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DEPARTMENT OF
WATER RESOURCES

CHARLES L. HONSINGER (ISB #5240)
RINGERT LAW CHARTERED
455 S. Third Street, P.O. Box 455
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
clh@ringertlaw.com

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 No. 63-14
Case 38576	)	
	)	
	)	
	)	
	)	RESPONSE TO EDWARDS FAMILY, LLC'S
	)	POST-TRIAL BRIEF AND PROPOSED
	)	FINDINGS OF FACT AND CONCLUSIONS OF
	)	LAW
	)	
	)	
	)	
	)	

COMES NOW, The Terteling Company, Inc. ("TTCI"), by and through their counsel of record, and hereby submit this *Response to Edwards Family, LLC's Post-Trial Brief* ("Edwards' Brief") and *Proposed Findings of Fact and Conclusions of Law*.

SUMMARY

Edwards argues that the seasonal volumetric limitations sought to be imposed upon water right no. 63-14 by TTCI cannot be decreed because they are unnecessary, because the 2002

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Settlement Agreement between the parties prevents their imposition, because TTCI waived its right to impose the same, and because quasi and/or judicial estoppel and/or laches prevents the imposition of the same. Each of these arguments is flawed and cannot be accepted by the Court, as explained hereinbelow.

1. Seasonal Groundwater Volumetric Limitations are Necessary

Edwards argues that the seasonal volumetric limitations imposed upon its water right in the *Silkey v. Tiegs Decree* (hereinafter “*Silkey Decree*”) should not be imposed in the SRBA because such are “unnecessary.” However, the Special Master has already recognized the necessity of seasonal limitations on right no. 63-14 to protect water right nos. 63-12 and 63-13: “the limitations in *Silkey v. Tiegs* imposed by the judge in that case were specifically put in there to protect that – those Silkey– those two wells owned by Frances Silkey at the time and now owned by your client.”

Tr, p. 80, lns. 17 - 21. Edwards attempts to overcome this simple fact by arguing that because IDWR has “extensive authorities over ground water” there is no “necessity” for the seasonal limitations imposed by the *Silkey Decree* to be carried over into the SRBA partial decree for water right no. 63-14. Edwards fails to explain exactly how these “extensive authorities” overcome the necessity of protecting the Silkey rights as set forth in the *Silkey Decree*. The fact is that without including in the SRBA partial decree for water right no. 63-14 the seasonal use limitations from the *Silkey Decree* as a binding provision on the parties to that decree (see *State v. Hagerman Water Right Owners (in Re SRBA Case No. 39576)*, 130 Idaho 736, 742 (1997), the SRBA Court will be sidestepping established Idaho law (See *Silkey v. Tiegs*, 51 Idaho 344, 354 (1931) ; *Silkey v. Tiegs*, 54 Idaho 126, 127 (1934); see also TTCI’s *Proposed Findings of Fact and Conclusions of Law*, pp.

9 - 10.) The Special Master should decline to overturn the Idaho Supreme Court's affirmation of the imposition of these seasonal use limitations.

2. **TTCI Is Not Attempting to Change the Diversion Rate for Water Right No. 63-14 in Contravention of the 2002 Settlement Agreement**

Edwards asserts that by requesting imposition of the seasonal volumetric limitations from the *Silkey Decree*, TTCI is violating "the express terms of the 2002 Settlement Agreement which allows the parties to divert at any rate authorized by the SRBA Court." *Edwards' Post-Trial Brief*, p. 16. The term of the agreement that Edwards accuses TTCI of violating is the following:

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.

It is difficult to understand the reason that Edwards discusses the parol evidence rule in its brief regarding the 2002 Settlement Agreement - apparently Edwards wishes to argue that no parol evidence is necessary to interpret the "diversion rate" provision in the 2002 Settlement Agreement. To the extent this is so, TTCI agrees with Edwards. However, what Edwards fails to do is discuss the law regarding exactly how the language of a contract is to be interpreted. Under Idaho law, the "interpretation of an instrument depends on whether the instrument is ambiguous." *C & G, Inc. v. Rule*, 135 Idaho 763, 765, 25 P.3d 76, 78 (2001). In the absence of ambiguity, the document must be "construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument." *Id.* The language of the 2002 Settlement Agreement is clear and unambiguous. Therefore both its meaning and the intent of the parties to it must be determined from the plain meaning of that Agreement's own words. *Taylor v. Browning*, 129 Idaho 483, 489, 927 P.2d 873, 879 (1996). No outside information is necessary to assist in the interpretation of the

Agreement. *Bilow v. Preco, Inc.*, 132 Idaho 23, 28, 966 P.2d 23, 28 (1998).

The simple fact is that the clear and unambiguous language of the 2002 Settlement Agreement permits the parties to “obtain whatever respective diversion rate they could justify in the SRBA.” *Edwards’ Post-Trial Brief*, p. 15. That is exactly what has occurred here - Edwards claimed a diversion rate for water right no. 63-14 in the SRBA, and has negotiated a diversion rate through the SRBA without any interference or input whatsoever from TTCI - no objection was filed by TTCI to any aspect of Edwards’ requested diversion rate, no contest of that claimed diversion rate has in any way been undertaken by TTCI, and TTCI was not in any way involved in the settlement of that element of water right no. 63-14 undertaken between IDWR and Edwards. Edwards argument that TTCI is somehow seeking to impose diversion rate limitations is false - TTCI is seeking only a volumetric limitation. Accordingly, the Court must simply disregard as irrelevant and nonsensical Edwards’ argument that TTCI has violated the 2002 Settlement Agreement.

3. Waiver of Silkey v. Tiegs’ Volumetric Limitations has not Occurred

Edwards argues that TTCI has waived the right to impose the limitations imposed by the *Silkey Decree* upon water right no. 63-14 by adding pumps to the Silkey wells, by asserting junior geothermal water rights in the SRBA, and by claiming a diversion rate for water right no. 63-15 in the SRBA. None of these actions in any way constitute a waiver of TTCI’s right to assert the volumetric limitations imposed by the *Silkey Decree* upon Edwards’ water right no. 63-14.

“A waiver is the intentional relinquishment of a known right. It is a voluntary act and implies election by a party to dispense with something of value or to forego some right or advantage which he might at his option have demanded and insisted upon.” *Crouch v. Bischoff*, 78 Idaho 364, 368

(1956). “What constitutes a waiver is essentially a question of intention. * * * In order to establish a waiver the intention to waive must clearly appear, and a waiver * * * will not be presumed or implied, contrary to the intention of the party whose rights would be injuriously affected thereby unless, by his conduct, the opposite party was misled, to his prejudice, into the honest belief that such waiver was intended or consented to.” *Motor Carrier Operations v. IDAHO PUC*, 83 Idaho 351, 357-358 (1961) (ellipses in original).

In this case, TTCI has neither expressly nor impliedly indicated its intent to waive its right to assert seasonal volumetric limitations for water right no. 63-14 as is required by Idaho law. TTCI never, by any conduct, misled Edwards into the belief that it had waived such right. There is no evidence whatsoever that Edwards has ever been under the assumption that TTCI has waived such rights. Accordingly, TTCI’s waiver can be neither presumed or implied, and is certainly not express as no evidence at trial of the existence of such express waiver was presented.

The addition of a pump on the Silkey wells does not constitute intent to waive the right to protection of the artesian pressure as explained by the testimony of J.L. Terteling:

Q. When you divert those water rights from the two Silkey wells as you call them, or the Silkey and the office wells as Mr. Neely called them, do you rely upon aquifer pressures?

A. Yes.

Q. Okay, do you currently pump those – those water rights?

A. No.

Q. Okay, have you needed to in the past?

A. You know, the past is a long time.

Q. Yes.

A. Before we – When we were growing greenhouses there and plants, the answer is we pumped them.

- Q. Yes.
- A. Since we moved that off and – We have relied on the artesian pressure for the heat, you know, in the wintertime.
- Q. Yes. Well, even if you had to pump those rights, wouldn't you rely upon aquifer pressure, as well?
- A. The aquifer pressure would determine how hard you have to pump, how big the pumps would be. And in our case at the ranch, it would be variable-frequency drives that regulates that on demand.
- Q. So even when you have to pump geothermal water, you still rely upon aquifer pressures, right?
- A. That's correct.

Tr., p. 332, ln. 11 - p. 333, ln. 11. The simple facts are that TTCI still diverts water right nos. 63-12 and 63-13 under artesian pressure, and that, whether Edwards wishes to admit it or not, TTCI continues to rely upon the existing artesian pressure in the aquifer even when it diverts its water rights via pumps. Accordingly, TTCI has not, as asserted by Edwards, "relinquished any need to use artesian pressure for delivery of the Silkey Rights." *Edwards' Post-Trial Brief*, p. 18. The fact that TTCI now pumps or may have pumped at one time, any portion of its Silkey rights has no bearing on the issue of waiver.

The assertion of junior water rights in the SRBA by TTCI does not in any way establish the intent of TTCI to waive its right to rely upon artesian pressure for the Silkey Rights. Edwards makes the blanket statement, without any supporting evidence or testimony whatsoever, that these 'rights, having no seasonal limitations, would counteract any effect that seasonal limitations on the Edwards Right would have.' *Edwards' Post-Trial Brief*, p. 18. This argument must be ignored for the simple reason that there is no evidence to back it up. No testimony or evidence establishes any effect that the diversion of any water pursuant to TTCI's "junior rights" diverted from the Stewart Gulch

Geothermal Aquifer have any effect on aquifer pressures as they relate to the diversion of the Silkey Rights. Additionally, the assertion that the rights can potentially result in the diversion of up to 900 acre-feet of geothermal water ignores the fact that the enormous majority of water diverted under those rights is for irrigation purposes from cold water wells, and that geothermal water is to be used only when cold water is unavailable. See Standard Forms Five - Water Right Nos. 63-3603, 63-7595.

Edwards complains that by asserting a diversion rate for the Tiegs right, 63-15, in the SRBA, and by not pursuing limitations upon water right no. 63-16, TTCI has waived its right to assert seasonal limitations upon the Edwards' right. Exactly how such assertion and non-assertion constitute an "intentional relinquishment of a known right" as required by Idaho law to establish a waiver is left for us to speculate upon. The Court should decline such speculation and simply dismiss Edwards' arguments regarding waiver.

4. **Quasi and Judicial Estoppel are Inapplicable**

Edwards asserts that the doctrines of quasi-estoppel and judicial estoppel preclude TTCI from seeking to impose the seasonal volumetric limitations from the *Silkey Decree* upon water right no. 63-14. Edwards' arguments in support of this assertion are almost exactly the same as its arguments in support of its assertion of waiver, and merit similar responses, and the same dismissal of those arguments by the Special Master.

"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 which is inconsistent from a position from which it has already derived a benefit.” *City of Sandpoint v. Sandpoint Independent Highway Dist.*, 126 Idaho 145, 151(1994) “Quasi-estoppel is essentially a last-gasp theory under which a defendant who can point to no specific detrimental reliance due to plaintiffs’ conduct may still assert that plaintiffs are estopped from asserting allegedly contrary positions where it would be unconscionable for them to do so.” *Schoonover v. Bonner County*, 113 Idaho 916, 919, 750 P.2d 95, 99 (1988).

As an initial matter, Edwards points to no instance in which it has changed its own position regarding the imposition of seasonal volumetric limitations to its detriment. For that reason alone, the doctrine of quasi-estoppel is unavailable to it. Moreover, it was not TTCI that litigated *Silkey v. Tiegs*, and Edwards cites to no law establishing that quasi-estoppel may be applied forward eighty years through successive parties-in-interest.

The instances that Edwards asserts TTCI has asserted an inconsistent position with the *Silkey Decree* seasonal volumetric limitations upon Edwards’ right are simply not inconsistent positions. The fact that the 2002 Settlement Agreement makes no mention of seasonal limitations does not in any way somehow mean that TTCI cannot now assert those limitations - if TTCI were asserting that the volume of Edwards’ water right is something less than 250 acre-feet per year, Edwards’ arguments would make sense - as that provision is specifically spelled out in the 2002 Settlement Agreement. However, that is simply not the case with respect to the seasonal use volumetric limitations - there is no provision in the 2002 Settlement Agreement that speaks to those limits one way or the other - and one cannot be implied simply because Edwards wishes it were so.

The argument that the Silkey Rights are no longer diverted only under artesian pressure likewise is inapplicable - the fact is that TTCI relies upon artesian pressure to divert those rights - whether diverted only under that pressure, or by using the assistance of a pump (see argument hereinabove regarding J.L. Terteling's testimony on this point at trial). The fact that TTCI did not affirmatively file an objection to the Ryan right, no. 63-16, simply cannot be termed the "assertion of a position" with respect to that right such that it can now be asserted in an estoppel context. Finally, the alleged "potential additional 900 acre feet per year of diversions" by TTCI has been established as a false argument hereinabove.

"Judicial estoppel, sometimes also known as the doctrine of preclusion of inconsistent positions, precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *Sword v. Sweet*, 140 Idaho 242, 252 (2004). Its application by a district court is entirely discretionary. *Id.* Again, TTCI was not a party to *Silkey v. Tiegs* - there is no law cited by Edwards establishing that judicial estoppel may be applied against successive parties in interest over an eighty-year period. The same arguments discussed above with respect to the inapplicability of quasi-estoppel likewise apply to the inapplicability of judicial estoppel. In addition, the fact is that Edwards' claim to water right no. 63-14 included the seasonal use limitations from 1989 to 2005 - so there would have been no need for TTCI to contest it during that period. *See* Original Claim to Water Right no. 63-14.

5. Laches is an Inapplicable Defense

Edwards asserts that TTCI is precluded by laches from enforcing the seasonal volumetric limitations because "over the years neither Terteling nor its predecessors enforced these limitations."

However, the lapse of time, standing alone, does not constitute laches. *Finucane v. Village of Hayden*, 86 Idaho 199, 206 (1963).

There are four elements to a defense of laches: “(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 defendant that plaintiff would assert his rights, and (4) injury or prejudice to defendant in the event relief is accorded to plaintiff or the suit is not held to be barred. *State Dep't of Health & Welfare ex rel. Wash. v. Annen*, 126 Idaho 691, 692-693 (1995).

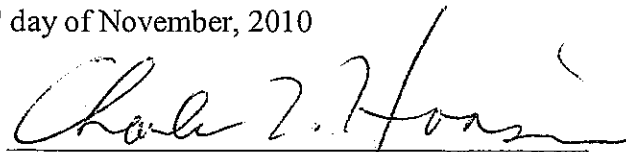
The assertion by Edwards that it has used more water during the winter months than in the summer months for the past ten years by itself is not an invasion of TTCI's rights - the relevant question is has Edwards used more water than that to which it is limited under the seasonal use volumetric limitations since before the SRBA? Edwards does not point to evidence establishing that it has historically used more water than the approximately 153.8 acre-feet during the winter months to which it would be limited. Thus, Edwards cannot establish that it has “invaded” TTCI's rights. Moreover, even if it could point to evidence establishing that fact over the last ten years, the SRBA has been pending for the last 23 years. So TTCI has in fact been involved in a lawsuit during that time to determine the elements of water right no. 63-14, and to determine whether or not limitations (including the seasonal volumetric limitations at issue in this subcase) should be imposed - there has been no “delay” by TTCI in asserting its rights. Additionally the fact is that from 1989 to 2005, the SRBA claim to water right no. 63-14 actually contained the seasonal limitations from the Silkey Decree. *See* Claim to Water Right No. 63-14; Amended Notice of Claim to Water Right No. 63-14.

Thus, there would have been no reason for TTCI to institute an entirely new suit or proceeding seeking to impose the very same limitations because Edwards itself had asserted the position that those seasonal use limitations should be imposed. “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.” *Thomas v. Arkoosh Produce*, 137 Idaho 352, 359 (2002). After IDWR issued its recommendation of water right no. 63-14, TTCI timely filed its objection to the recommendation, citing the lack of those seasonal limitations. In short, the defense of laches is simply not available to Edwards in this case because it is not clear that Edwards invaded TTCI’s rights, there has been no delay by TTCI in asserting its rights, and it has been clear from the assertion by Edwards of a claim without the seasonal volumetric limitations that TTCI would assert those limits.

CONCLUSION

Edwards’ defenses to the imposition of the seasonal volumetric limitations upon water right no. 63-14 are simply inapplicable, and do not overcome the binding effect of the seasonal use limitations from the Silkey Decree upon Edwards. See *State v. Hagerman Water Right Owners (in Re SRBA Case No. 39576)*, 130 Idaho 736, 742 (1997).

Dated this 12th day of November, 2010

A handwritten signature in black ink, appearing to read "Charles L. Honsinger", written over a horizontal line.

Charles L. Honsinger
Attorney for The Terteling Company, Inc.

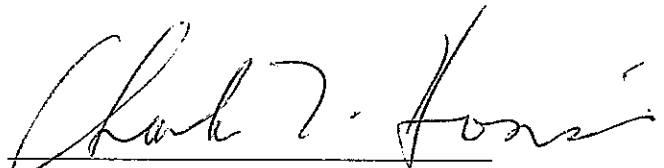
CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November, 2010, a true and correct copy of the foregoing document was served by U.S. mail to the following:

Nick Spencer
Deputy Attorney General
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098
Fax: (208)287-6700

Ms. 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

A handwritten signature in black ink, appearing to read "Charles L. Honsinger", written over a horizontal line.

Charles L. Honsinger