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DEPARTMENT OF
WATER RESOURCES

Dana L. Hofstetter, ISB #3867
HOFSTETTER LAW OFFICE, LLC
608 West Franklin Street
Boise, Idaho 83702
Telephone (208) 424-7800
Facsimile: (208) 424-8774
Email: Dana@IdahoWaterLaw.com

Attorney for Edwards Family, LLC

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

In Re SRBA

Case 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, 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
) REPLY MEMORANDUM IN SUPPORT
) OF ITS MOTION FOR
) SUMMARY JUDGMENT

Edwards Family, LLC ("Edwards") respectfully submits this *Reply Memorandum in Support of Its Motion for Summary Judgment ("Reply")*. This *Reply* is supported by the *Affidavit of Dana L. Hofstetter* filed June 18, 2010, ("*Hofstetter Affidavit #1*"), *Affidavit of Dana L. Hofstetter in Response to Terteling Summary Judgment Motion* filed July 2, 2010, ("*Hofstetter Affidavit #2*") and other matters of record.

II. Legal Argument

A. Separate Source Designation for the SGGA was agreed upon by Terteling and Edwards in the 2002 Settlement Agreement and in view of the SRBA's standard Separate Streams general provision language, there are no material issues of fact in dispute on the issue.

In its *Memorandum Opposing Edwards Family, LLC's Motion for Summary Judgment* ("*Terteling Response Memorandum*"), Terteling asserts that it does not oppose separate streams designation but that without specific proposed general provision language there are issues of fact regarding the proposal:

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 facts regarding the proposed "separate basin."

Terteling Response Memorandum at 4.

Terteling and Edwards agreed to seek separate source determination for the Stewart Gulch Geothermal Aquifer ("SGGA") in the 2002 Settlement Agreement between them. *Hofstetter Affidavit #1, Exhibit G*. Further, *Silkey v. Tiegs* established separate source administration of the SGGA in the 1930s and today such separate source administration continues under the umbrella of State Water District 63-S. *Hofstetter Affidavit #1, Exhibits A, B, C, D and E*. Thus, there does not appear to be any dispute as to the appropriateness of designating the SGGA as a separate source; rather, the issue raised by Terteling relates to the language of the separate source General Provision.

In regard to the separate source General Provision language, it is noted that the SRBA Court has developed standard language that it uses in the various sub-basins for this purpose. On February 27, 2002, after years of contentious litigation, involving surface water and ground water interests in the Basin Wide Issue No. 5 proceeding, the SRBA Court issued its *Memorandum Decision and Order of Partial Decree* deciding the general form of the conjunctive management general provision based upon a Stipulation of the parties. In its previous December 19, 2001 *First*

Order Re: Order to Show Cause in Subcase No. 91-00005, the SRBA Court found that all parties to the SRBA, with the possible exception of the United States which had a pending Motion for Clarification, were bound by the stipulated general provision language:

With the exception of the United States, all other parties to Basin-Wide Issue 5, and **all other parties to the Snake River Basin Adjudication**, are hereafter precluded from asserting before this Court that the Court should not enter the general provision as stipulated and proceed in the manner set forth in the *Settlement Agreement and Stipulation for Entry of Agreed Findings of Fact, Conclusions of Law, and Partial Judgment on Basin-Wide Issue 5*.

First Order Re: Order to Show Cause, Subcase No. 91-00005 (December 19, 2001) at 3 (emphasis added). In its subsequent ruling on the United States' Motion for Clarification, the Court also held that the United States was bound to the stipulated general provision language, although it could raise objections to specific water rights being on the associated water right lists. *Order On United States' Motion for Clarification (Second Order Re: Order to Show Cause)*, Subcase No. 91-00005 (February 27, 2002) at 6. Thus, at this time, the matter of the general form of the language of the separate source General Provisions has been fully litigated and decided in the SRBA.

Consistent with the standard language, the Idaho Department of Water Resources has proposed the following separate source General Provisions for Basin 63, Part 2:

The Director of the Idaho Department of Water Resources (IDWR) recommends to the Snake River Basin Adjudication (SRBA) District Court that the following general provisions be included in the decree determining rights to water from Basin 63:

1. The following water rights from the following sources of water in Basin 63 shall be administered separately from all other water rights in Basin 63 in accordance with the prior appropriation doctrine as established by Idaho law:

SEE ATTACHMENT "A"

2. The following water rights from the following sources of water in Basin 63 shall be administered separately from all other water rights in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law:

Water Right No.

Source

NONE

NONE

3. Except as otherwise specified above, all other water rights within Basin 63 will be administered as connected sources of water in the Snake River Basin in accordance with the prior appropriate doctrine as established by Idaho law.

Thus, Edwards would propose that the list of water rights determined to be diverted from the SGGA would be added to this General Provision. This would memorialize the historic practices that have been in place since the 1930s, the agreement of the parties and also be consistent with the standard General Provision language.

B. It is necessary for water right definition and administration for the rights diverted from the SGGA to be identified and, also, for the rights within District 63-S that are NOT diverted from the SGGA to be identified.

Terteling asserts that while it may be necessary for water rights diverted from the SGGA to be identified, such language has not been proposed and, therefore, there are “truly no ‘facts’ to evaluate.” *Terteling Response Memorandum* at 5. Further, Terteling asserts that cold water rights diverted within the boundaries of District 63-S should not be described as not diverted from the SGGA since there has never been a question as to whether the SGGA was the source for these cold water rights. *Terteling Response Memorandum* at 7. Terteling claims that each of the rights diverted from the SGGA either has heating listed as a purpose of use or states in the “Explanatory Material” section of the respective Idaho Department of Water Resources (“IDWR”) Director’s Report Recommendations that the water is geothermal. *Terteling Response Memorandum* at 5.

Based on established SRBA Court policy, language in the “Explanatory Material” section of the IDWR Director’s Reports do not make their way into the SRBA Partial Decrees. Therefore, information in “Explanatory Material” is not part of the official decree on which the watermaster is directed to administer water rights. *State v. Nelson*, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998). Further, while some rights diverted from the SGGA do indeed have heating related purposes of use,

not all rights diverted from the SGGA have heating purposes of use. For example, Water Right No. 63-3603 is recognized as being diverted from the SGGA but it is an irrigation right. *Hofstetter Affidavit #1, Exhibits C and D* and *Hofstetter Affidavit #2, Exhibits A, B and C*. Further, some wells involve both hot and cold sources of water. *Hofstetter Affidavit #1, Exhibit N (Terteling Deposition)* p. 60, L. 9 to p. 67, L. 18; p. 119, L. 2 to p. 123, L. 21. Also, some points of diversion are located in quarter-quarter sections that are partially in State Water District 63-S and, therefore, in these situations it is not clear whether the rights are actually within District 63-S boundaries or are outside of District 63-S boundaries. *Hofstetter Affidavit #1, compare Exhibits E and N (Terteling Deposition Exhibits C and R)*.

The Terteling representative indicated uncertainly in many instances in looking at specific Director's Report Recommendations for the Terteling rights (without consulting Explanatory Material) whether a right was diverted from the SGGA. *See e.g., Hofstetter Affidavit #1, Exhibit N (Terteling Deposition)* p. 162, L. 22 to p. 169, L. 1. Further, even with his own documentation available, it was frequently a difficult matter to determine whether a water right involved the diversion of water from the SGGA. *See e.g., Hofstetter Affidavit #1, Exhibit N (Terteling Deposition)* p. 61, L. 21 to p. 67, L.18; p. 86, L. 4 to p. 90, L. 3; pp. 103-123 *passim*.

As asserted in Edwards' *Memorandum in Support of Summary Judgment*, it is necessary for both water right administration and definition for the "cold" and "hot" sources to be identified for those ground water and spring rights diverted within the boundaries of District 63-S. If only the hot water rights were identified, ambiguities would remain as to the cold water rights since there would be no definitive indication whether certain rights diverted within the boundaries of 63-S involved hot or cold sources. Such ambiguities should be avoided with appropriate language instructing the watermaster as to whether the respective rights are subject to District 63-S or are not subjected to District 63-S.

The Idaho Department of Water Resources in “Explanatory Material” for some of its SRBA water right Recommendations (e.g. 63-12) has included the following language for rights diverted from the SGGA: “Use of water under this water right will be regulated by the watermaster of State Water District 63-S, Stewart Gulch.” If this language would be moved to the “Other Provisions” section it would be included in the SRBA *Partial Decrees* and would be legally available to the watermaster for purposes of administration.

Also, IDWR has approved numerous Standard Form 5 documents for ground water rights diverted within the boundaries of District 63-S that include the following: “This water right does not authorize the diversion of the low temperature geothermal resource or other geothermal resource.” See e.g. SRBA *Partial Decrees* for Water Right Nos. 63-2697, 63-3407, 63-5028, 63-5234, etc.

For the foregoing reasons, it is necessary for both water right definition and administration for ground water and spring rights within the boundaries of District 63-S to be identified as being diverted from the SGGA or as being diverted from some other source. Without such an indication there will be ambiguity and confusion as to the ultimate source of the respective rights and the applicable district for water right administration.

C. **Silkey v. Tiegs was identified as a quiet title action and in administrative proceedings, IDWR has treated Silkey v. Tiegs as governing the administration of the SGGA; in any event Silkey v. Tiegs is binding as on successors in interest.**

The *Terteling Response Brief* asserts that Edwards has not identified any evidence to support its assertion that *Silkey v. Tiegs* was a general adjudication. However, in its *Memorandum in Support of Motion for Summary Judgment*, Edwards refers to language in *Silkey v. Tiegs*, 51 Idaho 344, 347, where those proceedings were described as a quiet title action: “This suit was brought by respondent to quiet title to certain waters appropriated by means of two artesian wells bored on her farm....” Further, it was noted that the *Silkey v. Tiegs* District Court’s findings,

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, globally addressed the extent of the SGGA source. *Id.*, 51 *Idaho* at 353; *Edwards Memorandum in Support of Motion for Summary Judgment* at 19.

Terteling asserts that the Niznik Right, 63-5195, which has been claimed with a senior priority date, even to the Silkey rights, and which was not included in *Silkey v. Tiegs* establishes that *Silkey v. Tiegs* was not a quiet title action. However, Water Right No. 63-5195 is recommended as a domestic right and such rights, frequently, because of their *de minimus* nature have been omitted from general adjudication proceedings. Further, at this point in time, it has not been conclusively established that the Niznik right predated *Silkey v. Tiegs* or because of its domestic limited nature would have been subject to the *Silkey v. Tiegs* proceedings.

In any event, *Silkey v. Tiegs* is binding as *res judicata* for the rights that were actually determined in that proceeding: Water Right No. 63-12, 63-13, 63-14, 63-15, and 63-16. Whether or not *Silkey v. Tiegs* was a general adjudication, it certainly operates as *res judicata* for those rights. Terteling has succeeded to the 63-12, 63-13 and 63-15 water rights that were determined *Silkey v. Tiegs* and, accordingly, is bound by *res judicata* with respect to those rights to the determinations made in *Silkey v. Tiegs*.

Silkey v. Tiegs prohibited any diversions under 63-15 and SGGA junior rights in order to protect the artesian pressures of the Silkey and Edwards Rights. Terteling has claimed a number of junior rights in the SRBA which are also diverted from the SGGA, junior to 63-15. As a successor in interest to Water Right Nos. 63-12, 63-13 and 63-15, Terteling's more junior rights to the SGGA are bound by the principle of collateral estoppel to the issues litigated and determined in *Silkey v. Tiegs*.

Likewise, for the reasons discussed in *Edwards' Memorandum in Support of Motion for Summary Judgment*, principles of quasi estoppel and judicial estoppel would preclude Terteling from asserting a position in the SRBA inconsistent with a prior position taken by a predecessor in interest. Further, the 2002 Settlement Agreement which estimated the SGGA had a sustained yield of 650-750 acre feet per annum ("afa") precludes Terteling in good faith from asserting rights that would violate this sustained yield of the SGGA.

D. IDWR has deferred matters relating to administration of the SGGA and the continuing effect of *Silkey v. Tiegs* to the SRBA and, accordingly, such matters need to be specifically addressed by the SRBA Court or expressly preserved for later determination.

Terteling asserts that the Ground Water Act, specifically, Idaho Code § 42-226, and also pursuant to Idaho Code § 42-237(a)(g), IDWR is responsible in the first instance for water right administration, and, accordingly, the SRBA Court not in a position to make determinations regarding the protection of Edwards' artesian pressure. However, it should be noted that IDWR in the 1990 District 63-S administrative proceedings has reserved to the SRBA such matters. *Hofstetter Affidavit #1, Exhibit D at 8*. Accordingly, to the extent that this is the case, the SRBA Court needs to either address issues relating to administration or specifically preserve them for determination in later proceedings as necessary. Otherwise, the implication may be that by decreeing the rights that are junior to those that *Silkey v. Tiegs* allowed to be diverted, that the principles of *Silkey v. Tiegs* were superseded in the SRBA.

Thus, to the extent that the SRBA Court does not believe it is appropriate to address the continuing effect of the administrative provisions of *Silkey v. Tiegs* or the Idaho Ground Water Act or Idaho Code § 42-237(a)(g), in the SRBA, it is necessary for the Court to expressly indicate that such matters are preserved for subsequent proceedings. Language such as the following would be appropriate for inclusion in the respective water right decrees for SGGA rights to address this

issue:

Use of water under this water right will be regulated by the watermaster of State Water District No. 63-S. Administrative matters relating to the distribution and delivery of water in Water District No. 63-S were not determined in the SRBA and such matters are reserved for future proceedings, as necessary.

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 (63-12 and 63-13) are subject to *Silkey v. Tiegs* and based on principles of *res judicata*, collateral, judicial and quasi-estoppel and contract law, are precluded from being diverted and should not be decreed.

Dated this 9th day of July, 2010

HOFSTETTER LAW OFFICE, LLC


Dana L. Hofstetter

CERTIFICATE OF SERVICE

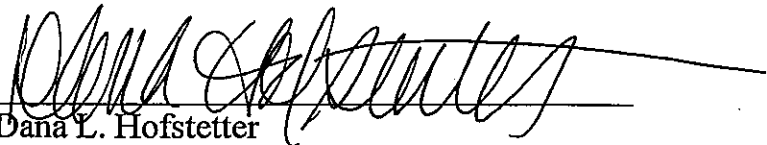
I hereby certify that I caused to be served a copy of the foregoing (with attachment) this 9th day of July, 2010, by U.S. Mail postage pre-paid (or by the pre-paid method as otherwise indicated below) to:

Andrew Waldera
Moffatt Thomas
P.O. Box 829
Boise, Idaho 83701

Charles Honsinger
Ringert Law
P.O. Box 2773
Boise, Idaho 83701-2773

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

Director IDWR
P.O. Box 83720
Boise, Idaho 83702


Dana L. Hofstetter

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