it is only a "possible" implication that issuance of Partial Decrees will constitute a rejection of the asserted argument that Edwards' artesian pressure is protected. This illustrates that this argument is nothing more than a legal position that Edwards is attempting to preserve through the insertion of a remark that will remain forever in water rights decrees that are not its own - it is not "necessary" for any statutorily recognized reason. In future administrative proceedings, Edwards should, if it so desires, assert its position, and undertake the appropriate remedies if that legal position is rejected. It is not up to this Court to now ensure that future adjudicative bodies decide some unspecified future case with unspecified facts involving issues that have not yet been formulated or contemplated in exactly the manner that Edwards would like it decided.

4. **Edwards' Request that all Terteling Water Rights Must be Limited to 400 Acre-Feet Annually Must be Denied**

Through a lengthy, confused analysis involving the legal concepts of *res judicata*, collateral estoppel, quasi-estoppel, judicial estoppel and the legal effect of a 2002 Settlement Agreement between Edwards and Terteling over a protested transfer application, Edwards somehow comes to the conclusion that all Terteling rights diverting water from the Stewart Gulch Geothermal Aquifer must be limited to a total combined annual diversion of 400 acre-feet annually - which would effectively divest Terteling of many of its water rights diverting low-temperature geothermal water. Edwards' conclusion is erroneous, and simply must be denied.

It is important for the Court to understand the genesis of the “400 acre-feet” combined annual diversion limitation on water right nos. 63-12, 63-13 and 63-15. The limitation stems from the language of a Settlement Agreement dated January 24, 2002 between The Terteling Company, Inc and Edwards Family, LLC that the parties executed to resolve Edwards’ Protest to a transfer application filed with the Idaho Department of Water Resources by The Terteling Company, Inc. See Exhibit G to *Hofstetter Affidavit*. As part of that Settlement Agreement, The Terteling Company, Inc. agreed to “divert a combined maximum total of 400 AFA from the Stewart Gulch Geothermal Aquifer under the Silkey and Tiegs Rights.” *Id*, at ¶4 (underlined emphasis added). The “Silkey Rights” are defined earlier in the Recitals and Background Information of the Settlement Agreement as Water Right Nos. 63-00012 and 63-00013; the “Tiegs Right” is defined as Water Right No. 63-00015. *Id*, at ¶A. Accordingly, the Settlement Agreement, which does not address any of the water rights at issue in the SRBA other than Silkey and Tiegs Rights and the Edwards Right (Water Right No. 63-00014) limits the total combined diversion of only those three water rights to a total of 400 acre-feet annually³.

A. *Res Judicata* is Not Applicable to Other Terteling Water Rights

Edwards now asserts that the principles of *res judicata* apply to water rights that were not yet even in existence at the time of the *Silkey v. Tiegs* proceeding, which are located on completely separate tracts of land, which are diverted from separate points of diversion and used for different purposes. Under the principles of *res judicata* (or “claim preclusion”) “a valid final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action

³The Settlement Agreement also limits the volumetric diversion under the Edwards Right no. 63-00014 to 250 acre-feet annually. See Exhibit G to *Hofstetter Affidavit*, ¶4.

between the same parties upon the same claim.” *Hindmarsh v. Mock*, 138 Idaho 92, 94 (Idaho 2002) (underlined emphasis added). The simple fact of the matter is that with respect to other water rights claimed by Terteling in the SRBA, we are not addressing the same claims, and accordingly, *res judicata* does not apply to these rights as Edwards erroneously asserts. *Silkey v. Tiegs* addressed only the Silkey and Tiegs right, not the other rights claimed by Terteling in the SRBA.

Even the case quoted by Edwards in support of its illogical argument in actuality supports the position that only the party’s rights that were litigated in the original case are binding upon the party:

The water rights litigated in the McGinness-McAnulty suit are the identical water rights litigated between McGinness and Stanfield in the McGinness-Stanfield suit, 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 (1902) (underlined emphasis added). In other words, it is only because the water rights are identical to those earlier adjudicated that McGinness was bound in that case. The Court should simply dismiss Edwards’ erroneous argument.

B. Collateral Estoppel is Not Applicable to Other Terteling Water Rights

Edwards asserts that the issue of the “protection of artesian pressure” was fully litigated in *Silkey v. Tiegs* and “the issue was decided in favor of the protection of artesian pressure.” *Edwards’ Memorandum* at p. 26. Therefore, according to Edwards, because of the legal principles of collateral estoppel (or “claim preclusion”) all Terteling water rights, other than 63-12 and 63-13 cannot be diverted.

Under Idaho Law, the

appropriate test for whether collateral estoppel should apply includes the following:

(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, P.A. v. Kolouch, 123 Idaho 434, 439 (1993).

The mistakes made by Edwards in applying collateral estoppel are in baldly asserting that the very broad issue of "the protection of artesian pressure" was the issue that was actually decided and litigated in *Silkey v. Tiegs*, and that to address that issue, the *Silkey* court determined that all water rights that were ever going to divert from the geothermal aquifer must be limited. In fact, nothing of the sort was ever decided by the *Silkey* Court; as already discussed, *Silkey v. Tiegs* was a private adjudication between several parties, not a general adjudication involving all claimants to the Stewart Gulch Geothermal Aquifer. What was decided by the Court was the entitlement of the parties, together with provisions that permitted the most senior water rights, the *Silkey* rights, to be diverted under the pressures and water levels existing at the time. Nothing about the issue of "protection of Edwards' artesian pressure" was discussed, nor was there any language whatsoever that limited future rights from ever being diverted. Edwards is attempting to broadly construe the *Silkey v. Tiegs* decree so as to prevent any other party (although it is really apparently only asserting such argument against Terteling) from diverting water from the SGGA - the Court should decline the invitation to do so.

C. Quasi-Estoppel and Judicial Estoppel are Inapplicable

Edwards asserts that under the doctrines of judicial estoppel and quasi-estoppel, Terteling must be prevented from diverting any of its junior water rights from the SGGA. Again, however,

Edwards mistakes the nature of the *Silkey v. Tiegs* decision, trying to read too broadly into it. *Silkey v. Tiegs* was not a general adjudication. It was simply a lawsuit between parties that bound the parties to the results of the litigation, not parties outside the litigation - which is the position in which Terteling find themselves now.

“The doctrine of quasi-estoppel requires that the offending party must have gained some advantage or caused a disadvantage to the party seeking estoppel; induced the party seeking estoppel to change its position to its detriment; and, it must be unconscionable to allow the offending party to maintain a position which is inconsistent from a position from which it has already derived a benefit.” *City of Sandpoint v. Sandpoint Independent Highway Dist.*, 126 Idaho 145, 151(1994) “Quasi-estoppel is essentially a last-gasp theory under which a defendant who can point to no specific detrimental reliance due to plaintiffs’ conduct may still assert that plaintiffs are estopped from asserting allegedly contrary positions where it would be unconscionable for them to do so.” *Schoonover v. Bonner County*, 113 Idaho 916, 919, 750 P.2d 95, 99 (1988).

The problem with Edwards’ quasi-estoppel argument is that it is not clear what position it is accusing Terteling of previously asserting; against which position it is now apparently asserting the opposite; it is also unclear exactly how it is that asserting these unspecified positions is somehow “unconscionable.” It was not Terteling that litigated *Silkey v. Tiegs*, and Edwards cites to no law establishing that quasi-estoppel may be applied forward eighty years through successive parties-in-interest. Moreover, as pointed out above, Terteling has made many claims in the SRBA other than those asserted by its predecessors in *Silkey v. Tiegs*. Edwards again cites to no law establishing that quasi-estoppel may be applied in such a case. To the extent that Edwards argues that it has been restricted in its water use over the years, Terteling points out that it has as well been so restricted

with respect to water right no. 63-15 pursuant to the Settlement Agreement entered into by both parties. Again, however, the key point related to Edwards' argument is that water levels are an administrative issue to be resolved before an administrative body, not before the SRBA District Court.

"Judicial estoppel, sometimes also known as the doctrine of preclusion of inconsistent positions, precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *Sword v. Sweet*, 140 Idaho 242, 252 (2004). Its application by a district court is entirely discretionary. *Id.* Here again, Terteling was not a party to *Silkey v. Tiegs* - there is again no law cited by Edwards establishing that judicial estoppel may be applied against successive parties in interest over an eighty-year period. The court, in its discretion should decline to apply judicial estoppel against Terteling to address what is a matter of administration of water rights best left to the Idaho Department of Water Resources.

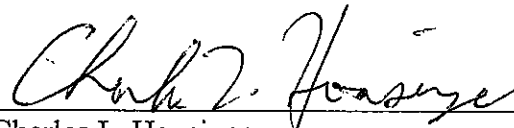
Finally, Edwards makes the argument that the 2002 Settlement Agreement between Terteling and Edwards requires Terteling to protect the "estimated 650-750 AFA sustained yield of the SGGA and protection of the Edwards' Right's artesian pressure" and that Terteling should therefore be "limited to a total combined amount of 400 acre feet per annum under all of their rights from the SGGA." *Edwards Family LLC's Memorandum in Support of its Motion for Summary Judgment*, p. 27. However, the argument is supported by no cited law whatsoever, and contains virtually no analysis - it is simply a bald statement without backing, and as such, does not merit any consideration whatsoever.

CONCLUSION

Edwards Family LLC's Memorandum in Support of its Motion for Summary Judgment contains numerous errors of legal reasoning, contains little actual legal support, and fails to establish that there are no genuine issues of material fact related to its Motion. For these reasons, as discussed more completely hereinabove, Terteling respectfully requests that the Court deny *Edwards' Motion for Summary Judgment* in all respects.

Dated this 2nd day of July, 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 2nd day of July, 2010, by mailing a copy thereof, postage prepaid, to each of the parties listed below.

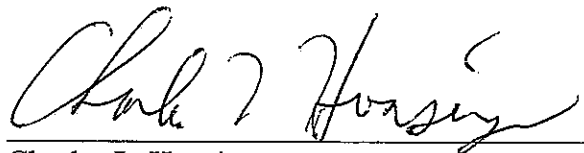
Dana Hofstetter
Hofstetter Law Office, LLC
608 W. Franklin Street
Boise, ID 83702
Fax: (208)424-8744

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

Nick Spencer
Deputy Attorney General
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098
Fax: (208)287-6700

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

Andy Waldera
Moffatt Thomas
P.O. Box 829
Boise, ID 83701-0829
Fax: (208)385-5384

A handwritten signature in black ink, appearing to read "Charles L. Honsinger", written over a horizontal line.

Charles L. Honsinger