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DEPARTMENT OF
WATER RESOURCES

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

In Re SRBA	)	
	)	Subcase No. 63-14
	)	
Case 39576	)	
	)	
	)	
	)	EDWARDS FAMILY, LLC'S
	)	POST-TRIAL BRIEF
	)	
_____	)	

Edwards Family, LLC ("Edwards") respectfully submits this Post-Trial Brief. For the reasons discussed more fully below, The Terteling Company, Inc.'s Objection to the volume element of Water Right No. 63-14 (the "Edwards Right") should be denied.

I. Statement of Facts

A. Issue Presented

While Edwards and The Terteling Company and the other parties involved in these subcases have resolved the various Objections among them, The Terteling Company has reserved for trial only its objection to the Edwards Right's annual volume, asserting that the seasonal administrative volume limitation in the prior *Silkey v. Tiegs* should be decreed in the SRBA. Tr., p. 14, L. 20 - p. 15, L. 1. Terteling does not dispute the 250 acre feet per annum ("AFA") recommended by the Idaho Department of Water Resources ("IDWR") for the Edwards Right; but, rather, asserts that this should be further broken down to winter season and summer season volumetric limitations, based on the administrative diversion rate limitations in the *Silkey v. Tiegs* Decree. On this basis, Terteling seeks a limitation on the Edwards Right of 108.3 acre feet during the "winter" months of October, November, December, January, February and March and a limitation of 145.2 acre feet on the Edwards Right for the remaining "summer" months. Tr., p. 70, L. 8 - p. 73, L. 2.

Edwards asserts that The Terteling Company's claim is inconsistent with: 1.) The Terteling Company's Transfer No. 68558 adding a pumped point of diversion for its Silkey Rights (63-12 and 63-13); 2.) the Settlement Agreement between The Terteling Company and Edwards in connection with that Transfer; 3.) The Terteling Company and its related T-7, LLC's (hereinafter collectively "Terteling") numerous other junior geothermal rights potentially amounting up to an additional 900 AFA of diversions from the Stewart Gulch Geothermal Aquifer ("SGGA"); 4.) Terteling's failure to recognize the similar

limitations on Water Right No. 63-15 (the “Tiegs Right”) and 63-16 (the “Ryan Right”); and 5.) recent aquifer data indicating lower aquifer levels during the “summer” months. Also in response to Terteling’s continued assertion of its Objection to the Edwards Right’s annual volume, Edwards likewise retained its Objection concerning the volume recommendation for the Edwards Right. Thus, the sole issue addressed at trial was the annual volume limitation for Water Right No. 63-14 and whether seasonal volume limitations should be placed on the Edwards Right in the SRBA.

B. Edwards and Terteling Greenhouse Operations

At trial, Garnette Edwards explained that her grandfather, Thomas Edwards, the same Thomas Edwards involved in the *Silkey v. Tiegs* proceeding, began the Edwards Greenhouse business. Tr., p. 298, L.L. 7-18. In the beginning, the business was a truck farm whereby vegetable and fruit crops were grown, put on a truck and delivered to customers door to door. Tr., p. 298, L. 19 – p. 299, L. 10. About ten years’ ago, Ms. Edwards took over the business from her father, Paul Edwards, and today the Edwards Greenhouse business raises flowers, vegetables and other crops year around for sale in the local community. Tr., p. 300, L. 2 - p. 301, L. 17.

Today, the Edwards Greenhouse business uses geothermal water under the Edwards Right as a heat source year around. Tr., p. 301, LL. 18-22. For instance, in January, the hot water heats the greenhouses and, also, the geothermal water is run in tubing through the benches to heat the root areas of the plants to facilitate plant growth. Tr., p. 301, L. 23 - p. 302, L. 7. During the months of January and February, seeds are being started, as are annuals and perennials from cuttings. Tr., p. 302, LL. 8-11. For instance, petunias,

calendulas, onions and tomatoes are being started during these months. Tr., p. 302, LL. 14-18. During this time period, Easter lilies and hydrangeas are being “pushed” for Valentine’s Day and roses and other flowering crops are being “forced” for Mother’s Day. Tr., p. 302, L. 19 - p. 303, L. 12. “Pushing” or “forcing” refers to creating the conditions, including temperature, to ensure that the plants will be ready at the appointed time. Tr., p. 304, L. 18 - p. 305, L. 22.

Edwards’ greenhouses are typically full from the beginning of January to the first of June and as the summer and winter crops are sold and space becomes available, the poinsettias for Christmas begin to arrive. Tr., p. 303, LL. 20-24. This year, the poinsettias began to arrive on the 16th of June. Tr., p. 303, LL. 23-24. And with careful manipulation of temperature and other conditions, the poinsettias will be ready for sale in November and December. Tr., p. 304, LL. 3-25.

Although Edwards Greenhouse needs and uses geothermal water year around, there is no question that there is more need for the water in the “winter” months, typically starting in October and going as long as May. Tr., p. 305, L. 23 - p. 306, L. 6. At trial, Terry Scanlan, who previously advised Edwards, confirmed that based on his knowledge of Edwards’ measurement data, most of Edwards’ geothermal need was during the winter months. Tr., p. 236, L. 17 - p. 237, L. 2. In fact, Edwards Greenhouse could use more geothermal water and has installed additional heating systems to ensure that adequate temperatures can be met during the winter months. Tr., p. 308, L. 2 - p. 310, L. 17. The seasonal limitations proposed by Terteling would pose an enormous burden on the Edwards Greenhouse business. Tr., p. 311, L. 18 - p. 312, L. 7.

At the time of the IDWR proceedings establishing Water District 63-S for the SGGA, in the late 1980s to the mid-1990s, Terteling owned the Ranch property in the Boise Foothills with junior SGGA rights, including 63-3603 and 63-7595, diverted from its Windsock well and other points of diversion. Edwards Trial Exhibits B, C, D and E. It was not until after 1997, when Terteling purchased the property and water rights associated with the Silkey and Tiegs wells at 36th Street and Hill Road in Boise, that it first got into the greenhouse business. Tr., p. 335, L. 23 - p. 336, L. 7. It was just after this purchase that Terteling, under Transfer No. 68558, transferred the Silkey and Tiegs Rights to include the Terteling Ranch as a place of use and the pumped Windsock well at the Terteling Ranch as a point of diversion. Edwards Trial Exhibits 9 and 15. Today, as a result of that transfer, Terteling now has approximately 20 geothermally heated greenhouses, most of which are about 42 feet by 144 feet in size, which grow and supply flowers and plant material for wholesale customers and for the Terteling Garden Center at 36th and Hill Road. Tr., p. 336, L. 8 - p. 343, L. 7; p. 328, LL. 5-10. Under Transfer No. 68558, the greenhouses at the Terteling Ranch can be heated with the geothermal water along with the newly developed Terteling facilities at 36th and Hill Road. *Id.*

C. SRBA

IDWR Agent Vicky Music used the 2002 Settlement Agreement entered into between Terteling and Edwards in connection with the Terteling Transfer Application No. 68558 as a starting point in developing its SRBA Recommendation for the Edwards Right. Tr., p. 59, L. 10 - p. 60, L. 10; IDWR Trial Exhibit No. 3. Then, Ms. Music, strove to substantiate the Settlement Agreement's 250 AFA figure for the Edwards Right based on

the IDWR diversion rate and theoretical calculation methods. Tr., p. 60, L. 11 - p. 61, L. 23. The IDWR recommendation of 250 AFA was consistent with IDWR policy that annual diverted volumes be recommended for ground water rights. Tr., p. 67, LL. 7-15. It was also consistent with IDWR standard procedure not to specify seasonal volumes. Tr., p. 65, LL. 11-17.

As an initial matter, Ms. Music noted that the upper limit for the Edwards Right would have been 608 AFA based on the maximum recommended quantity of 0.84 cubic feet per second (“cfs”) being diverted 24 hours a day, 365 days a year. Tr., p. 88, L. 12 - p. 90 L. 13. In connection with determining the IDWR theoretical calculation, Ms. Music explained that she used an Excel spreadsheet based on IDWR Administrative Memorandum No. 23 for calculating geothermal water requirements. Tr., p. 91, L. 6 - p. 94, L. 16. Based on this policy and the Excel spreadsheet, Ms. Music calculated a theoretical geothermal water requirement for Edwards of 288.4 acre feet during the six winter months. Tr., p. 105, LL. 3-16.

With respect to the second IDWR approach for determining annual volume, based on diversion rate, Ms. Music explained that she utilized the diversion records in Ken Neely’s files and based on a diversion rate of 160 gallons per minute, or 0.37 cfs, recorded for the Edwards Right in April 2002, she calculated a six month annual volume of 133.9 acre feet, or 267.9 acre feet on an annual basis.¹ Tr., p. 118, L. 7 - p. 121, L. 24. The 288.4 acre feet theoretical calculation for the winter months together with the diversion rate calculation of 133.9 acre feet during the summer months, indicates that an annual volume of over 400 acre

¹ It should be noted that the recorded diversion rate for the Edwards Right which is diverted under artesian pressure is not necessarily a good indication of the potential extent of usage if a pump is employed. Tr., p. 312, LL. 11-13.

feet could be justified for the Edwards Right. Nevertheless, Ms. Music simply used these determinations to validate the legitimacy of the 250 acre feet figure in the 2002 Settlement Agreement. Tr., p. 59, L. 21 - p. 60, L. 23.

D. Factual Inconsistencies in Terteling's Assertion of Seasonal Limitations for the Edwards Right

The position Terteling is taking in this proceeding is directly at odds with positions it has taken at other times. Further, nowhere in the record has Terteling provided any hard evidence that restricting Edwards to seasonal limitations would confer any benefit at this point in time to the Silkey Rights.

The 2002 Settlement Agreement. Terteling's attempt to impose seasonal restrictions on the Edwards Right is at direct odds with the expressed terms of the 2002 Settlement Agreement. In the 2002 Settlement Agreement, Terteling and Edwards agreed to certain respective annual volumes for the Silkey and Tiegs Rights and for the Edwards Right:

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.

IDWR Trial Exhibit No. 3 at 3. Nowhere in this provision or in other provisions of the 2002 Settlement Agreement is there any mention of seasonal limitations.

Further, while the *Silkey v. Tiegs* Decree's seasonal restrictions were actually diversion rate limits, not seasonal volume limits, the 2002 Settlement Agreement did not impose any diversion rate limitations on the Silkey, Tiegs or Edwards Rights. Specifically, the 2002 Settlement Agreement allowed either party to obtain any diversion rates they would be able to get approved in the SRBA:

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.

Id. Thus, Terteling’s attempt to impose the *Silkey v. Tiegs* seasonal restrictions is directly contrary to the express language of the 2002 Settlement Agreement.

Water Right Nos. 63-15 and 63-16. Under the *Silkey v. Tiegs*, The Tiegs Right, 63-15, was prohibited entirely from diversion pursuant to the administrative limitations. IDWR Trial Exhibit No. 2. Nevertheless, Terteling has claimed in the SRBA, and IDWR has recommended, diversion of 0.06 cfs of this right. Tr., p. 144, L. 24 - p. 145, L. 10; Tr., p. 149, L. 6 - p. 150, L. 9; Edwards Trial Exhibit 27. Therefore, Terteling’s attempt to continue to impose the *Silkey v. Tiegs* administrative limitations on the Edwards Right is inconsistent with the position it has taken with regard to its own Tiegs Right, 63-15.

Similarly, although the Ryan Right, 63-16, also was subject to *Silkey v. Tiegs* based administrative limitation precluding any diversion, Terteling has not sought to impose the *Silkey v. Tiegs* administrative limitation on the Ryan Right. It appears that with regard to the *Silkey v. Tiegs* administration limitations, Terteling seeks only to continue to have these limitations imposed on the Edwards Right.

Terteling Junior Geothermal Rights. In addition to the Silkey and Tiegs Rights, Terteling has claimed five junior rights in the SRBA that include points of diversion from the SGGA.² The total potential maximum diverted volume of these junior Terteling Rights is 909.4 acre feet with a maximum diversion rate of 3.19 cfs. Tr., p. 164, LL. 4-19. *See*

² There also may be two additional Terteling Rights that divert from this SGGA, but whose status is currently unknown, 63-27671 and 63-31054. These two rights are diverted from the Terteling Springs well, whose temperature

also, Table 1 attached hereto. None of the claims or recommendations for these five junior rights provide for any sort of seasonal restrictions on usage. It is inherently contradictory for Terteling to be seeking to impose seasonal limits on the Edwards Right when it has the potential under its rights junior to the Edwards Right to divert up to an additional 900 acre feet from the SGGA without any such seasonal limitations.

The Silkey Rights No Longer Rely on Artesian Pressure. Terteling Transfer Application No. 68558 added the large pumped Windsock well for diversion of the Silkey Rights. Tr., p. 258, L. 15 - p. 259, L. 19; p. 171, L. 21 - p. 173, L. 15. Thus, the Silkey Rights no longer are diverted exclusively with artesian pressure as they apparently were at the time of *Silkey v. Tiegs*. Also, Vicky Music's testimony at trial established that the 400 acre foot per year diversion volume recommended for the Silkey Rights (in the Transfer and in the SRBA) was based on the diversion rate achieved by the Silkey Rights being diverted by pumping. Tr., p. 179, L. 8 - p. 193, L. 17.

Again, it is inconsistent for Terteling to be attempting to impose seasonal restrictions on the Edwards Right to protect delivery of the Silkey Rights when the quantities of the Silkey Rights are being determined in the SRBA based on rates achieved by pumping of the Silkey wells and the Silkey Rights are no longer diverted exclusively with artesian pressure.

Recent Water District Findings Establish Low Aquifer Levels During the Summer Season. Terteling is asserting seasonal limits which would restrict Edwards to using more geothermal water during the "summer" months and less geothermal water during the "winter" season. However, such restrictions would be inconsistent with recent Water

has been measured at 97°F and 70°F at various times. Accordingly, the extent to which these two rights divert from the SGGA is currently undetermined. Tr., p. 167, L. 18 - p. 168, L. 11.

District proceedings that found the periods of lowest aquifer levels to be during the irrigation season.

In the late 1980s, early 1990s, Hunt Brothers, the then owners of the Silkey Rights, instituted a call which ultimately led to the creation of Water District 63-S covering the Stewart Gulch Geothermal Aquifer. Tr., p. 267, L. 21 - p. 268, L. 6. IDWR Orders resulting from that call determined that certain irrigation wells utilizing the geothermal resource interfered with the artesian pressure in the Silkey wells during the late summer. Tr., p. 268, L. 15 - p. 269, L. 15. Indeed, hydrographs for the Edwards and Silkey wells indicate that during the period of the early 80s to mid-90s, aquifer levels were typically lowest at the end of the irrigation season in the August to September time period. Tr., p. 274, L. 7 - p. 279, L. 17. In fact, the major change in use practices after these proceedings was the addition of cold water irrigation wells to reduce impacts on the geothermal aquifer during the irrigation season. Tr., p. 269, L. 16 - p. 272, L. 15.

It appears that Terteling's proposal to increase Edwards' use of the geothermal aquifer during the summer could actually exacerbate aquifer conditions and potentially cause a return to the heavy summer usage conditions that led up to the prior call. At the same time, Terteling presents no evidence at all that the proposed seasonal limitations would result in a benefit to aquifer levels or the artesian pressure in the Silkey wells. Terteling has submitted no evidence establishing that the proposed seasonal restrictions would present a benefit; and, in fact, available information indicates that they would not.

II. Legal Argument

A. Terteling has introduced no evidence establishing that seasonal limitations on the Edwards Right are necessary for water right definition or administration.

Idaho Code § 42-1411(2)(j), regarding Director's Reports, provides for the inclusion 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. I.C. § 42-1412(6).

Issues arising in the SRBA concerning water right remarks or the related matter of general provisions have been presented to the Idaho Supreme Court on a number of occasions. It was on the first such occasion that the Idaho Supreme Court established the "necessary" criterion as a constitutional test for ensuring that such provisions would not run afoul of separation of powers principles. *State of Idaho v. United States*, 128 Idaho 246, 912 P.2d 614 (1995). This 1995 SRBA case addressed constitutional separation of powers issues in the context of the 1994 legislative amendments to the SRBA statutes. These amendments included the general provision statute, Idaho Code § 42-1412(6). The Court concluded that the Idaho Legislature could amend the SRBA statutes when "necessary" even though the SRBA was underway.

When it turned to the matter of the constitutionality of the SRBA statutory amendment providing for general provisions, the Supreme Court applied the same "necessary" standard. The Court concluded that "the requirement that the district court

include in its decree those provisions necessary for the executive to administer the rights decreed is not an impermissible delegation.” *Idaho v. U.S.*, 128 Idaho at 262, 912 P.2d at 630 (emphasis added). It is noteworthy, that the Court’s holding with respect to the general provisions statute relied on two early cases, *Silkey v. Tiegs*, 51 Idaho 344, 5 P.2d 1049 (1939) and *Montezuma Canal v. Smithville Canal Company*, 218 U.S. 371, 31 S. Ct. 67 (1910), for the proposition that when the executive does not have the necessary statutory authority, it is permissible for administrative matters to be included in a water rights decree. At the time of *Silkey v. Tiegs*, it was necessary for the Court to decree the administrative provisions since without those provisions, the regulatory agency would have been without the necessary statutory authority to implement the distribution of ground water pursuant to the decree. At the time of *Silkey v. Tiegs*, the Idaho Department of Reclamation, which it was called at the time, did not have statutory authority over ground water and it was “necessary” for the *Silkey* Court to include in its decree administrative provisions.

In *State v. Nelson*, 131 Idaho 12, 15-16, 951 P.2d 943, 946-47 (1998), the Court emphasized that both parts of the statutory standard (necessity for definition or administration) need to be evaluated as part of the constitutional necessity evaluation. A provision is to be included in a decree if it is necessary to define or to efficiently administer water rights:

In *A & B Irrigation Dist. v. Idaho Conservation League*, this Court held that a “general provision is ‘necessary’ if it is required to define the water right being decreed or to efficiently administer water rights in a water right decree.” *A & B Irrigation Dist.*, 97.20 ISCR at 972, 131 Idaho at 414, 958 P.2d at 571. Since these General Provisions regulated whether water is administered from a single or separate water source, it is possible that these provisions define the source element or are

necessary for the efficient administration of a water right. Considering this test was not employed by the SRBA Court, we remand this case for further factual findings as to whether these provisions are necessary for the efficient administration of a water right or to define a water right.

State v. Nelson, 131 Idaho at 15-16, 951 P.2d at 946-47. Thus, in instances of water right definition as well as water right administration, general provisions may be necessary because of limited IDWR authorities.

The Idaho Supreme Court has consistently applied this constitutional separation of powers “necessary” standard in each of its SRBA general provisions cases, and on remand of general provisions subcases, the Supreme Court has directed the SRBA Court to evaluate the necessity of the proposed general provisions either for water right definition or administration. Since the “necessary” standard derives from constitutional separation of powers principles, it is important to evaluate this standard in connection with IDWR’s regulatory authorities and whether there is the need to fill any regulatory voids in order to properly effectuate the SRBA decree consistent with the law.

Similarly, the SRBA Court has applied the following standard in considering the addition of remarks to water right decrees:

With respect to the "remark" section, or I.C. § 42-1411(2)(j), there are three (3) possible statutory components which need to be examined. They are:

- 1) whether the remark is necessary for definition of the right, or
- 2) whether the remark is necessary for clarification of any element of a right, or
- 3) whether the remark is necessary for the administration of the right by the Director.

Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue, SRBA Subcase Nos. 36-02708 *et al.* (December 29, 1999) at 6.

At the time of *Silkey v. Tiegs*, no regulatory agency had authority over ground water rights. Accordingly, the *Silkey v. Tiegs* Court determined it was necessary to include administrative provisions in that decree which authorized the then Department of Reclamation to administer the subject ground water right. Today, IDWR has extensive authorities over ground water, along with surface water sources, and there is no question that IDWR has the necessary statutory authorities to regulate the Edwards Right along with the other SGGA rights. Therefore, from the perspective of agency authority, there is no “necessity” for the proposed seasonal limitations being included in the SRBA decree.

Further, Terteling has not established that there is a technical justification for continuing the *Silkey v. Tiegs* administrative limitations on the Edwards Right. No evidence has been submitted indicating that imposing the *Silkey v. Tiegs* restrictions on the Edwards Right would result in improvement of the artesian pressure in the Silkey wells. Rather, the available evidence of the Water District 63-S proceedings from the late 1980s and early 1990s suggest otherwise, that the proposed limitation, requiring more usage of the Edwards Right during the summer irrigation season, would be detrimental. Accordingly, as a threshold matter, Terteling has not proven the necessity of any seasonal limitations on the Edwards Rights as required by SRBA statutes and case law.

B. The 2002 Settlement Agreement between Terteling and Edwards prevents Terteling from pursuing seasonal diversion rate based limitations on the Edwards Right in the SRBA.

It is fundamental that an unambiguous written agreement is binding upon the parties and that extrinsic evidence is not considered in enforcing the terms of an unambiguous agreement:

The parol evidence rule provides that when a contract has been reduced to a writing that the parties intend to be a final statement of their agreement, evidence of any prior or contemporaneous agreements or understandings which relate to the same subject matter is not admissible to vary, contradict, or enlarge the terms of the written contract. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 44, 740 P.2d 1022, 1029 (1987); *Chapman v. Haney Seed Co., Inc.*, 102 Idaho 26, 624 P.2d 408 (1981). Parol evidence may be considered to aid the trial court in determining the intent of the drafter of a document if an ambiguity exists. *Matter of Estate of Kirk*, 127 Idaho 817, 907 P.2d 794 (1995)

Simons v. Simons, 134 Idaho 824, 828, 11 P.3d 20, 24 (2000). *See also, Lindberg v. Roseth*, 137 Idaho 222, 228, 46 P. 3d 518, 524 (2002) (“It is well settled that in an action for a breach of contract, oral stipulations, agreements, and negotiations prior to the execution of the written contract are presumed merged into the contract, and evidence of them cannot be admitted to contradict the plain terms of the contract.”)

The 2002 Settlement Agreement between Terteling and Edwards declared that it “is the entire agreement of the Parties ... with respect to the matters addressed herein concerning Water Right Nos. 63-00012, 63-00013, 63-00014 and 63-00015.” IDWR Trial Exhibit 3 at 5. At trial, Terteling confirmed that it is a valid binding contract. Tr., p. 329, LL. 11-23.

As discussed above, the express terms of the 2002 Settlement Agreement identify certain respective annual diverted volumes for the Silkey and Edwards Rights but also expressly allowed both Terteling and Edwards to obtain whatever respective diversion rate they could justify in the SRBA. IDWR Trial Exhibit 3 at 3. Despite this express language,

Terteling is trying to impose the following *Silkey v. Tiegs* administrative diversion rate limitations, converted to seasonal volume quantities, on the Edwards Right in the SRBA:

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 minders inches.

IDWR Trial Exhibit 2.

Although Terteling attempts to impose seasonal volume limitations, at their origin, they remain diversion rate limitations. Therefore, Terteling's attempt to impose these seasonal diversion rate based restrictions on the Edwards Right violates the express terms of the 2002 Settlement Agreement which allows the parties to divert at any rate authorized by the SRBA Court. Having agreed in the 2002 Settlement Agreement to an annual volume number for the Edwards Right without a seasonal apportionment, Terteling should not later seek to impose a seasonal apportionment of this quantity. The Settlement Agreement provides only for a single cumulative annual figure. Inherent in the designation of this single annual figure is that Edwards may apportion this annual amount as it chooses during the course of the year. However, Terteling now attempts to modify this annual quantity, by a seasonal apportionment inconsistent with the express terms of the 2002 Agreement.

C. Terteling has waived any protections afforded by *Silkey v. Tiegs* to artesian pressure delivery of the Silkey Rights in a number of ways.

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). For instance, “[i]n the context of lease agreements, acceptance of rent accruing subsequent to a breach is a well recognized form of conduct which may establish a lessor’s intent to waive a breach of a lease agreement.” *Id.* However, in assessing waiver, each situation should be addressed on a case by case basis. *Id.* at 521, 650 P.2d at 663. Terteling has waived any right to impose the *Silkey v. Tiegs* seasonal limitations on the Edwards Right by numerous actions, any one of which alone would constitute waiver.

Terteling’s transfer of the Silkey Rights resulted in a relatively new large well, outfitted with a pump, being included in the authorized points of diversion for the Silkey Rights. In any event, it appears that at the time of the Transfer, the Silkey wells were also outfitted with pumps, as discussed in a supporting report providing the basis for the quantities asserted in the Transfer. Tr., p. 179, L. 8 - p. 193, L. 17. These same transfer quantities ended up being recommended in the SRBA. Accordingly, the recommended quantities for the Silkey Rights in the SRBA are based on pumped diversions, not artesian aquifer pressures.

By adding the Windsock well as a point of diversion to the Silkey Rights and asserting quantities in the SRBA for the Silkey Rights associated with the pumping of the

Silkey wells, Terteling has waived any right to claim protection of the artesian pressure for delivery of the Silkey Rights. At the time of *Silkey v. Tiegs*, the Silkey wells relied on artesian pressure exclusively and protection of the artesian pressure was necessary in order for Silkey to obtain her senior rights. Because of Transfer No. 68558 and the claimed quantities in the SRBA, Terteling has relinquished any need to use artesian pressure for delivery of the Silkey Rights.

Further, Terteling has waived any right to protection of the historic artesian pressures of the Silkey Rights as a result of its assertion of five junior SGGA rights in the SRBA, 63-31052, 63-3603, 63-7595, 63-31057 and 63-31059, which together total potentially up to 900 acre feet per year additional diversions from the Stewart Gulch Geothermal Aquifer. These five rights, having no seasonal limitations, would counteract any effect that seasonal limitations on the Edwards Right would have. Accordingly, by asserting these five junior rights in the SRBA, Terteling has waived any right to impose seasonal limitations on the Edwards Right.

By asserting a portion of the diversion rate of the Tiegs Right, 63-15, in the SRBA in contradiction to the *Silkey v. Tiegs* administrative limitations, Terteling has waived any right to impose the *Silkey v. Tiegs* administrative limitations on the Edwards Right. Likewise, by not pursuing the *Silkey v. Tiegs* administrative limitations on the Ryan Right, 63-16, Terteling also has waived the related administrative limitations on the Edwards Right.

In summary, Terteling has waived the *Silkey v. Tiegs* restrictions on the Edwards Right in a number of different ways. Any one of these grounds would provide an adequate

basis to deny Terteling's Objection in this matter. Taken together, Terteling's pursuit of its Objection is wholly unjustified.

D. Due to these inconsistent positions and actions, Terteling also is estopped from asserting seasonal limitations on the Edwards Right.

The doctrines of quasi and judicial estoppel also preclude Terteling from seeking to impose the *Silkey v. Tiegs* seasonal limitations on the Edwards Right. 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). It applies where it is unconscionable for the party to maintain a position which is inconsistent with a position from which it has already derived a benefit. *Thomas v. Arkoosh Produce, Inc.*, 137 Idaho 352, 357, 48 P.3d 1241, 1246 (2002). The principle precludes a party from asserting to another's disadvantage, a right inconsistent with the position previously taken by him. *Id.*

Not only once, but several times, Terteling has taken a position inconsistent with the imposition of the continuation of *Silkey v. Tiegs* seasonal volume limitations on the Edwards Right: The 2002 Settlement Agreement makes no mention of any such seasonal limitations although it deals squarely with the issue of diverted volume. Further, after the Terteling Transfer the Silkey Rights no longer are diverted only with artesian pressure. The quantities Terteling asserted for the Silkey Rights in the SRBA are based on the pumping of the Silkey wells. Likewise, Terteling's assertion of a portion of the Tiegs Right in the SRBA, a right which *Silkey v. Tiegs* administratively precluded from diversion at all, is inconsistent with seeking to impose the *Silkey v. Tiegs* administrative seasonal limitations on the Edwards Right. Also, Terteling has only sought to impose the *Silkey v. Tiegs*

administrative limitations on the Edwards Right, and has not pursued the related administrative limitations on the Ryan Right, 63-16. Terteling's potential additional 900 acre feet per year of diversions from the SGGA under junior rights is yet an additional inconsistency with its position on the Edwards Right. For any of these reasons, Terteling should be estopped from asserting any seasonal volume limitations on the Edwards Right under the doctrine of quasi estoppel.

Similarly, the doctrine of judicial estoppel prohibits a party from assuming a 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). Judicial estoppel is an equitable doctrine existing to protect 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 doctrine of judicial estoppel especially should apply where, as here, a party has taken inconsistent positions in the same proceeding. The same inconsistencies, discussed above in connection with quasi estoppel, also satisfy the doctrine of judicial estoppel.

E. Terteling also is prevented by the doctrine of laches from asserting the *Silkey v. Tiegs* seasonal limitations on the Edwards Rights as, over the years, neither Terteling nor its predecessors tried to enforce such provisions.

Terteling also is precluded by laches from enforcing the *Silkey v. Tiegs* seasonal limitations on the Edwards Right as over the years neither Terteling nor its predecessors enforced these limitations:

The necessary elements to maintain a defense of laches are:
(1) defendant's invasion of plaintiff's rights; (2) delay in
asserting plaintiff's rights, the plaintiff having had notice and an

opportunity to institute a suit; (3) lack of knowledge by the defendant that plaintiff would assert his rights; and (4) injury or prejudice to the defendant in the event relief is accorded to plaintiff or the suit is not held to be barred. *Henderson v. Smith*, 128 Idaho 444, 449, 915 P.2d 6, 11 (1996). ... Because the doctrine of laches is founded in equity, in determining whether the doctrine applies, consideration must be given to all surrounding circumstances and acts of the parties. *Id.*

Thomas v. Arkoosh Produce, 137 Idaho 352, 359, 48 P.3d 1241, 1248 (2002).

In connection with the first element, invasion of Plaintiff's rights, the record reflects that Edwards currently and for at least ten (10) years, has used more water in the winter months, than in the summer months. Tr., p. 305, L. 23 - p. 306, L. 6; p. 236, L. 17 - p. 237, L. 2. In regard to the second element, delay, Terteling first raised the issue of the *Silkey v. Tiegs* seasonal limitations in its Objection to the Edwards Right the SRBA. There is no indication that Terteling's predecessor in interest raised this matter in the Water District 63-S proceedings in the late 1980s or the early 1990s. See Edwards Trial Exhibits B, C, D and E. Further, there is no record of any attempts before the District 63-S proceedings to raise this issue.

Given the long delay and Terteling's agreement to only an annual quantity in the 2002 Settlement Agreement, Terteling's assertion of this issue in the SRBA did, indeed, come without prior warning and at great surprise. Finally, in respect to the fourth element, injury, there is no question that there would be great injury to Edwards if it were required to use less geothermal water in the winter, when it needs it most, than in the summer when there is less need for the hot water. Thus, Terteling is also barred by the doctrine of laches from imposing the *Silkey v. Tiegs* seasonal limitations on the Edwards Right.

III. Conclusion

For the foregoing reasons, the Court should deny Terteling's Objection seeking to impose seasonal limitations on the Edwards Right.

Dated this 29th day of October, 2010

HOFSTETTER LAW OFFICE, LLC

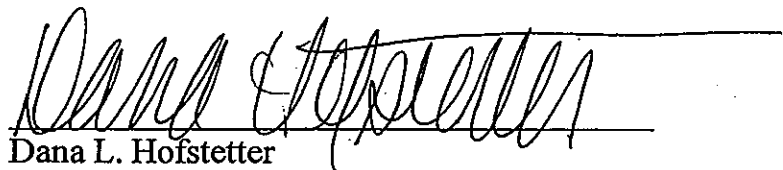

Dana L. Hofstetter

CERTIFICATE OF SERVICE

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

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

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



Dana L. Hofstetter

3006.3/9517

Table 1

Terteling Hot Water Rights			
Water Right No.	Priority	Diversion Rate (cfs)	Diverted Volume (AFA)
63-12	07/01/1921	0.14	101.40
63-13	07/01/1922	0.66	400
63-15	03/23/1927	0.80	400
COMBINED TOTAL		0.86	400
63-31052	04/24/1948	0.12	86.9
63-3603	04/26/1967	1.03	351.0
63-7595	03/07/1973	2.00	465.5
63-31057	06/20/1994	0.02	14.7
63-31059	07/01/1994	0.02	14.7
COMBINED TOTAL		3.19	909.4