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DEPARTMENT OF
WATER RESOURCES

CHARLES L. HONSINGER (ISB #5240)
RINGERT CLARK CHARTERED
455 S. Third Street, P.O. Box 455
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
Attorneys for Objector The Terteling Company, Inc.

**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. 63-00014
Case No. 39576	)	
	)	
	)	PROPOSED FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
	)	
_____	)	

COMES NOW Objector The Terteling Company, Inc., (hereinafter "Terteling") by and through its attorneys of record, Ringert Law, Chartered, and hereby submit these Proposed Findings of Fact and Conclusions of Law in the above-captioned subcase for the Special Master's consideration.

FINDINGS OF FACT

A. Claim to Water Right No. 63-00014

1. Paul W. Edwards claimed water right no. 63-00014 in the Snake River Basin Adjudication on May 1, 1989 with the following relevant elements:
 - A. Priority Date: November 22, 1926
 - B. Source: Groundwater

COPY

C. Point of Diversion: T04N R02E, Section 29 SESWNE

D. Purpose of Use: Irrigation - .20 cfs; Heating - .84 cfs

E. Season of Use: Irrigation - 3/15 - 11/15; Heating - 1/1 -12/31

F. Quantity: .84 cfs

See Claim to Water Right No. 63-14.

2. Mr. Edwards' May 1, 1989 claim also included the following remark: ".3 CFS FROM 10/1 TO 4/1. 4/1 TO 10/1 .4 CFS OR SO MUCH THEREOF THAT WILL NOT DEplete PLAINTIFFS WELL BELOW .8 CFS." *Id.*

3. On January 14, 2005, Edwards Family, LLC filed its Amended Notice of Claim to Water Right No. 63-14. The claim was signed by Garnette Monie on behalf of Edwards Family, LLC and was amended from the original May 1, 1989 claims filed by Mr. Edward in the following relevant respects:

A. Purpose of Use: Irrigation - .33 cfs; Heating - .84 cfs; Commercial - .84 cfs.

B. Season of Use: Commercial - 1/1 -12/31.

See Amended Notice of Claim to Water Right No. 63-14.

4. The remark in the original claim filed by Mr. Edwards to the effect that ".3 CFS FROM 10/1 TO 4/1. 4/1 TO 10/1 .4 CFS OR SO MUCH THEREOF THAT WILL NOT DEplete PLAINTIFFS WELL BELOW .8 CFS." was deleted from the January 14, 2005 Amended Claim filed by Ms. Monie on behalf of Edwards Family, LLC.

5. Both the May 1, 1989 original claim to water right no. 63-00014 filed by Paul W.

Edwards, and the January 14, 2005 amended claim to water right no. 63-00014 listed the basis of the water right as “decree”, and referenced the Silkey v. Tiegs Decree, Ada County Case No. 11748 (August 19, 1930).

B. The Terteling Company, Inc. Water Rights

6. The Terteling Company, Inc. claimed water right numbers 63-00012, 63-00013 and 63-00015 in the Snake River Basin Adjudication for, among other purposes, heating.
7. The Idaho Department of Water Resources recommended water right numbers 63-00012, 63-00013 and 63-00015 in the Snake River Basin essentially as claimed by The Terteling Company, Inc.

C. Silkey v. Tiegs Decree

8. The Ada County, Idaho District Court of the Third Judicial District issued its Decree in the case of Silkey v. Tiegs, Edwards and Ryan on June 13, 1930 (the “*Silkey Decree*”). See IDWR Exhibit 2.
9. The *Silkey Decree* resulted in the allotment of groundwater to the parties to the decree, including: (1) Thomas F. Edwards, the predecessor-in-interest in water right no. 63-00014 to Paul W. Edwards and Edwards Family, LLC; (2) Frances Silkey, the predecessor-in-interest in water right nos. 63-00012 and 63-00013 to The Terteling Company, Inc.; and (3) H.W. Tiegs, the predecessor-in-interest in water right no. 63-00015 to The Terteling Company, Inc. *Id.*
10. The *Silkey Decree* resulted in the decree to Thomas F. Edwards of water right no. 63-00014 in the amount of “forty-two miners’ inches of water . . . for irrigation, domestic stock and heating purposes with priority dating from November 22, 1926.”

The water right was decreed as appurtenant to Thomas F. Edwards' lands. *Id.*, ¶3.

11. Paragraph 7 of the *Silkey Decree* provides in relevant part as follows:

During the period from October 1st of each year to April 1st of the following year, the defendant Edwards may be permitted to flow from his said well and use for beneficial purposes fifteen miners inches of water; from April 1st to October 1st of each year, said defendant Edwards may be permitted to flow from his said well and to use for beneficial purposes twenty miners inches of water or so much thereof as will not deplete the flow of plaintiff's wells below forty miners inches. . . . it is hereby further determined and decreed that until further order of the court, no water can without injury to plaintiff's prior right to the use of said water to the extent herein decreed be permitted to flow or be used from the wells of any of the defendants in excess of the amount herein permitted to be used by the defendant Edwards.

Id., ¶7. (Emphasis added).

12. Paragraph 10 of the *Silkey Decree* provides in relevant part as follows:

The enforcement of this decree is committed . . . pending the creation . . . of a water district comprising the source of supply of the water rights herein decreed, to said Commissioner of Reclamation who is hereby appointed a commissioner of this court for that purpose Said Commissioner is hereby directed to regulate the flow of the wells of the parties hereto in accordance with the terms hereof.

Id., ¶10.

13. Paragraph 11 of the *Silkey Decree* provides in relevant part as follows:

The court retains jurisdiction of this cause for a period of two years from this date to adjust the allowance of water permitted to be used from the wells of the defendants, 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, or any of them, without infringement of the rights herein decreed in accordance with their respective priorities.

Id., ¶11.

D. Agreement Between Edwards Family, LLC and The Terteling Company, Inc.

14. On or about December 20, 2000, The Terteling Company, Inc. filed an Application for Transfer of Water Right no. 68558 with the Idaho Department of Water Resources. The Application sought to add alternate points of diversion to water right nos. 63-12, 13 and 15 for the use of the rights at an additional location. *See* Edwards Exhibit 9.
15. On or about December 22, 2002, Edwards Family, LLC filed a protest to Application for Transfer of Water Right no. 68558 with the Idaho Department of Water Resources. *See* IDWR Exhibit 3, p. 2.
16. On January 24, 2002, The Terteling Company, Inc. and Edwards Family, LLC entered into a written agreement to settle Edwards Family, LLC's protest to The Terteling Company, Inc.'s Application for Transfer of Water Right no. 68558 (the "Settlement Agreement"). *See* IDWR Exhibit 3.
17. The Settlement Agreement provides that "Edwards shall divert a maximum of 250 AFA from the Stewart Gulch Geothermal Aquifer under the Edwards Right." *See* IDWR Exhibit 3, ¶4.
18. The Settlement Agreement provides that "Terteling shall divert a combined maximum total of 400 AFA from the Stewart Gulch Geothermal Aquifer under the

Silkey and Tiegs Rights.” *Id.* As discussed in paragraph 9 hereinabove, the “Silkey Rights” are water right nos. 63-12 and 63-13, and the “Tiegs Right” is water right no. 63-15.

19. The Settlement Agreement also provides that the “Parties agree that their respective SRBA claims shall be consistent with the terms of this Agreement, including the total annual combined diverted volume of 400 AFA for the Silkey and Tiegs Rights and the total annual diverted volume of 250 AFA for the Edwards Right.” *See* IDWR Exhibit 3, ¶8.

E. Recommendation of Water Right No. 63-14

20. The Idaho Department of Water Resources issued a Director’s Report for Water Right No. 63-14 recommending the water right for decree with the elements essentially as claimed pursuant to the Amended Claim described in paragraph 4 hereinabove. *See* IDWR Exhibit 1.
21. The Idaho Department of Water Resources placed a volumetric limitation of 250 AFY (acre feet per year) in its recommendation of Water Right No. 63-14. *Id.*

F. Objections to Water Right No. 63-14

22. The Terteling Company, Inc. filed an Objection in the Snake River Basin Adjudication to water right no. 63-14, objecting to the quantity element, specifying that it should be “[l]imited to the quantities listed in” the *Silkey Decree*; and objecting to the period of year element, specifying that it should be “[a]s specified in” the *Silkey Decree*.
23. Edwards Family, LLC also filed an Objection in the Snake River Basin Adjudication

to water right no. 63-14, objecting to the quantity element, and specifying that the “annual volume limitation only should appear in the “Other Provisions” section in reference to private agreement.”

24. Evidence and testimony were taken at the trial of this matter on September 27 and September 28, 2010.

CONCLUSIONS OF LAW

1. Neither The Terteling Company, Inc. nor Edwards Family, LLC is asserting through this litigation that the annual volumetric limitation placed upon Water Right No. 63-14 should be any less or any greater than 250 AFY as it is currently recommended by the Idaho Department of Water Resources. In fact, both parties are precluded from making such assertions by the following language from their 2002 Settlement Agreement:

The Parties on behalf of themselves and any related individuals or entities agree that they will not assert or argue in the SRBA . . . that total annual diverted volume for the Edwards Right is greater or less than 250 AFA.

2. The Terteling Company, Inc.’s position with respect to its Objection is that the volumetric limitation of 250 AFY placed on the director’s recommendation of Water Right No. 63-14 by the Idaho Department of Water Resources does not reflect the seasonal limitations of .30 cfs(15 miner’s inches) from 10/1 to 4/1 (the “Winter Months”) and .40 cfs (20 miner’s inches) from 4/1 to 10/1 (the “Summer Months”) that were placed on that right by the *Silkey* Decree.
3. Vicky Music is a Senior Water Resource Agent with the Idaho Department of Water

Resources. Reporter's Transcript, Subcase Nos. 63-12 *et. al.* (hereinafter "Tr."), p. 40, lns. 9 - 14. Ms. Music is an expert in the investigation and recommendation of claims in the SRBA. Tr. p. 49, ln. 21 - p. 50, ln.4. Ms. Music prepared the director's report for water right no. 63-14. Tr. p. 50, ln. 21 - p. 52, ln. 19.

4. Ms. Music testified that a diversion rate of 20 miner's inches for the six Summer Months would generate a volume of 145.2 acre-feet, and that a diversion rate of 15 miner's inches for the six Winter Months would generate a volume of 108.3 acre-feet. Tr. p. 71, ln. 1 - p. 72, ln.20. The total of these two volumes is 253.5 acre-feet. Tr. p. 72, ln. 23 - p. 73, ln. 2.
5. Ms. Music testified that although she conducted many hypothetical calculations of the property volumetric limitation to impose upon water right no. 63-14, the sole basis of her recommendation of the 250 acre-feet per year volumetric limitation on water right no. 63-14 was the limitation on that right of 250 acre-feet per year contained in the Settlement Agreement between The Terteling Company, Inc. and Edwards Family, LLC. Tr. p. 64, ln. 4 - p.65, ln. 6.
6. Because Ms. Music did not see that seasonal volumetric limitations imposed by the *Silkey* Decree were addressed either in the Settlement Agreement or in any of the myriad number of documents she reviewed, she assumed they were temporary and did not address them. Tr. p. 65, ln. 18 - p. 66, ln. 9; Tr. p.73, ln. 8 - p. 74, ln. 7.
7. However, Ms. Music admits that there was nothing in either the documents she reviewed to prepare the recommendation or the Settlement Agreement that precluded the imposition of the seasonal volumetric limitations imposed by the *Silkey* Decree.

Tr. p. 74, lns. 8 - 19; Tr. p. 75, ln. 19 - p. 77, ln. 12; Tr. p. 78, lns. 1 - 6.

8. After issuance of the *Silkey* Decree, the defendant Thomas F. Edwards (the predecessor-in-interest of Edwards Family, LLC in water right no. 63-14) appealed the case in part on the grounds that the District Court erred in imposing the “seasonal limitations” on water right no. 63-14. *Silkey v. Tiegs*, 51 Idaho 344, 354 (1931) (“*Silkey I*”). The Idaho Supreme Court responded to Thomas F. Edwards’ complaint by stating that

this provision is not final and is in effect an administrative one, subject to change by the trial court in case it should later develop that said appellant is entitled to more or less than the amounts so permitted to flow from his well.

Silkey I, at 355 (emphasis added). The Supreme Court affirmed the *Silkey* Decree with the exception of its supplementation with a minor, unrelated clause. *Silkey I*, at 359.

9. Later, before the expiration of the two year period within which the District Court retained jurisdiction to adjust the amounts to be received by the parties to the case, the defendants in *Silkey v. Tiegs* petitioned the trial court to retain its jurisdiction for the purpose of continuing measurements and tests and, based upon the alleged results therefrom, to allow defendants to divert additional water. *Silkey v. Tiegs*, 54 Idaho 126, 127 (1934) (“*Silkey II*”). The trial court denied the motion, thereby indicating that “he was not satisfied the provisional tests entitled [the defendants] to more water, without interference with [plaintiff’s] prior right.” *Silkey II*, at 128. The Supreme Court affirmed the trial court, stating that the proof submitted by the defendants in

support of their motion was

not sufficient to show that any good, without possible continuing hazard to [plaintiff Silkey's] rights, would be accomplished by continuing the provisional portion of the decree, even though the affirmance of the former decree was not an adjudication that two years was the maximum period for such study, fixing that as the limit, which point we do not decide, as unnecessary.

Silkey II, at 129.

10. In short, the Idaho Supreme Court in *Silkey I* affirmed that it was the trial court that retained jurisdiction over the seasonal limitations provision imposed upon the Edwards right in the *Silkey* Decree, and that it was up to that court to change the seasonal limitations or not as it saw fit. In *Silkey II* the Idaho Supreme Court determined that the trial court had the jurisdiction to determine that he would neither lift the burdens imposed upon the defendants by the *Silkey* Decree, including the seasonal limitations imposed upon Edwards, nor permit those burdens (again including the seasonal limitations imposed upon Edwards' water right no. 63-14) to remain provisional instead of permanent for the purpose of continued studies after what was already two years of study at that time.
11. There is nothing in the record to indicate that Thomas F. Edwards, or his successor(s)-in-interest, including Edwards Family, LLC ever again made any attempt to have the seasonal limitations imposed by the *Silkey* Decree upon water right no. 63-14 lifted.
12. A private adjudication such as that resulting in the *Silkey* Decree binds parties and privies to that adjudication. *State v. Hagerman Water Right Owners (in Re SRBA*

Case No. 39576), 130 Idaho 736, 742 (1997).

13. “Every person is privy to a judgment or decree who has succeeded to an estate or interest held by one who was a party to such judgment or decree, if the succession occurred after the bringing of the action.” *Smith v. Kessler*, 22 Idaho 589, 594 (1912).
14. Edwards Family, LLC is privy to the *Silkey* Decree because it succeeded to the interest of Thomas F. Edwards, who was a party to that decree, and succeeded to that interest well after the adjudication resulting in the *Silkey* Decree was commenced. Accordingly, Edwards Family, LLC is bound by the limitations imposed by the *Silkey* Decree, including the seasonal limitations at issue in this proceeding.
15. At trial, during opening argument, in response to questioning from the Special Master regarding what procedural mechanisms would have been available for parties to the *Silkey* Decree to address its administrative provisions (including the seasonal limitations imposed upon Edwards) counsel for Edwards Family, LLC explained her client’s position *vis a vis* the *Silkey* Decree and subsequent appellate proceedings:

Your Honor, one of the things we’re going to - I mean maybe it’s not appropriate for submitting it to evidence, but I plan to, is the two supreme court - or put into evidence the two supreme court decisions concerning *Silkey v. Tiegs*. And also -

And they illustrate that there was an attempt by Edwards and others to extend the provisional period of two years to - And there was data submitted to the court; and we’re going to submit that in the record, too.

And that - and that the supreme court - Or the

district court ended up deciding to make the administrative provisions final and to end the provisional period. And then the supreme court upheld that decision, despite the additional evidence that was submitted at the time.

And so certainly going into the water district proceedings, the call that was made in the 19- late 19802, 1989 by former owners of the Silkey rights, the Hunt Brothers, and the decisions that the department issued from that, indicate that everyone was under the impression that the Silkey v. Tiegs administrative provisions had been made final and remained in effect pending the SRBA.

And then looking at the department's orders, I mean they specifically said, "We're going to administer this aquifer based on Silkey v. Tiegs until the SRBA Court rules on this." So I mean I'm not really answering your question, and I'd like to reserve an answer for the briefing, or an opportunity to research your question, but I'm just stating factually what - what I think -.

Tr. p. 36, ln. 11 - p. 37, ln. 15.

16. Edwards Family, LLC's counsel's representations regarding the effect of the "provisional" limitations of the Silkey Decree, including the seasonal limitations imposed upon Edwards Water Right No. 63-14 reflects the legal analysis outlined hereinabove; Edwards Family, LLC appears to be in accord with that analysis.

CONCLUSION

17. Because Edwards Family, LLC is in privy with Thomas F. Edwards, a party to the Silkey Decree, the provisions of that decree, including the seasonal limitations imposed upon water right no. 63-14, are enforceable against Edwards Family, LLC.
18. Because the diversion rate of 20 miner's inches specified in the *Silkey* Decree for the

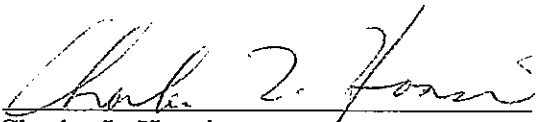
period between 4/1 and 10/1 would generate a volume of 145.2 acre-feet, and the diversion rate of 15 miner's inches specified in the *Silkey* Decree for the period between 10/1 and 4/1 would generate a volume of 108.3 acre-feet, Water Right No. 63-14 is limited to those volumes during those respective periods.

19. Due to the fact that the 2002 Settlement Agreement between The Terteling Company, Inc. and Edwards Family, LLC very clearly and very specifically limits the annual volume for water right no. 63-14 to 250 acre-feet, the annual volume limitation recommended by the Idaho Department of Water Resources remains in place.

IT IS SO RECOMMENDED TO THE DISTRICT COURT.

Dated this 29th day of October, 2010.

RINGERT LAW, CHARTERED

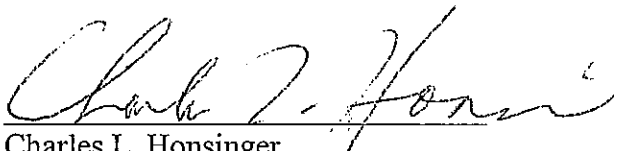
By: 
Charles L. Honsinger

CERTIFICATE OF MAILING

I hereby certify that service of the within and foregoing document was made this 29th day of October, 2010, by mailing a copy thereof, postage prepaid, to each of the parties listed below.

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

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


Charles L. Honsinger