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DEPARTMENT OF
WATER RESOURCES

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

In Re SRBA	)	
	)	
	)	Subcase Nos. 63-30006, 63-31050, 63-31051,
	)	63-31053, 63-31056, 63-31060, 63-31062, and
	)	63-32895
Case 39576	)	
	)	
	)	EDWARDS FAMILY, LLC'S RESPONSE
	)	MEMORANDUM IN OPPOSITION
	)	TO TERTELING MOTION FOR
	)	SUMMARY JUDGMENT

Edwards Family, LLC ("Edwards") respectfully submits this *Response Memorandum in Opposition to Terteling Motion for Summary Judgment*. For the reasons discussed more fully below, the June 18, 2010, *Motion for Summary Judgment* filed by The Terteling Company, Inc., T-7, LLC and the Estate of Steve Terteling (hereinafter collectively "Terteling") in the above-captioned Subcases should be denied. This Response is supported by the contemporaneously filed

Affidavit of Dana L. Hofstetter in Response to Terteling Summary Judgment Motion (hereinafter “*Hofstetter Affidavit #2*”), the *Affidavit of Dana L. Hofstetter* filed in these (and other) Subcases on June 18, 2010, (hereinafter “*Hofstetter Affidavit #1*”) and other matters of record.

I. Statement of Pertinent Facts

The overarching history of the Stewart Gulch Geothermal Aquifer (“SGGA”) was described in the Edwards Family, LLC’s June 18, 2010, *Memorandum in Support of its Motion for Summary Judgment* and is incorporated by reference herein, as if set forth in full. This history, beginning in the 1920s with *Silkey v. Tiegs*, continuing through the 1990s with the Water District 63-S proceedings and, now, with the SRBA underway, provides the necessary context for addressing the issue whether “cold” and “hot” spring and ground water derived rights diverted within the boundaries of District 63-S need to be respectively described in the SRBA decrees. The *Terteling Motion for Summary Judgment* suggests that identifying which rights are “not” geothermal is unnecessary but that it may be a good idea to identify affirmatively whether rights are cold or hot, respectively:

There is simply no reason to create confusion by decreeing these rights with the language requested by Edwards stating what the rights are not. There might be a good reason for decreeing rights with language describing what rights are. However, despite the fact that this approach would make more sense, that is not what has been proposed.

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

Terteling Memorandum in Support of Motion for Summary Judgment at 6 (emphases supplied).

We must surmise from the *Terteling Memorandum in Support of Motion for Summary Judgment* that the water rights that are the subject of their summary judgment motion divert “cold”

water rather than “hot” water, although none of the filings with their Summary Judgment Motion establish this fact definitively.¹ Rather, Terteling suggests, that because these rights are not for “heating” purposes that, therefore, the source must be “cold:”

Each of the water rights recommended by IDWR in the above-captioned subcases entitles Terteling to divert water for various purposes, including domestic, stock water, aesthetic, wildlife and irrigation, but not heating.... Edwards wishes to insert a provision in each of the water rights subject to this *Motion* stating that such rights do not authorize the diversion of geothermal water.

Memorandum in Support of Motion for Summary Judgment at 2 (emphasis supplied).

In its *Objections* and its *Summary Judgment Motion*, Edwards has asserted that it is necessary to identify which rights are “cold” and which rights are “hot.” Otherwise, it could be ambiguous whether a certain right diverted within the boundaries of District 63-S actually diverts water from the SGGA and, therefore, is subject to District 63-S administration. If only the “hot” rights are identified as such, ambiguities would remain as to the unidentified rights since the issue of whether the source is the cold aquifer or the hot SGGA would be unclear in such instances. Edwards would not necessarily be opposed to clarifying language which affirmatively identified the rights diverting from “cold” and “hot” sources respectively; the important principle is to avoid ambiguity that may interfere with the efficient administration of water rights in District 63-S.

Edwards notes that it has settled a number of SRBA Subcases involving “cold” ground water diverted within the boundaries of District 63-S with the addition of the following language in the SRBA Partial Decrees:

This water right does not authorize the diversion of a low temperature geothermal resource or other geothermal resource.

See e.g., SRBA Subcase Nos. 63-2697, 63-3407, 63-5028, 63-5234, 63-5284, 63-5325, 63-9812, 63-16488, 63-16517, 63-17417, 63-17621, 63-17672, 63-20156, 63-31233, 63-31299, 63-31300,

¹ The *Terteling Motion for Summary Judgment* references an *Affidavit of Charles L. Honsinger* but no such Affidavit appears to have been filed or served.

63-31433, 63-31556, 63-31997 and 63-31998. Therefore, while for reasons of consistency, Edwards prefers this language, it is open to other language that effectively and unambiguously identifies the rights that are subject to District 63-S administration (and, also to leave no confusion, the ones that are not).

Frequently, in the IDWR Director's Report Recommendations, information about whether a water right is from a geothermal source is in the "Explanatory Material" which typically does not find its way into the SRBA Partial Decree. *See Hofstetter Affidavit #1, Exhibit N, p. 162, L. 22 to p. 169, L. 1.* Further, due to the numerous ground water and spring rights claimed in the area, even the Terteling representative demonstrated confusion as to which Terteling water right number went with a given well and whether a given Terteling well was geothermal or "cold." *See Hofstetter Affidavit #1, Exhibit N.* Some of this confusion involved the water rights that are the subject of the *Terteling Motion for Summary Judgment*, including 63-31050, 63-31051, 63-31053, and 63-31056. *See Hofstetter Affidavit #1, Exhibit N, pp. 86-88, pp. 103-112 and p. 230, pp. 114-123.* Further making the situation even more confusing, some wells located within District 63-S boundaries, divert both cold and hot water, either via concentrically located casings or side-by-side casings. *See Hofstetter Affidavit #1, Exhibit N, p. 60, L. 9 to p. 67, L. 18; p. 119, L. 2 to p. 123, L. 21.*

It should be noted that one cannot always tell from the water right purposes of use alone whether it is diverted from the SGGA. For instance, based on the IDWR administrative proceedings of the 1990s that resulted in the establishment of District 63-S, it is well known that Terteling Water Right No. 63-3603 is diverted from the SGGA and is subject to District 63-S. *Hofstetter Affidavit #1, Exhibits C and D.* However, that right, as originally licensed was for irrigation purposes, although the present intentions of Terteling with respect to such right are presently evolving and remain unclear. *Hofstetter Affidavit #2, Exhibits A, B and C.* In any event, the bottom line is that both cold and hot ground water is present within the boundaries of District

63-S and an administrative nightmare will be avoided if the respective sources of the various points of diversion can be identified either by stating that they are “hot” or “cold.”

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 a preliminary matter, summary judgment must be denied since Terteling has not established factually whether the source of the subject rights are indeed “cold.”

The *Terteling Motion for Summary Judgment* and the associated *Memorandum* did not conclusively establish factually whether the subject rights are diverted from the SGGA or are diverted from a “cold” aquifer. All of the respective Director’s Report Recommendations appear to identify “ground water” as the source and all of the recommended points of diversion appear likely to be within the District 63-S boundaries, except for, perhaps, Water Right No. 63-31060. See *Hofstetter Affidavit #1, Exhibit E and Exhibit N (Joe Terteling Deposition Exhibits C and R)*. None of the recommended uses for the subject rights are for heating but these uses include irrigation, recreation, aesthetics and other purposes that could involve “hot” or “cold” water. Thus, the record does not definitively establish that these rights are not diverted from the SGGA. Since, the *Terteling Motion for Summary Judgment* hinges on these rights not being geothermal, and the current record does not factually establish this, the *Terteling Motion for Summary Judgment* must be denied on this basis alone.

- C. Even assuming that the source of the subject rights is “cold,” the Terteling Motion for Summary Judgment should be denied since the identification of the “cold” and also the “hot” rights is necessary for water right definition and administration.

Idaho Code § 42-1412(6) refers to Idaho Code §§ 42-1411(2) and (3) for the appropriate contents of individual SRBA water right Partial Decrees and also notes that each Partial Decree is subject to “necessary” general provisions:

The district court shall enter a partial decree determining the nature and extent of the water right which is the subject of the objection or other matters which are the subject of the objection. The decree shall contain or incorporate a statement of each element of a water right as stated in subsections (2) and (3) of section 43-1411, Idaho Code, as applicable. 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.

Idaho Code § 42-1412(6). Then, in turn, Idaho Code §§ 42-1411(2)(j) and (3) provide for water right remarks necessary for definition and/or administration of the rights:

(2) The director shall determine the following elements, to the extent the director deems appropriate and proper, to define and administer the water rights acquired under state Law: ...

(j) 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.

(3) The director may include such general provisions in the director's report as the director deems appropriate and proper, to define and to administer all water rights.

As discussed in *Edwards' Memorandum in Support of its Motion for Summary Judgment*, it is necessary for both water right definition and administration for ground water and spring rights deriving from within District 63-S boundaries to be identified as either hot or cold. Further, it is necessary for this information to be on the face of the Partial Decrees themselves, and not just in the "Explanatory Material" which never makes its way to the Partial Decrees. *See 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.")

IDWR has established the boundaries of Water District 63-S and has identified certain of the water rights subject to Water District 63-S administration. *Hofstetter Affidavit #1, Exhibits B, C, D and E*. However, many additional ground water and spring rights, such as the above-captioned rights along with other Terteling water rights, have been claimed within District boundaries in the SRBA. Unless, the SRBA identifies which rights are subject to District 63-S administration (and

which are not), the District 63-S watermaster will not be in a position even to know for certain which rights are subject to District 63-S administration. *See Idaho Code § 42-607*. Further, the unambiguous identification of low temperature geothermal water rights is especially important since such rights are subject to unique administrative requirements. *See Idaho Code §§ 42-226, 42-230 and 42-233a*.

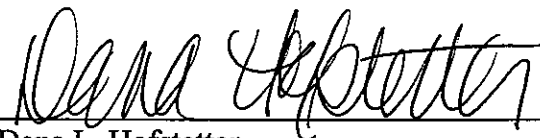
It appears that Terteling has no objection to identifying the rights that are subject to District 63-S administration but objects to identifying the rights that are not subject to District 63-S administration. This approach would leave ambiguous the administrative status of those ground water and spring rights that are diverted in District 63-S boundaries but have Partial Decrees omitting any reference to District 63-S applicability (or inapplicability). Such a “beg the question” approach would defy the statutory mandate for SRBA Partial Decrees to include “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.”

III. Conclusion

For the foregoing reasons, the Court should deny the *Terteling Motion for Summary Judgment*.

Dated this 2nd day of July, 2010

HOFSTETTER LAW OFFICE, LLC

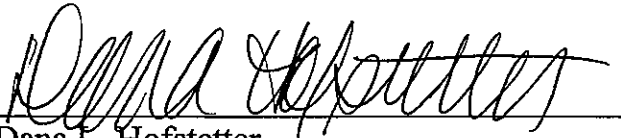

Dana L. Hofstetter

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of the foregoing (with any attachments) this 2nd day of July, 2010, by U.S. Mail postage pre-paid (or by the pre-paid method as otherwise indicated below) to:

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