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

	)	Subcase No. 63-14
	)	
In Re SRBA	)	PROPOSED
	)	
Case No. 39576	)	SPECIAL MASTER'S REPORT
	)	AND RECOMMENDATION
	)	
	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW

After settlement of all other issues, a trial on the volume element for Water Right No. 63-14 was held in Boise, Idaho, on September 27 and 28, 2010. The Special Master, having heard the testimony of the witnesses, having reviewed the other evidence, and having considered applicable law, makes the following findings and conclusions:

I.
FINDINGS OF FACT

1. *Silkey v. Tiegs*, Ada County Case No. 11748 (June 13, 1930), involved the call for geothermal water by the holder of Water Right No. 63-12 and 63-13 (the "Silkey Rights") against the holders of junior geothermal Water Right Nos. 63-14 (the "Edwards Right"), 63-15 (the "Tiegs Right") and 63-16 (the "Ryan Right"). The holder of the Silkey Rights brought the action in order to ensure delivery of the Silkey Rights by artesian pressure. The *Silkey v. Tiegs* Court decreed the various elements of the respective rights and also imposed administrative limitations on the junior Edwards, Tiegs and Ryan Rights for a provisional period of two years. These administrative limitations prohibited any diversions under the Tiegs and Ryan Rights seasonally restricted diversions of Water Right No. 63-14:

The amount of water that may be permitted to flow from the wells of the defendants is hereby provisionally fixed and limited 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 purpose twenty miners inches of water or so much thereof as will not deplete the flow of plaintiff's wells below forty miners inches.

2. Later, the provisional nature of the *Silkey v. Tiegs* administrative provisions was terminated. *See Silkey v. Tiegs*, 51 Idaho 344, 5 P.2d 1049 (1931); *Silkey v. Tiegs*, 54 Idaho 126, 28 P.2d 1037 (1934).

3. In the early years after *Silkey v. Tiegs*, the Edwards Right was used in connection with the Edwards family's truck farming operations. Truck farming involved growing fruits

and vegetables and then delivering them to customers by truck. Originally, the Edwards Right appears to have been used heavily for irrigation and, also, for heating. Today, the Edwards Greenhouse business which continues to rely on the Edwards Right utilizes the geothermal water largely for heating purposes in connection with raising plants and flowers in its greenhouses. While the geothermal water is used by Edwards Greenhouse year around, the need and use for the geothermal water now is the greatest during the winter months.

4. In the late 1980's, the then holder of the Silkey Rights instituted a call for water. These proceedings before the Idaho Department of Water Resources ("IDWR") resulted in the creation of Water District 63-S for the Stewart Gulch Geothermal Aquifer ("SGGA"). By this time, rights additional to those decreed in *Silkey v. Tiegs* had been developed in the SGGA. These additional rights included The Terteling Company, Inc.'s Water Right Nos. 63-3603 and 63-7595. Other water rights involved in the IDWR proceeding included Quail Hollow Golf Club's Water Right Nos. 63-4037 and 63-9758.

5. None of the IDWR Orders which issued from the Water District 63-S proceedings had any references to seasonal limitations on the Edwards Right. However, there were findings that diversions by Quail Hollow during the late irrigation season had contributed to the aquifer conditions culminating in the call. Testimony by Ken Neely, the current Water Master for Water District 63-S, confirmed that during this period of time, aquifer levels were generally the lowest during August and September, late in the irrigation season.

6. In 1997, the Terteling Company, Inc. purchased the Silkey and Tiegs Rights and the associated land located at 36th Street and Hill Road in Boise. Shortly thereafter, The

Terteling Company filed Transfer Application No. 68558 to add the Terteling Ranch property, approximately two miles north, to the place of use of the Silkey and Tiegs Rights and, also, to add the pumped geothermal Windsock well at the Terteling Ranch as a point of diversion for the Silkey and Tiegs Rights. The Edwards Family LLC protested this Transfer Application and its Protest ultimately was resolved in a 2002 Settlement Agreement that included *inter alia* the following provisions:

4. Diverted Volumes. Terteling shall divert a combine maximum total of 400 AFA from the Stewart Gulch Geothermal Aquifer under the Silkey and Tiegs Rights and Edwards shall divert a maximum of 250 AFA from the Stewart gulch Geothermal Aquifer under the Edwards Right.

5. Diversion Rate. Each Party may divert water at the rates ultimately authorized by the respective final Snake River Adjudication ("SRBA") partial decrees for the Silkey Rights and the Edwards Right.

7. Evidence at trial established that The Terteling Company, Inc. and T-7, LLC are related entities sharing the same management and ownership. The Terteling Company, Inc. and T-7 LLC (hereinafter collectively "Terteling") have asserted the following geothermal rights in the SRBA: Terteling Water Right Nos. 63-12, 63-13, 63-15, 63-31052, 63-3603, 63-7595, 63-31057, and 63-3159, all of which are diverted and/or used on the Terteling Ranch and/or the 36th and Hill property. It is not established at the present time the extent to which, if any, Terteling Water Right Nos. 63-27671 and 63-31054, diverted from the Terteling Springs Well, utilize the geothermal resource. The Edwards Family, LLC ("Edwards") has claimed only one geothermal right, 63-14, in the SRBA.

8. Terteling and Edwards have resolved the various Objections to each other's rights in the SRBA with the exception of Terteling's Objection to the diverted volume quantity of

the Edwards Right which asserts that the administrative seasonal diversion rate limitations from the *Silkey v. Tiegs* Decree, as translated to seasonal volume limitations, should continue to be imposed on the Edwards Right in the SRBA. Because of Terteling's Objection in this regard, Edwards has likewise preserved its volume Objection to 63-14. Terteling has not sought to impose the *Silkey v. Tiegs* administrative restriction on Water Right No. 63-16 in the SRBA and Terteling has asserted in the SRBA 0.06 cubic feet per second ("cfs") of 63-15, the Tiegs Right, in the SRBA, despite the *Silkey v. Tiegs* administrative prohibition on the use of 63-15.

9. Evidence introduced at trial substantiates that the 400 acre feet per year asserted by Terteling under Water Right Nos. 63-12 and 63-13, the Silkey Rights, was a quantity determined by pumping the wells associated with the Silkey Rights. Further, the respective Standard Form 5's and other evidence introduced at trial establish that up to an additional 909.4 acre feet per year can be diverted from the SGGA under Terteling junior Water Right Nos. 63-31052, 63-3603, 63-7595, 63-31057 and 63-31059.

10. Evidence introduced at trial also establishes that under the recommended diversion rate for the Edwards Right, 0.84 cfs, up to a total of 608 acre feet per year is the maximum possible diverted volume for the Edwards Right, based on continuous diversion at this maximum rate 24 hours a day, 365 days a year.

11. Based on IDWR policy, the quantity of 288.4 acre feet during the winter six months is theoretically necessary for heating purposes under the Edwards Right. Additionally, based on a diversion rate measurement in April 2002, another 133.9 acre feet per year during the "summer" months is supportable for the Edwards Right on a diversion

rate calculation basis.

II. CONCLUSIONS OF LAW

1. Prior decrees in the private adjudications are only binding on the parties or their privies to the prior adjudication. *State v. Hagerman Water Right Owners*, 130 Idaho 736, 741, 947 P.2d, 409, 414 (1997). However, a license or a prior decree is only evidence of the water right in the SRBA, it is not conclusive proof, because the elements of the water right are not insulated from re-examination. Elements can subsequently be changed voluntarily such as through contract or by operation of law. *Id. See Memorandum Decision and Order on Cross-Motions for Summary Judgment*, SRBA Consolidated Subcase No. 91-63 (September 1, 2004) at 12.

2. IDWR typically recommends only an annual diverted volume for ground water rights in the SRBA. Seasonal breakdowns of diverted volumes are not usual. Idaho Code § 42-1411(2)(j) provides for the inclusion in director's reports of "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...." In turn, SRBA Partial Decrees must "contain or incorporate a statement of each element of a water right," including any such remarks. Idaho Code § 42-1412(6). At the time of *Silkey v. Tiegs*, there was no administrative agency with the authority to administer ground water rights. Today, IDWR has authority to administer both ground water and surface water rights. Terteling has introduced no evidence otherwise supporting the continued "necessity" of imposing the *Silkey v. Tiegs* administrative limitations on the Edwards Right and the District 63-S proceedings actually indicate that imposing the *Silkey v. Tiegs* limitations on the Edwards Right actually could be

detrimental to aquifer levels. Therefore, administrative provisions imposing seasonal volume limitations on Water Right No. 63-14 are not necessary in the SRBA.

3. An unambiguous written agreement is binding upon the parties without the need to resort to extrinsic evidence for its interpretation. *Simons v. Simons*, 134 Idaho 824, 828, 11 P.3d 20, 24 (2000); *Lindberg v. Roseth*, 137 Idaho 222, 228, 46 P.3d 518, 524 (2002). Terteling's attempt to impose seasonal limitations on the Edwards Right violates the plain terms of the 2002 Settlement Agreement which provides only for a total annual volume for the Edwards Right and indicates that both parties are free to divert under their respective rights at whatever rates are ultimately approved in the SRBA.

4. Waiver is the voluntary and intentional relinquishment of a known right. *Seaport Citizens Bank v. Dippel*, 112 Idaho 736, 739, 735 P.2d 1047, 1050 (Ct. App. 1987). To establish waiver, the intention to waive must clearly appear. *Id.* An intent to waive a right may, however, be established by conduct. *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 520, 650 P.2d 657, 662 (1982). Terteling has waived any right to impose the *Silkey v. Tiegs* seasonal restrictions on the Edwards Right by: 1. diverting the Silkey Rights, at least in part, with the pumped Windsock well; 2. asserting a diverted volume in the SRBA for the Silkey Rights based on the pumping of the Silkey wells; 3. asserting potentially over 900 acre feet per year of additional diversions from the SGGA under rights junior to those decreed in *Silkey v. Tiegs*; 4. asserting a portion of the diversion rate of the Tiegs Right, 63-15, in the SRBA; and 5. by not also pursuing the *Silkey v. Tiegs* administrative limitations on the Ryan Right, 63-16.

5. Quasi estoppel applies when 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). Terteling is also barred by the principle of quasi estoppel from asserting that the *Silkey v. Tiegs* seasonal limitations should apply to the Edwards Right, based on the following prior inconsistent positions: 1. the addition of the pumped Windsock well for diversion of the Silkey Rights; 2. the assertion of quantities in the SRBA for the Silkey Rights based on pumping of the Silkey wells; 3. the assertion of over 900 acre feet per year of additional diversions from the SGGA under rights junior to those decreed in *Silkey v. Tiegs*; 4. the assertion of a portion of the diversion rate of the Tiegs Right, 63-15, in the SRBA, in contradiction of the *Silkey v. Tiegs* administrative limitations on that Right; and 5. not pursuing the *Silkey v. Tiegs* administrative limitations on the Ryan Right, 63-16.

6. The doctrine of judicial estoppel prohibits a party from assuming a position in one proceeding and then taking an inconsistent position in another proceeding. *Riley v. W.R. Holdings*, 143 Idaho 116, 121-22, 138 P.3d 316, 321-322 (2006). The same inconsistent positions detailed above in connection with the doctrine of quasi estoppel, also apply to preclude Terteling under the doctrine of judicial estoppel from pursuing seasonal volume limitations on the Edwards Right.

7. The defense of laches applies where: 1. the claimant has invaded the objector's rights; 2. the objector has delayed in asserting its rights, the objector having had notice and an opportunity to institute a suit; 3. lack of knowledge by the claimant that the objector would assert its right; and 4. injury or prejudice to the claimant in the even relief is accorded to the objector or the suit is not held to be barred. *Thomas v. Arkoosh Produce*,

137 Idaho 352, 359, 48 P.3d 1241, 1248 (2002), *referencing Henderson v. Smith*, 128 Idaho 444, 449, 915 P.2d 6, 11 (1996). Testimony at trial indicated that Edwards currently and for many years used more geothermal water in the winter months than in the summer months. However, there is no indication that Terteling or its predecessors raised the issue of the *Silkey v. Tiegs* seasonal limitations prior to its Objection to the Edwards Right in the SRBA. Given the long delay in asserting this issue and Terteling's agreement to an annual quantity for the Edwards Right in the 2002 Settlement Agreement, Terteling's assertion of this issue in the SRBA came without prior warning. There would be great injury to Edwards if required to use less geothermal water in the winter, when it currently needs the water most, and more in the summer, when it has less need for the geothermal water.

III. SPECIAL MASTER'S RECOMMENDATION

Having weighed the entirety of the evidence presented and considered the applicable law, the Special Master concludes that Water Right No. 63-14 should be decreed in the SRBA without seasonal volume limitations. Accordingly, the Special Master recommends that Water Right No. 63-14 be decreed in the SRBA, as set forth in the attached Special Master's Recommendation.

DATED this ____ day of November, 2010.

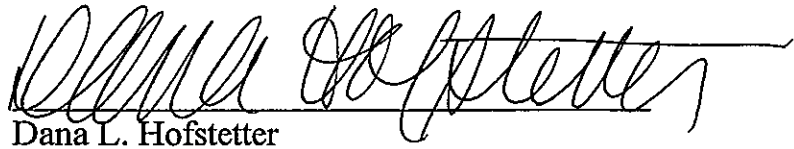
THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of the foregoing this 29th day of October, 2010, by U.S. Mail postage pre-paid (or by the pre-paid method as otherwise indicated below) to:

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