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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
AUG 23 2010	
By _____	Clerk
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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

Case No. 39576

) Subcases 63-00012, 63-00013, 63-00014,
) 63-00015, 63-00016, 63-00308, 63-02103A,
) 63-02103B, 63-03603, 63-04037, 63-05067,
) 63-05195, 63-07595, 63-09758, 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,
) 63-32895
)
) ORDER ON MOTION TO STRIKE
)
) MEMORANDUM DECISION AND
) ORDER ON MOTIONS FOR SUMMARY
) JUDGMENT

I. APPEARANCES

Dana L. Hofstetter, Hofstetter Law Office, LLC, for claimant / objector Edwards Family, LLC (hereinafter "Edwards").

Charles L. Honsinger, Ringert Clark Chartered, for claimants / objectors The Terteling Company, Inc., T-7, LLC, and the Estate of Steve Terteling (hereinafter collectively "Terteling").

II. PROCEDURAL AND FACTUAL BACKGROUND

The origin of the dispute in these subcases can be traced to the *Decree* entered on June 13, 1930 by Judge Dana E. Brink in the case of *Silkey v. Tiegs*, Case No. 11748, Third Judicial District, Ada County, *on review* 51 Idaho 344 (1931) and 54 Idaho 126 (1934). That *Decree* confirmed the following water rights:

NUMBER	PARTY	CURRENT OWNER	PRIORITY DATE	QUANTITY
63-12	Frances Silkey	The Terteling Co., Inc.	7/01/1921	7 miners inches (0.14 cfs)
63-13	Frances Silkey	The Terteling Co., Inc.	7/01/1922	33 miners inches (0.66 cfs)
63-14	Thomas F. Edwards	Edwards Family LLC	11/22/1926	52 miners inches (1.04 cfs)
63-15	H.W. Tiegs	The Terteling Co., Inc.	3/23/1927	40 miners inches (0.8 cfs)
63-16	J. Ryan	Mary Ryan and Rose Ryan	9/24/1927	40 miners inches (0.8 cfs)

The *Decree* states:

That the waters herein decreed and allotted are subterranean waters subject to appropriation by the several parties hereto under the laws of the State of Idaho. 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

As to the plaintiff Silkey's two water rights decreed therein, the *Decree* states that said plaintiff is decreed the use of water "flowing from her said wells" In addition to decreeing the elements of the water rights, the *Decree* also has terms concerning the post-decree administration of the rights. Specifically, the defendants' (Edwards, Tiegs, and Ryan) water rights were restricted in the use of their water rights for the purpose of not depleting the flow of the plaintiff's wells below the decreed amount. The defendant Thomas F. Edwards was allowed to flow from his well fifteen miners inches during the winter season, and 20 miners inches during the irrigation season, "or so much thereof as will not deplete the flow of plaintiff's wells below forty miners inches." *Hofstetter Aff.* Ex. A. As to the wells of defendants Tiegs and Ryan, the Judge ordered that no water could be permitted to flow or be used from these wells until further order of the court. *Id.* The Court retained jurisdiction over the case for a period of two years, one of the purposes being the adjustment or allowance of use of water from the defendants' wells, "in case it should hereafter appear from said record of measurements that more or less

water than herein provisionally fixed may or should be permitted to flow from the wells of said defendants.” *Id.*

In the SRBA, the current owner of water right 63-14, Edwards Family LLC, successor in interest to *Silkey v. Tiegs* defendant Thomas F. Edwards, filed objections to the *Director's Report* for numerous ground and surface water right claims located within the general vicinity of the Edwards' well. These *Director's Report* recommendations for these water right claims are summarized as follows:

NUMBER	CLAIMANT	SOURCE	PRIORITY DATE	PURPOSES OF USE
63-12	The Terteling Co, Inc.	Ground Water	7/1/1921	Domestic Heating Irrigation
63-13	The Terteling Co, Inc.	Ground Water	7/1/1922	Domestic Heating Irrigation
63-15	The Terteling Co, Inc.	Ground Water	3/23/1927	Domestic Heating Irrigation
63-16	Mary Ryan and Rose Ryan	Ground Water	9/24/1927	Domestic
63-308	Terteling Trust No. 7 The Terteling Co., Inc.	Stewart Creek	7/23/1899	Aesthetic Stor. Irrigation Irrigation Stor. Stockwater
63-2103A	Ray Eldridge	Springs	6/3/1909	Domestic
63-2103B	Kenneth T. Ham	Springs	6/3/1909	Domestic
63-3603	The Terteling Co, Inc.	Ground Water	4/26/1967	Irrigation
63-4037	Quail Hollow LLC	Ground Water	4/7/1937	Irrigation (w/ remark requiring heating use first)

63-5067	Edwards Family LLC	Ground Water	10/01/1930	Commercial Irrigation
63-5195	David Niznik Diane Peck-Niznik	Ground Water	6/01/1921	Domestic Heating
63-7595	The Terteling Co, Inc.	Ground Water	3/7/1973	Irrigation Stockwater
63-9758	David Hendricksen DBA Quail Hollow Golf Course	Ground Water	3/19/1996	Aesthetic Irrigation
63-21875	Quail Hollow LLC	Stewart Gulch Creek	3/15/1943	Irrigation
63-27649	T-7 LLC	Springs	6/1/1899	Aesthetic Stor. Irrigation Irr. Storage Recreation Rec. Storage
63-27671	T-7 LLC	Ground Water	1/1/1938	Fish Prop. Irrigation
63-30006	T-7 LLC	Ground Water	3/1/1938	Aesthetic Stor. Recreation Stor
63-30007	T-7 LLC	Spring	3/1/1938	Irrigation
63-31050	T-7 LLC	Ground Water	4/24/1948	Aesthetic Irrigation Stockwater
63-31051	The Terteling Co, Inc.	Ground Water	7/01/1921	Commercial
63-31052	T-7 LLC	Ground Water	4/24/1948	Aesthetic Aesthetic Stor. Heating Irrigation Recreation
63-31053	T-7 LLC	Ground Water	1/1/1938	Domestic Irrigation

63-31054	T-7 LLC	Ground Water	11/01/1940	Aesthetic Fire Protection Irrigation Recreation Stockwater
63-31055	T-7 LLC	Ground Water	1/1/1938	Aesthetic Stor. Irrigation Irrigation Stor. Stockwater Stor
63-31056	T-7 LLC	Ground Water	1/1/1938	Domestic Irrigation Stockwater
63-31057	T-7 LLC	Ground Water	6/20/1994	Domestic
63-31058	The Terteling Co, Inc.	Spring Stewart Creek	1/1/1945	Irrigation Stockwater Stockwater Stor
63-31059	The Terteling Co, Inc.	Ground Water	7/1/1994	Domestic
63-31060	The Terteling Co, Inc.	Ground Water	1/1/1910	Domestic Stockwater
63-31061	The Terteling Co, Inc.	Spring	3/1/1938	Domestic Stockwater
63-31062	The Terteling Co, Inc.	Ground Water	1/1/1938	Domestic Irrigation Stockwater
63-32895	Estate of Steve Terteling	Ground Water	4/15/1948	Domestic

III. ORDER GRANTING MOTION TO STRIKE

On July 2, 2010, Terteling filed a *Motion to Strike Portion of Hofstetter Affidavit*, seeking to strike from the record Exhibit "P" to the *Affidavit of Dana L. Hofstetter*. The *Motion to Strike* is based upon I.R.E. 408. For the reasons set forth on the record at the July 16, 2010, hearing on the matter the *Motion* is **granted**. The Exhibit P to the

Affidavit of Dana L. Hofstetter, filed June 18, 2010, is stricken from the record and shall not be considered.

IV. ISSUES PRESENTED

A. Edward's Motion for Summary Judgment. In its *Memorandum in Support*, Edwards states the following issues:

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.

Memo in Support, p. 2

B. Terteling's Motion for Summary Judgment.

Terteling filed a *Motion for Summary Judgment* in subcase nos. 63-30006, 63-31050, 63-31051, 63-31053, 63-31056, 63-31060, 63-31062, and 63-32895. Therein, Terteling seeks dismissal of the objection filed by Edwards as to Edwards' assertion that these water rights should be conditioned with a remark which states: "The diversion and use of geothermal water is not authorized under this right."

V. STANDARD OF REVIEW

A motion for summary judgment shall be rendered 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 judgment as a matter of law. I.R.C.P. 56(c); *Olsen v. J. A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990).

All controverted facts are liberally construed in favor of the non-moving party. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987). The burden at all times is upon the moving party to prove the absence of a genuine issue of material fact. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 362 (1969). The moving party's case must be anchored on something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue. *R. G. Nelson, A.I.A. v. Steer*, 118 Idaho 409, 797 P.2d 117 (1990). All doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom and if reasonable people might reach different conclusions. *Doe v. Durtschi*, 101 Idaho 466, 716 P.2d 1238 (1986). The court is authorized to enter summary judgment in favor of non-moving parties. *Barlow's Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310, 647 P.2d 766 (Ct. App. 1982).

VI. ANALYSIS

A. Edwards' Motion for Summary Judgment.

1. Edwards' Issue 1 - Separate Source Designation for SGGA Rights.

Edwards has moved for summary judgment on the issue of whether the water rights with a source of the SGGA should be designated as being derived from a separate source. The objections filed by Edwards to the *Director's Report* for water right 63-14 and others states: "The Stewart Gulch Geothermal Aquifer should be managed as a separate source pursuant to *Silkey v. Tiegs*."

In its *Memorandum in Support*, Edwards argues: "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*. *Memo in Support*, p. 17. At oral argument on summary judgment, and also at a status conference held on August 17, 2010, counsel for Terteling, and counsel for Quail Hollow LLC stated that they are not in opposition to separate source designation for those rights with a source of the SGGA. At the August 17, 2010, status conference, the Deputy Attorney General for IDWR stated that the Department is not in agreement with separate source designation for the SGGA.

The *Director's Report(s)* for these water rights did not recommend any SGGA water rights to be administered on a separate source basis. Accordingly, pursuant to the *prima facie* weight afforded the *Director's Report* under I.C. § 42-1411 (5), the posture of this issue begins with the presumptions that separate source designation is not necessary. Therefore, the proponent of separate source designation has the burden of demonstrating that such a provision is necessary. *Id.* In these subcases, the other parties do not disagree with Edwards that the SGGA should be administered separately. Hence no party is aligned with the facts contained in the *Director's Report* (i.e. that the SGGA is should not be administered as a separate source). In *State v. Hagerman Water Right Owners*, 130 Idaho 736, 744-45, 947 P. 2d 409 (1997), the Idaho Supreme Court held that in one party subcases, where the claimant alleges facts different from those set forth in the *Director's Report*, summary judgment is not an appropriate procedure and an evidentiary hearing must be held. Although the present set of subcases are not one-party subcases, the posture is the same as in the situation where the Supreme Court held that summary judgment was inappropriate. Therefore, Edwards' motion for summary judgment seeking separate source designation for the SGGA water rights is **denied**.

2. Edwards' Issue 2 - Identification of SGGA Rights.

Edwards asserts on summary judgment that the water rights which are subject to administration as a part of Water District 63-S (i.e. water rights with a source of the SGGA) need to be identified via a remark on the partial decrees for those rights. Edwards further asserts that the water rights that are within the designated geographical boundaries of water district 63-S, but do not have a source of the SGGA, likewise need to be identified via a remark stating that such right is not subject to District administration. For the reasons set forth below, this Special Master finds that the facts in the record do not demonstrate the absence of genuine issues of material fact regarding the necessity of remarks identifying SGGA (or non-SGGA) rights. Therefore, the matter cannot be decided on summary judgment.

(i) **Necessity of a remark identifying water rights subject to administration in District 63-S.** Pursuant to Idaho Code § 42-604, the Director is charged with the responsibility of dividing the state into water districts. Additionally, the Director is authorized to abolish water districts, revise the boundaries thereof, and combine water districts. *Id.* It is not the function of the SRBA Court to change the boundaries of water districts or to mandate that certain water rights are or are not subject to administration in a particular water district. That being said, the SRBA Court may perform the limited role of clearing-up any ambiguities as to whether the administrative orders of the Department in creating and defining a water district pertain to or effect particular water rights; provided that a remark as to water district administration is necessary pursuant to I.C. § 42-1411(2)(j).

Water District 63-S was created by a *Final Order Adopting Proposed Memorandum Decision and Order* (hereinafter “1989 Final Order”) issued by the Department on December 5, 1989. *Hofstetter Aff.*, Ex. B. The 1989 Final Order states “Water District 63-S, Stewart Gulch, is hereby created in connection with the use of the low temperature geothermal water resource.” *Id.* The 1989 Final Order goes on to describe the geographical boundaries of the Water District. The 1989 Final Order also has a clause exempting certain domestic uses.

On December 8, 1995, the Department issued a *Final Order* (hereinafter “1995 Final Order”) concerning a petition filed by the Terteling Trust No. 7 to modify the boundaries of Water District 63-S. The 1995 Final Order modified the geographical boundaries of Water District 63-S so as to exclude therefrom a well owned by the petitioner and known as the “Motorcycle well” or “TMC well.” Additionally, the 1995 Final Order states:

[Conclusion of Law No. 7] The low temperature geothermal wells that should remain subject to watermaster control include six wells situated down-gradient from the [hydrological] barrier. The regulated wells include those operated by the Petitioner (TWS [Windsock well]), the Golf Course (two wells), Flora (two wells), and Edwards (one well) as previously identified by legal location herein. Low temperature geothermal wells found within the District and utilized for domestic use defined in I.C. § 42-111 remain excused from watermaster regulation.

Hofstetter Aff., Ex. E, p. 7. Additionally, the 1995 *Final Order* orders:

This Final Order shall only govern the administration of low temperature geothermal ground water from the District until such time as the water rights are adjudicated and all other relevant matters necessary to define the rights are addressed in [the SRBA].

Id.

Turning to the *Director's Reports* for the above-captioned water rights, a few include remarks stating that the rights are subject to administration in Water District 63-S. Specifically, the *Director's Report* for water rights 63-14 and 63-31052 states:

This right is subject to regulation by the watermaster of Water District 63-S.

The *Director's Report* for 63-4037 states:

Use of water under this water right will be regulated by the watermaster of State Water District No. 63-S.

The *Director's Report* for water right 63-9758 states (under the "Explanatory Material" section):

Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 63S.

Based on the facts in the record set forth above, the inferences that can be drawn therefrom are inconclusive. The 1995 *Final Order* states that there are six wells subject to District administration. The 1995 *Final Order* does not specify the water right numbers that correspond with those wells, although the wells are described by the names of the owners (at the time) and also by legal description of the location of the well. The *Director's Reports* have remarks that correspond to some of these water rights, but not to others. For example, the *Director's Report* for 63-14 contains such a remark, but the *Director's Report* for 63-12 and 63-13 do not.

There is no factual inference that can be drawn from the fact that the *Director's Report* appears to treat similarly situated rights differently. There may be some explanation for this, but the explanation is not found in the record on summary judgment.

Accordingly, because all doubts as to conflicting inferences are to be resolved in favor of the non-moving party, Edwards' *Motion for Summary Judgment* is **denied** with respect to the necessity of a remark applicable to administration of SGGA rights in Water District 63-S.

(ii) Necessity of a remark identifying water rights NOT subject to administration in District 63-S. Edwards also asserts that water rights for the use of groundwater within the geographical boundaries of Water District 63-S that are not subject to administration thereunder should also be conditioned with a remark to that effect.

Water District 63-S may be somewhat anomalous compared to other water districts for the administration of ground water in that Water District 63-S does not include water rights that do not divert water from the SGGA, even though such rights are within the geographic boundaries of the District. This Special Master is not familiar with any law of the case or precedent in the SRBA regarding a remark stating that a particular water right is **not** within a water district, as is advocated here by Edwards. Edwards asserts that such a remark is necessary to avoid the uncertainty, ambiguity, and confusion that may result from the circumstance of having water rights within the boundaries of the District that are not subject to District administration. The record as it exists on summary judgment is insufficient to determine, as a matter of law, that such a remark in non-SGGA water rights is necessary. Therefore, Edwards' *Motion for Summary Judgment* is **denied** as to the inclusion of a remark to be included on the partial decrees for non-SGGA water rights to the effect that such rights are not subject to Water District 63-S administration. This matter will have to be determined at trial.

In connection with the issue regarding the identification of water rights subject to administration under Water District 63-S, and the related issue of whether a remark is necessary for such rights, this Special Master makes the following observation for purposes of assisting the parties as to the factual questions to be determined at trial. Namely, it should be noted that the *1995 Final Order* identifies the six wells that are presently subject to administration in Water District 63-S. To the extent that it is asserted

at trial that there are additional rights that should be included in Water District 63-S beyond those identified in the *1995 Final Order*, this Special Master is uncertain of the SRBA Court's authority to essentially "modify" the boundaries of the District, where such authority is statutorily assigned to the Department under I.C. § 42-604.

3. Edwards' Issue 3 – Effect of *Silkey Decree* on Post-*Decree* Water Rights.

(i) General Adjudication vs. Private Adjudication. Edwards asserts that all water rights with a source of the SGGA that came into existence after the entry of the *Decree* in *Silkey v. Tiegs* are subject to the provision in the *Decree* protecting the plaintiff Silkey's water rights to a flow of the wells under artesian pressure in the amount of 40 miners inches. Edwards asserts that the action in *Silkey* constituted a general adjudication of the SGGA source of water as opposed to a private adjudication of only the rights of the parties thereto, and hence subsequent appropriations from that source are to be administered pursuant to the terms of the *Silkey Decree* protecting the artesian pressure of the source. For the reasons set forth below this Special Master holds that the term in the *Silkey Decree* requiring the junior water rights of the defendant parties to be administered so as to provide 40 miners inches of artesian flow at the Silkey wells is not binding on future appropriations from the SGGA. Accordingly, summary judgment is **granted** in favor of Terteling on this issue.

As pointed out by Terteling in its *Memorandum Opposing*, the terms "General Adjudication" and "Private Adjudication" are now statutorily defined as follows:

42-1401A. Definitions. - . . . (5) "General adjudication" means 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.

(8) "Private adjudication" means 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.

(12) “Water system” includes all rivers, streams, lakes, springs, ground waters, or other sources within this state, including any river system or other source, as used in 43 U.S.C. section 666.

I.C. § 42-1401A. This Special Master notes that these statutory definitions were not enacted until 1986. Session Laws 1986, ch. 220, § 3, p. 558 and ch. 234, § 1, p. 645. However, these statutory definitions may be instructive as to the determination of whether *Silkey v. Tiegs* was a “general” as opposed to a “private” adjudication. As pointed out by Terteling in its *Memorandum Opposing*, there is no evidence in the record to demonstrate that all persons using water from the source at the time the action in *Silkey* was initiated were joined in the lawsuit. To the contrary, Terteling points out that at least one SRBA water right claim, 63-5195, has been recommended in the *Director’s Report* for the use of geothermal water with a priority date predating the January 1930 trial in *Silkey*.

In *State v. Hagerman Water Right Owners*, 130 Idaho 736, 947 P.2d 409 (1997), the Idaho Supreme Court held that a prior decree entered in a private adjudication is binding only upon the parties (and their privies) to that decree. The converse of this principle is that in a general adjudication the decree entered therein is binding upon all existing users of water from the adjudicated water system, irrespective of whether such water user was made a party to the action or not.¹ In other words, in a general adjudication, a water right that was not claimed in the adjudication is lost.

With respect to water rights that come into existence after the issuance of a decree in an adjudication of the rights on a given water source, Edwards’ argument is that if the adjudication was “general” as opposed to “private,” such post-decree rights are subject to the terms of the decree. In this Special Master’s opinion, this argument misses the mark. First, it should be noted that under the prior appropriation doctrine, subsequent water users on a source take subject to senior users. This is true whether the senior users rights have been decreed by a court or not, let alone whether such decree was entered in a general or private adjudication. The situation in the present case involves more than

¹ This assumes that such water user was provided the constitutionally required notice of the adjudication proceeding.

simply a junior water user appropriating a right subject to senior water users on the source. The Judge in *Silkey v. Tiegs* decreed and adjudged the elements of the five water rights involved – i.e. priority date, source, purpose of use, place of use, etc. In addition, however, the Judge decreed something that is beyond the scope of a defining the elements of the water rights – the Judge decreed that the defendants’ water rights shall be administered in a manner that the plaintiff Silkey’s wells flow at a rate of 40 miners inches. This provision in the *Silkey Decree* speaks to how the parties rights will be administered – i.e. it goes beyond simply defining and decreeing the elements of the respective rights of the parties. The argument advanced by Edwards is that in a general adjudication, a provision such as this defines and decrees something about the source proper – as opposed to defining the property interests of the various users in that source.

In support of its argument, Edwards points to the reported decision of the Idaho Supreme Court in the appeal of the *Silkey Decree*, wherein the Court stated: “This suit was brought by respondent to quiet title to certain waters appropriated by means of two artesian wells bored on her farm . . .” *Silkey v. Tiegs*, 51 Idaho 344, 347. Edwards asserts that the Supreme Court’s statement that the action was one for “quiet title” means that the action was a general adjudication. This Special Master cannot conclude, as a matter of law, that the Supreme Court’s use of the term “quiet title” means that the action was a general adjudication of all the rights claimed in the source. Additionally, even if the action in *Silkey v. Tiegs* were considered to be a general adjudication, Edwards has not cited to any Idaho law stating that a provision in a decree in that type of adjudication regarding the administration of the rights (as opposed to the elements of the rights) necessarily has prospective application on subsequent appropriators.

In Idaho, actions to determine the ownership, description, nature and extent of water rights have often been referred to as “quiet title” actions. See *Taylor v. Hulett*, 15 Idaho 265, 97 P. 37 (1908) (“An action to ascertain, determine and decree the extent and priority of [appellant’s] right partakes of the nature of an action to quiet title to real estate.”) (citing *Conant v. Deep Creek & Curlew Valley Irr. Co.*, 23 Utah 627, 90 Am. St. Rep. 721, 66 P. 188; *Rickey Land & Cattle Co. v. Miller & Lux*, 152 Fed. 11, 81 C. C. A. 207.) In labeling an action as a “quiet title”, the import is that the court obtains

jurisdiction over the *res* or subject matter of the action. As such, Edwards' argument apparently is that a quiet title action is an *in rem* proceeding. In an action that is strictly *in rem*, a decree can be made conclusive as to persons who are not joined in the action. In *State v. Hagerman Water Right Owners*, the Court quoted previous Idaho case law and stated:

Except for that limited class of actions which are strictly *in rem*, a decree is not, and cannot be made, conclusive as to the parties who are strangers to it. The same principle applies to **decrees rendered in proceedings to adjudicate rights to the use of water, they not being strictly *in rem***. The contention that one's rights can be affected by a decree to which he was a stranger is repugnant to a fundamental principle of our jurisprudence that no one will be judged until he has had a hearing. The operation of this principle cannot be defeated by the mere fact that it will put other parties to some added trouble or expense.

Id., quoting *Mays v. District Court of Sixth Judicial Dist.*, 34 Idaho 200, 207-08, 200 P. 115, 116 (1921)(bold added).

The action in *Silkey v. Tiegs* was not strictly an *in rem* proceeding, nor could it have been. A proceeding that is strictly *in rem* determines the interests in specific property against the whole world. This is distinguished from a proceeding *quasi in rem*, which determines the interests of particular persons in specific property. In a proceeding *quasi in rem*, where the persons claiming an interest in the property are known, they must be served with process just as in any other action. In the rare class of proceedings that are strictly *in rem*, all persons in the world cannot be served with process, and hence some other form of constructive notice is prescribed by the legislature for those types of cases. The Idaho legislature has gone down that road before concerning the adjudication of water rights. On March 11, 1903, the legislature approved an act entitled "An act to regulate the appropriation and diversion of the public waters and to establish rights to the use of such waters and the priority of such rights." The statute provided for constructive notice via publication of suits to adjudicate water rights. This provision of the act was held to be unconstitutional on the grounds that the Idaho Constitution requires personal service of such defendants. *Bear Lake County v. Budge*, 9 Idaho 703, 75 P. 614 (1904). The action in *Silkey v. Tiegs* was not a proceeding strictly *in rem*, and therefore it does not bind persons who were not parties thereto.

This Special Master understands Edwards' legal theory to be as follows: (1) the subject matter or *res* of the action in *Silkey v. Tiegs* was the entire source of water now referred to as the SGGA. (2) Since the action was a "general adjudication" or a "quiet title action" the *Silkey* Court had jurisdiction over the entirety of that *res*. (3) The *Silkey* Court decreed that water rights with a source of the SGGA need to be administered in a way that provides 40 miners inches of artesian flow at the Silkey wells. (4) Since the Court had jurisdiction over the entire *res* (the SGGA), all water rights taking from that source, including post-*Silkey Decree* rights, are subject to the Court's determination that the rights on the source be administered so as to maintain 40 miners inches of flow at the Silky wells.

This Special Master disagrees with Edwards' reasoning. First, as discussed above, the action in *Silkey v. Tiegs* was not strictly an *in rem* proceeding and as such it is not binding "on the world." More importantly, however, is the fact that the State of Idaho was not joined as a party to the action. Therefore the *Decree* cannot be effective as to future appropriations from the source for the reason that it cannot be effective as to unappropriated waters in the source.

Idaho Code § 42-101 states in part: "All waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the 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 therefrom for any beneficial purpose . . ." Additionally, "[t]he right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied . . ." Idaho Const., Art. XV, § 3. Pursuant to these provisions, the people of the state of Idaho have an interest in the unappropriated waters of the state; and the State of Idaho has a duty to supervise the appropriation and allotment of said water. The unappropriated waters of the state are waters to which future property interests of individual appropriators may attain. Even on a fully appropriated source, the public interest in that source is not extinguished for the reason that through forfeiture or abandonment of water rights in the source, such water reverts to the state and becomes subject to appropriation. I.C. § 42-222(2).

A judicial determination regarding some aspect of an entire source of water - as compared to a determination of the then existing private property rights previously appropriated in said source - necessarily carries with it a determination that affects the public's interest in the existing or potential future unappropriated waters in that source. Therefore, in order to bind the public as to that judicial determination, the State of Idaho would have to be brought in as a party to the action. In this way, the public's interest in the unappropriated waters of the state can be protected. There can be no question that the people of the state of Idaho have an interest in the unappropriated waters of the state. This interest includes the inchoate interests of those future appropriators of such unappropriated waters of the state.²

Additionally, in any lawsuit where it is asserted that the court should decide, adjudge or decree some aspect of the entire source - i.e. something that pertains not only to existing private property rights in the source but also to future appropriations in the source - the State of Idaho cannot fulfill its statutory duty under I.C. § 42-101 to supervise the appropriation of water from that source unless it is a party to the action. In the case of *Silkey v. Tiegs*, the State of Idaho was not joined as a party to the action; nor was the State's interests in the *res* (SGGA) determined via constructive notice of a strictly *in rem* proceeding.

In accordance with the forgoing, this Special Master holds that the Court's determination in *Silkey v. Tiegs* that the water rights of the defendant parties be administered so as to provide 40 miners inches of flow at the Silkey wells is not binding on post-*Decree* appropriations of water from that source.

(ii) The operation of I.C. § 42-226 relative to the artesian pressure in the SGGA. Edwards asserts that the diversion of its water right under artesian pressure at the

² It is interesting to note that under Edwards' legal theory, the existing users on a source could file a lawsuit styled as a general adjudication, and then agree to the entry of a consent decree that would adjudge something about the source itself, and thereby provide protection for themselves from future water uses from that source. For example, say the parties to such an action agreed to the entry of a judgment stating that the source was fully appropriated and no more appropriations could ever be made from the source. Under the statute cited above (I.C. § 42-101), the people of the state of Idaho are the owners of such unappropriated waters. It seems peculiar that a court could judicially determine the non-existence of

surface is protected under I.C. § 42-226. Edwards has two arguments in this regard: First, Edwards argues that the Ground Water Act (GWA), which was enacted after the Edwards' right was perfected, provides that groundwater rights appropriated prior to enactment are exempt from the from reasonable pumping levels pursuant to I.C. § 42-226. Secondly, Edwards argues that artesian pressure historically associated with the Edwards right is protectable under the explicit recognition in I.C. § 42-226 that the Director shall consider and protect thermal and/or artesian values to the extent that he determines such protecting is in the public interest. Each of these arguments is discussed below.

As to Edwards' argument that I.C. § 42-226 exempts pre-existing ground water rights from the reasonable pumping levels as may be established by the Director, this Special Master disagrees. Edwards bases its argument on the phrase in I.C. § 42-226 that states: "This act shall not affect the rights to the use of groundwater in this state acquired before its enactment." *Id.* Edwards asserts that if its right is not subject to such reasonable pumping levels, it is therefore protectable to historic levels – i.e. artesian pressure at the surface. Edwards points out that this issue was addressed in the recent district court case of *A & B Irrigation District v. IDWR*, Memorandum Decision and Order on Petition for Judicial Review, Minidoka County Case No. 2009-000647 (May 4, 2010). Therein it is stated:

The language of the 1987 amendment to I.C. § 42-226, which provides '[t]his act shall not affect the rights to the use of groundwater in this state acquired before its enactment' appears, when read in isolation, to exempt water rights existing prior to the enactment of the GWA from its application. However, when construing the Act in its entirety, and specifically taking into account the plain language of I.C. § 42-229, it becomes clear that the Legislature intended a distinction between the 'right to the use of ground water' and the '*administration* of all rights to the use of groundwater.' This distinction is significant in that the plain language of the Act makes clear that the Act applies retroactively to the later category unless specifically exempted.

Id. This Special Master has carefully reviewed the reasoning set forth in the Memorandum Decision cited above and concurs therewith.

unappropriated water in the source without the State of Idaho being joined as a party to protect the interests

As to Edwards' second argument - that the language of I.C. § 42-226 protects artesian and/or thermal values of a subterranean water source – Terteling points out in its *Memorandum Opposing* that it is the Director, not the SRBA District Court that is statutorily authorized to determine whether and to what extent thermal and or artesian values are to be protected in establishing reasonable pumping levels. This Special Master agrees with Terteling's argument in this regard. The protection of the thermal and/or artesian values of the SGGA is an issue that Edwards will need to address with the Department if and when the Department undertakes to establish reasonable pumping levels for the SGGA. The SRBA District Court cannot set such reasonable pumping levels nor can the Court dictate to the Department the value that should be assigned to the thermal and/or artesian values of the SGGA.

In accordance with the forgoing, this Special Master **grants** summary judgment in favor of Terteling as follows: (1) The SGGA water rights at issue herein that pre-date the enactment of the Groundwater Management Act are subject to reasonable pumping levels as they may be set by the Department;³ and (2) The extent to which the thermal and/or artesian values of the SGGA will be protected in the context of the establishment of reasonable pumping levels is a matter left to the discretion of the Department.

(iii) Protection of Edwards' artesian pressure pursuant to I.C. § 42-237a(g).

Idaho Code § 42-237a(g) states:

42-237a. Powers of the director of the department of water resources.

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 exercise and administration of all rights to the use of ground waters 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 right in said well is not there available. To assist the director of the department of water resources in the administration and enforcement

of owners of such unappropriated water.

³ This ruling is not intended to mean that such reasonable pumping levels as may be set by the Department will supersede the provision in *Silkey v. Tieg*s as to protection of the artesian pressure as between the parties and successors to that action.

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. 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 reasonable 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.

Id. Edwards asserts that under this statute the SRBA District Court can disallow the use of water by junior users of the SGGA so as to prevent mining of the aquifer. Edwards asserts that the statute, taken together with: (1) the regulation of use under *Silkey v. Tiegs*; (2) The regulation of withdrawals pursuant to the Stewart Gulch IDWR Action; and (3) the estimate of sustainable yield from the SGGA stated in the 2002 Settlement Agreement (*Hofstetter Aff. Ex. G*) – authorize the SRBA District Court to disallow junior water rights with a source of the SGGA.

This Special Master disagrees with Edwards' interpretation of I.C. § 42-237a(g). The statute is clearly directed at providing authorization for the Director to take such actions as are described therein. Edwards has not presented any legal theory or precedent that would allow a court to convert the discretionary authority assigned by statute to the Director into authority of the court to decree into perpetuity certain aspects of ground water management.

Edwards' argument regarding I.C. § 42-237a(g) is contrary to the discretionary management authority assigned by the legislature to the Director. The broader picture under the Ground Water Act is that the Director, in the administration of water rights, is to have flexibility into the future to adapt water rights administration between competing

uses of water. Such future adaptation and flexibility is necessary to deal with matters such as changes in patterns of water use, irrigation practices, climatic variability, increased scientific understanding of groundwater hydrology, future programs for recharge, etc. It is inconsistent with the discretion necessary for future adaptations for a court to decree some aspect of such administration into an inflexible and inadaptatable water rights decree. The SRBA Court is charged with the duty to ascertain and decree the statutorily defined elements of water rights, which are not thereafter subject to change except through transfer proceedings initiated in compliance with I.C. § 42-222, and or such legal doctrines such as forfeiture and abandonment. In the administration of water rights, the Director is not authorized to change or re-examine the basic elements of the right holders usufructory property right in the waters of the state. However, in the administration of water rights into the future, Idaho Code § 42-237a defines the discretionary, and hence adaptable, powers of the Director as prescribed by the legislature. The SRBA Court simply is not authorized to remove from the Director any aspect of this discretion by means of decreeing, for example, a pumping level in the SGGA.

In accordance with the foregoing, this Special Master holds that Idaho Code § 42-237a(g) does not provide any protection of the artesian pressure of the SGGA that is amenable to being incorporated into the provisions of a partial decree in the SRBA. While the statute may provide some protections to Edwards' continued diversion of water under artesian pressure, such protection will need to be pursued before the Department. Summary judgment is **granted** in favor of Terteling on this issue.

(iv) Necessity of a remark preserving issues of administration for future IDWR proceedings. Edwards asserts that: "[I]f the SRBA Court does not deem it necessary to address the protection of the Edward 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." Edwards has not proposed what it considers to be an appropriate remark.

The SRBA District Court is authorized to include in water right decrees “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). Terteling argues that Edwards has submitted no facts into the record establishing that such a remark is necessary. This Special Master agrees with Terteling that the factual basis for the inclusion of an unspecified remark sought by Edwards has not been established. Therefore, summary judgment is **denied** on this issue.

4. Edwards’ Issue 4 – Whether Terteling’s post-Silkey Rights are Subject to Silkey v. Tiegs Based on Principles of Res Judicata, Estoppel and Contract.

(i) **Collateral Estoppel.** Edwards asserts that the successors-in-interest to the water rights decreed in *Silkey v. Tiegs* (i.e. 63-12, 63-13, 63-14, 63-15, and 63-15) are bound by the *res judicata* effect of that proceeding. Edwards’ argument continues by asserting that Terteling is barred by principles of collateral estoppel (issue preclusion) as to asserting that the artesian pressure in the SGGA is not protected. Edwards’ argument in this regard stems from Terteling being owners of both the senior Silkey rights and junior rights in the SGGA that came into existence after the decree was entered in *Silkey v. Tiegs*. Edwards’ argument also relies on the assertion that the issue of protection of artesian pressure in the SGGA was fully litigated in *Silkey v. Tiegs*, “and the issue was decided in favor of the protection of artesian pressure.” *Memo in Support*, p. 26.

Terteling counters this argument by asserting that the parties in *Silkey v. Tiegs* did not litigate the very broad issue of “the protection of artesian pressure” and further the Court in *Silkey* did not determine that all water rights that were ever going to divert water from the SGGA must be limited. *Memorandum Opposing*, p. 17. Terteling goes on to state:

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.

Id. This Special Master agrees with Terteling’s analysis of this issue and holds that Terteling is not estopped to assert its junior SGGA water rights in the SRBA. Summary judgment is **granted** in favor of Terteling in this regard.

(ii) Quasi-Estoppel and Judicial Estoppel. Edwards argues that Terteling is estopped to assert its junior SGGA water right claims in the SRBA by reason of quasi-estoppel and judicial estoppel. First, as to quasi-estoppel, that doctrine applies where 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). In *City of Sandpoint v. Sandpoint Independent Highway Dist.*, 126 Idaho 145, 151, 879 P.2d 1078 (1994), the Idaho Supreme Court stated:

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 from which it has already derived a benefit.”

Id. Edwards points out that over the years it has complied with the burdensome use restrictions imposed by the *Silkey* Court on its water right. Edwards assert that it would be unconscionable to allow Terteling to divert water under its much junior rights from the SGGA when the defendant parties to *Silkey v. Tiegs* have been restricted in their use.

This Special Master disagrees with Edwards’ analysis regarding the application of the doctrine of quasi-estoppel. First, it should be noted that the Edwards right was put under the use restrictions pursuant to the order of the Court in *Silkey v. Tiegs*. Such use restrictions would have been applicable irrespective of any post-*Silkey Decree* water rights from the SGGA coming into existence. Accordingly, any such post-*Silkey Decree* rights cannot be said to have caused a disadvantage to the party now seeking estoppel (Edwards). Additionally, there is nothing in the record that would establish that Edwards

has heretofore been disadvantaged by the existence or use of any post-*Silkey Decree* water rights from the SGGA. Edwards' theory with respect to quasi-estoppel appears to be based upon some speculative future disadvantage to its rights, at the expense of an advantage to such junior rights. As pointed out by Terteling, the water levels in the SGGA are an administrative issue to be resolved before the Department pursuant to its statutory responsibility under the Ground Water Act. It is beyond the scope of the SRBA to establish reasonable pumping levels for the aquifer. Edwards' quasi-estoppel argument assumes some future disadvantage occasioned by some future determination by the Department that may affect the Edwards' right *vis a vis* the establishment of reasonable pumping levels.

Turning now to the doctrine of judicial estoppel, Edwards asserts that Terteling, as successor-in-interest to the Silkey rights, cannot be allowed to take a position in the SRBA that is inconsistent with the position taken by Silkey in the prior judicial action. The doctrine of judicial estoppel prohibits a party from taking one 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). The doctrine of judicial estoppel is an equitable doctrine that protects the dignity of the judicial process. *Indian Springs LLC v. Indian Springs Land Investment*, 147 Idaho 737, 748, 215 P.3d 457, 468 (2009). The application of the doctrine is discretionary with the court. *Sword v. Sweet*, 140 Idaho 242, 252, 92 P. 3d 492 (2004).

Based upon the *Decree* entered in *Silkey v. Tiegs*, it can be inferred that that plaintiff Silkey took the position that her water rights were deliverable by means of artesian pressure. It can further be inferred that defendant Tiegs took the opposing position. It can also be inferred that defendant Edwards took a position opposing that of Silkey in the original action. In the SRBA, Terteling is the successor-in-interest to both the Silkey rights and the Tiegs right, and the Edwards Family LLC is the successor-in-interest to the Edwards right. Edwards currently takes the position that the artesian pressure of the SGGA is protected or protectable under the various legal theories discussed herein. It occurs to this Special Master that Edwards could just as easily be taking the opposite position in the SRBA, and that such a position would likely be

consistent with the position taken by its predecessor-in-interest. If that were the case, Edwards could point to Terteling in the SRBA proceeding and assert that Terteling is judicially estopped to take a position different from that taken by its predecessor-in-interest Tiegs. It cannot therefore be said as to the positions currently taken by Terteling and/or Edwards in the SRBA that the dignity of the judicial process is offended. Accordingly, in an exercise of discretion, this Special Master concludes on summary judgment that Terteling is not judicially estopped to assert its post-*Silkey Decree* water rights in the SRBA.

In accordance with the foregoing, this Special Master holds that Terteling is not precluded via quasi-estoppel or judicial estoppel to assert its junior SGGA water rights in the SRBA. Summary judgment is **granted** in favor of Terteling in this regard.

(iii) **Contract.** The 2002 Settlement Agreement states in the “recital” section of that Agreement, that: “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.” *Hofstetter Aff.* Ex. G. Edwards asserts that under this statement, Terteling is contractually obligated to take no more than a cumulative total of 400 AFA from the SGGA (650 less Terteling’s 400 divertible under 63-12, 63-13, and 63-15, and Edwards’ 250 divertible under 63-14).

The question of whether the terms of a contract are ambiguous is a question of law. *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 308, 160 P.3d 743, 747 (2007). Recitals in contracts are merely explanations of the circumstances surrounding the execution thereof. *See* 17A C.J.S. Contracts § 317. As such, recitals are not considered binding contractual terms unless referred to in the operative provision of the contract. *Id.*

This Special Master has reviewed the operative portion of the 2002 Settlement Agreement and finds it to be clear and unambiguous. Nowhere in the operative portion of the Agreement is the above-quoted recital referred to, nor is there any indication that Terteling agreed to forgo diversion of water under its junior rights pursuant to the estimate. Likewise, there is nothing in the operative portion of the Agreement that could

be construed as an agreement by Terteling that it would not pursue decree of such junior rights in the SRBA.

This Special Master finds, as a matter of law, that the 2002 Settlement Agreement is unambiguous, and further that nothing therein converts the estimate of sustainable aquifer yield set forth in the recital into a contractual obligation on the part of Terteling. Accordingly, summary judgment is **granted** in favor of Terteling on this issue.

B. Terteling's Motion for Summary Judgment.

In its *Motion for Summary Judgment*, Terteling seeks dismissal of Edwards' objection as to a subset of the above-captioned water rights. Terteling seeks dismissal of Edwards' objection with respect to the Edwards' assertion that the partial decrees for this group of Terteling claims should be conditioned with a remark which states: "The diversion and use of geothermal water is not authorized under this right."

The objection filed by Edwards has two parts which essentially assert that if the rights are diverting water from the SGGA then such rights should be disallowed; however, if such rights are not diverting from the SGGA, then they should be conditioned with a remark. As to the first scenario, Terteling asserts that none of the rights subject to its *Motion for Summary Judgment* divert water from the SGGA. Terteling makes the factual assertion that: "Each of the water rights recommended by IDWR in the above-captioned subcases entitles Terteling to divert water for various purposes, including domestic, stockwater, aesthetic, wildlife and irrigation, but not heating." *Terteling Memorandum in Support*, p. 2. The language used by Edwards in its objection can be read to assert that there is a possibility that some of all of these rights may in fact be diverting from the SGGA. The fact that the *Director's Report* does not list heating as a purpose of use is not dispositive of the fact that water is not diverted under the right from the SGGA. *The Director's Report* is the departments recommendation and is presumptively correct, but Edwards here is asserting that the right may be diverted from the SGGA. As to any of these water rights that may be diverted from the SGGA, Edwards is not seeking inclusion of a remark, but rather disallowance of the right.

Therefore, it is possible that the issue of whether such rights should include a remark is moot to the extent the right is in fact diverted from the SGGA.

Terteling's *Motion for Summary Judgment* goes to the second half of Edwards' objection – i.e. that the water rights not diverted from the SGGA should include a remark stating so. Terteling's argument as to why such a remark cannot be necessary as a matter of law can be summarized as follows: First, there is no specific requirement in the statutes or otherwise in Idaho law that water rights be defined as not "authorized to divert geothermal water." Secondly, such a remark is not "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). Terteling asserts that none of these statutory basis apply. Terteling points out that it does not make sense to describe a water right by what it is not. Terteling next points out that there is no element that can be clarified by such a remark, because "heating" would be the only possibility of an element that might be clarified by such a remark, and none of the subject rights are recommended with a heating purpose of use. Lastly, Terteling asserts that such a remark as to water rights that are not authorized to divert geothermal water is not necessary for administration of the rights by the director.

This Special Master disagrees with Terteling that this issue can be decided on summary judgment. Terteling may well be correct that the remark proposed by Edwards is not necessary under Idaho Code § 42-1411(2)(j), but there are material issues of fact in this regard that preclude deciding the matter on summary judgment.

As to Terteling's argument that it is not proper to define a water right by what it is not, this Special Master thinks that Terteling is construing Edwards' objection too narrowly. Edwards proposed in its objection that the remark it seeks should state: "The diversion and use of geothermal water is not authorized under this right." Terteling points out that the term "geothermal water" is not defined by statute in Idaho, unlike the terms "low temperature geothermal resource" and "geothermal resource." I.C. § 42-230. Under the concept of notice pleading, this Special Master views the language in Edwards objection much more broadly. Such language could put Terteling on notice that Edwards is seeking clarification that the rights that do not divert from the SGGA need to be

identified as such. This could be accomplished in many ways (if it is in fact necessary to do so) such as further defining the source with a remark that describes the source more particularly than simply “groundwater”; or perhaps a remark that states that the water rights are not administered by the watermaster for Water District 63-S even though such right is within the geographical boundaries of the district. It is the opinion of this Special Master that Edwards is not stuck with the precise language set forth in its objection in the event that Edwards succeeds at trial to prove that such a remark is necessary.

As to Terteling’s assertion that there is no element of the subject rights that could possibly be clarified for the reason that none of the rights are recommended with a heating purpose of use, this Special Master notes that if “heating” were a purpose of use, the Objection filed by Edwards seeks disallowance, not a remark. Furthermore, this Special Master takes note of a similar situation found in the *Director’s Report* for water right 63-4037. In the *Director’s Report* for that right heating is not a purpose of use either – the only purpose of use is stated to be irrigation. However, the *Director’s Report* recommends that the use of water for irrigation be clarified or defined by a remark stating that low temperature geothermal water cannot be used for irrigation unless it is first used for heating purposes. In the opinion of this Special Master, the situation in 63-4037 - where the *Director’s Report* essentially says that the right holder can not use the water for irrigation unless it is first used for heating - is somewhat analogous to the remark sought by Edwards essentially seeking to confirm that water under the subject rights cannot be used for the described purposes if in fact the water is “geothermal water.”

Finally, this Special Master takes judicial notice of the numerous subcases where parties have settled similar or identical objections filed by Edwards. In those settlements, the parties agreed to a remark stating in essence that the water right does not authorize diversion or use of low temperature geothermal resource or other geothermal resource. The department concurred with those settlement agreements. While the Department’s concurrence is not dispositive that such a remark is necessary, such concurrence at a minimum is a fact from which it can be inferred that such a remark might be necessary. Such factual inferences are to be construed in favor of the non-moving party.

In accordance with the foregoing, Terteling's *Motion for Summary Judgment* is **denied**. Edwards shall have the opportunity at trial on the matter to put on its proof as to why a 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" pursuant to Idaho Code § 42-1411(2)(j).

VII. ORDER

In accordance with the foregoing, the respective motions for summary of the parties are granted and/or denied as set forth herein.

Dated Aug. 23, 2010



THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON MOTION TO STRIKE MEMORANDUM DECISION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT was mailed on August 23, 2010, with sufficient first-class postage to the following:

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