

I. Summary of Terteling Position

Terteling's sole legal position is that an administrative provision of the *Silkey v. Tiegs* Decree, not in its original diversion rate form, but as converted to seasonal volume limitations, should continue to apply to the Edwards Right (63-14). Terteling asserts that these seasonal limitations should apply to the Edwards Right because it was decreed in *Silkey v. Tiegs*, while ignoring that this logic also should result in the even more restrictive *Silkey v. Tiegs* administrative limitations being imposed on the successors in interest to the Tiegs Right (63-15 owned by Terteling) and the Ryan Right (63-16). Terteling's position also selectively ignores language in *Silkey v. Tiegs* which stated that the administrative seasonal limitations on the Edwards Right applied only to the extent "as will not deplete the flow of plaintiff's [Silkey's] wells below forty miner's inches" and, also, which provided that the administrative limitations would be in effect only "until further order of the court." Indeed, Terteling asks the SRBA Court to ignore the essential function of a general water right adjudication and the 80 years of history since *Silkey v. Tiegs*.

Among Terteling's numerous oversights, perhaps, the most egregious oversight of all is Terteling's assertion of over 900 acre feet per year of potential additional diversions from the Stewart Gulch Geothermal Aquifer ("SGGA") under Terteling's junior rights (63-31052, 63-3603, 63-7595, 63-31057 and 63-31059) at the same time that it seeks to require that Edwards diverts about 140 acre feet of 250 acre feet total only during the summer. Clearly, any potential effect of the requested seasonal limitations on the

Edwards Right could be outweighed by the potential effect of these junior Terteling rights.

The various inconsistencies in Terteling's position were previously discussed in Edwards' Post-Trial Brief and will not be reiterated in detail here. Nevertheless, in analyzing Terteling's legal position, it is important not to lose sight of the extraordinary illogic of the result that Terteling is seeking. The law does not require the SRBA Court, as Terteling invites, to decree an outcome that literally makes no sense today.

II. Legal Argument

A. Terteling's proposed seasonal limitations are at odds with the express terms of the *Silkey v. Tiegs* Decree.

1. The *Silkey v. Tiegs* Decree provided for seasonal diversion rate limitations, not diverted volume limitations.

The *Silkey v. Tiegs* Decree specified the seasonal limitation on the Edwards Right in terms of diversion rate, not diverted volumes:

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 purposes twenty miners inches of water, or so much thereof as will not deplete the flow of plaintiff's wells below forty miners inches.

Silkey v. Tiegs Decree, Ada County Case No. 11748 (June 13, 1930). IDWR, Trial Exhibit No. 2 at 6-7 (emphases added).

All of the rights in *Silkey v. Tiegs*, including the senior Silkey Rights (63-12 and 63-13), were diverted under artesian pressure and the administrative limitations including this administrative limitation on the Edwards Right, were imposed for the purpose of protecting the full quantities of the Silkey Rights as delivered by artesian flow:

That the waters herein decreed and allotted are subterranean waters subject to appropriation by the several parties hereto under the laws of the State of Idaho. That the waters flowing from the artesian well of each party is derived from the same source, and the supply of said wells constitutes one interdependent and connected source of supply and such water and said wells are hereby drawn within the jurisdiction of this court for distribution for beneficial uses.

Id. at 1.

Terteling does not seek to have the *Silkey v. Tiegs* seasonal limitations imposed as written; rather, Terteling asks that they be reinterpreted to specify seasonal volume limitations (145.2 acre feet and 108.3 acre feet), instead. Although Terteling relies exclusively on the continuing effect of the *Silkey v. Tiegs* seasonal limitation language on the Edwards Right, Terteling actually asks the SRBA Court to rewrite the provision, rather than recognize it in the terms originally decreed. At the same time, Terteling provides no evidentiary support that a diverted volume restriction would effectuate the same outcome in connection with artesian delivery of the Silkey Rights. Actually, seasonal volume limitations would not be equivalent to seasonal diversion rate limitations.

The seasonal *Silkey v. Tiegs* quantity limitations on the Edwards Right were based on “more flow during the later period than in the first period.” *Silkey v. Tiegs*, 51 Idaho

344, 354, 5 P.2d 1049 (1932) (“*Silkey I*”). As stipulated in the SRBA, up to 0.84 cubic feet per second (“cfs”) may be diverted under the Edwards Right. Terteling’s proposed reformulation of the *Silkey v. Tiegs* provision would continue to allow an instantaneous diversion rate of 0.84 cfs as long as the seasonal volumes were not exceeded. A diversion rate of four or more times the seasonal rate limitations in *Silkey v. Tiegs* likely would translate to a very different hydrogeologic effect, even when coupled with seasonal volume limitations.

Silkey v. Tiegs was quite explicit that the rate at which the wells were allowed to flow affected artesian pressure: “60 miner’s inches is the amount found by the Court to be the normal flow from said basin.” *Silkey I* at 355. The regulation of the respective flow rates was based on the hydrogeologic understanding at the time that the ground water resource constituted an underground flowing stream, with each of the wells diverting a portion of the available total flow:

The court found for respondent and among other things: “That underlying the lands of the parties hereto, all of which lands are in the same immediate vicinity, is a supply of natural warm water forming an artesian basin; that the evidence is insufficient to establish that the water flows in a subterranean stream, and the court accordingly finds that said supply of water is water percolating underground through a stratum of material which stratum is more pervious than the adjacent material, with the result that with such pervious stratum being tapped by the wells of the respective parties hereto, water from such wells flowed and flows freely therefrom in copious streams to the surface of the ground by artesian pressure, and such pervious stratum and the water percolating therein is the common source of supply for each and every of the flowing artesian wells of the parties hereto, which wells are hereinafter more particularly described, such source of supply forming a natural underground artesian

reservoir which underlies not all, but a part of the lands of the several parties hereto.”

Silkey I at 347 (emphases added). Thus, based on the understanding at the time, it was the respective diversion rates of the wells that affected artesian pressure. The seasonal volume limitations that Terteling now seeks to impose represent not only a recasting of the express terms of the *Silkey v. Tiegs* provisions, but, also, a major conceptual change in direction. *Res judicata* principles would not authorize rewriting a prior decree.

2. The *Silkey v. Tiegs* Decree expressly provided for modifications to the seasonal diversion rate limitations.

Immediately following the seasonal limitations for the Edwards Right, the *Silkey v. Tiegs* Decree states that in lieu of the specified seasonal diversion rates, the Edwards well may flow “so much thereof as will not deplete the flow of plaintiff’s wells below 40 miner’s inches.” IDWR Trial Exhibit 2, at 6. Thus, the designated quantities of 15 miner’s inches of water in the winter months and 20 miner’s inches of water in the summer months were not hard and absolute restrictions, but could be adjusted as long as the *Silkey* wells were not depleted below 40 miner’s inches.

This language is particularly significant today because the *Silkey* Rights are no longer diverted exclusively by artesian pressure and the wells can produce this quantity without seasonal restrictions on the Edwards Right. The record reflects that the bulk of the Terteling facilities that are heated with geothermal water under the *Silkey* Rights rely on the pumped Windsock well on the Terteling Ranch. Tr., p. 326, L. 2 - p. 328, L. 10;

p. 342, L. 15 - p. 342, L. 21. The record also indicates that at the time Terteling's expert tested the wells associated with the Silkey Rights in 2002, with the pumps that they were outfitted at the time, Terteling was able to realize the 40 miner's inches flow from these wells. Edwards Trial Exhibits 10, 11 and 13. The subsequent addition of the Windsock well as a point of diversion for the Silkey Rights under Transfer No. 68558 only enhanced the quantities that Terteling is able to divert under the Silkey Rights and the associated wells. Edwards Trial Exhibit No. 15. Thus, even under the express terms of *Silkey v. Tiegs*, seasonal limitations on the Edwards Right are not needed in order to ensure the availability of 40 miner's inches from the wells associated with the Silkey Rights.

The *Silkey v. Tiegs* Decree also recognized that the specified administrative provisions could be modified by subsequent court order:

No water shall be permitted to flow or be used from the respective wells of the defendants Tiegs and Ryan, as 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.

Silkey v. Tiegs Decree at 6-7 (emphasis added). Today, the SRBA Court has exclusive subject matter jurisdiction over the water rights decreed in *Silkey v. Tiegs* and, pursuant to this provision, would be the court in the position of modifying the terms of the *Silkey v. Tiegs* administrative restraints.

B. The SRBA Court is not “obligated” to decree the administrative provisions of *Silkey v. Tiegs*.

State v. Hagerman Water Right Owners, 130 Idaho 736, 740-41, 947, P.2d 409, 414 (1997), held that determinations in prior private adjudications were not binding on Idaho Department of Water Resources (“IDWR”) and the SRBA Court:

Nowhere in Title 42 is the Director “obligated to accept a prior decree” issued in a private adjudication “as being conclusive proof of the nature of a water right.” This is especially true in light of longstanding decisions in Idaho that decreed water rights although protected like any other water right, are not insulated from re-examination by the court and may be lost or reduced based on evidence that the water right has been forfeited, *Graham v. Leek*, 65 Idaho 279, 287-88, 144 P.2d 475, 479 (1943), abandoned, *Alberthsen v. Wood River Land Co.*, 40 Idaho 49, 59-60, 231 P. 418, 421-22 (1924), *Washington County Irr. Dist. v. Talboy*, 55 Idaho 382, 393, 43 P.2d 943, 947 (1935), or lost through adverse possession, *Mountain Home Irr. Dist. v. Duffy*, 79 Idaho 435, 443, 319 P.2d 965, 969 (1957) (quoting *Hall v. Blackman*, 8 Idaho 272, 68 P. 19 (1902)). *See generally* Wells A. Hutchins, *Idaho Law of Water Rights*, 5 Idaho L.Rev. 1, 73-85 (1968). Although a decree evidences a legal right to the use of water, *see* I.C. § 42-230(e), it does not obligate the Director to make a recommendation contrary to his findings.

Likewise, the SRBA Court has recognized that previously decreed water rights are not insulated from re-examination in the SRBA because water right elements can be changed after a decree, such as through contract or by operation of law:

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 (i.e. forfeiture or abandonment).

Memorandum Decision and Order on Cross-Motions for Summary Judgment, SRBA Consolidated Subcase No. 91-63 (September 1, 2004) at 12. Numerous events and developments since *Silkey v. Tiegs* have rendered the seasonal limitations on the Edwards Right inappropriate for continued effect in the SRBA.

The *Silkey v. Tiegs* Court had the need to impose administrative limitations because the regulatory authority at the time did not have jurisdiction over ground water:

There being no definite procedure established by statute the court in this equitable suit had inherent power to enforce its decree in its own way. (*See Maloney v. Zipf*, 41 Ida. 30, 237 Pac. 632; *State v. Superior Court*, 101 Wash. 260, 172 Pac. 254.) Retaining jurisdiction of the cause for two years and the administrative provisions of the decree objected to by appellants were all framed for their benefit and were within the powers of a court of equity in the absence of express statutory provisions governing the matter.

Silkey I at 358. Today, of course, IDWR has jurisdiction to administer both surface water and ground water and seasonal limitations or other similar administrative provisions are not needed in the SRBA Partial Decrees. Thus, the fundamental need for these administrative provisions no longer applies today.

Evidence introduced at trial established that the quantities asserted for the Silkey Rights in the SRBA are based on pumping of the original Silkey wells along with the Tiegs well. Tr., p. 193, L. 13 - p. 193, L. 17. Further, transfer of the Silkey Rights to the Windsock well also effectively relinquished any continued delivery of the Silkey Rights exclusively by artesian pressure from the original Silkey wells. Since the administrative limitations in *Silkey v. Tiegs* were imposed in order to protect artesian delivery of the

senior Silkey Rights from the original Silkey wells, the underlying reason for those administrative limitations no longer exists.

Additionally, pursuant to the 2002 Settlement Agreement with Edwards, Terteling voluntarily agreed to respective annual volumes for the Silkey, Tiegs and Edwards Rights, without any specification of any seasonal limitations and agreed that both parties could divert at whatever rates ultimately were authorized by the SRBA Court. Edwards Trial Exhibit 3. In agreeing to these provisions without any specification of seasonal volumes or diversion rates, Terteling implicitly relinquished the *Silkey v. Tiegs* seasonal limitations on the Edwards Right, as the Settlement Agreement provided: “This Agreement 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. If the seasonal limitations were to be retained, they should have been mentioned, as the Settlement Agreement addressed the diversion rate and volumes for the Edwards Right.

Likewise, the junior diversions from the SGGA, including potentially over 900 acre feet per year of additional diversions under the Terteling junior rights, creates a very different legal and factual circumstance today, than at the time of *Silkey v. Tiegs*. It simply makes no sense today to impose administrative limitations on a relatively senior right, the Edwards Right, when more junior rights, having the same owner as the Silkey Rights, would not similarly be so restricted. It’s likely that the diversion of such junior rights would counteract the effect of any such seasonal limitations on the Edwards Right. It should also be taken into account that Terteling is selectively pursuing the *Silkey v.*

Tiegs restrictions only against the Edwards Right in the SRBA. It has not uniformly sought their observance for its own *Tiegs* Right, 63-15, or for the Ryan Right, 63-16.

As further detailed in Edwards' opening Post-Trial Brief, by contract, by statutory changes, by operation of legal principles, such as waiver, estoppel and laches, the *Silkey v. Tiegs* seasonal restrictions on the Edwards Right should no longer apply in the SRBA.

C. While the SRBA Court has the inherent authority to re-examine previously decreed rights, Rule 60(b), I.R.C.P. provides an alternative means to relieve Edwards from the *Silkey v. Tiegs* seasonal limitations.

Rule 60(b) provides for relief from a final judgment under certain specified circumstances. The reasons for relief from a final judgment under Rule 60(b)(5) include circumstances where "it is no longer equitable that the judgment should have prospective application." This basis appears particularly suited to address the *Silkey v. Tiegs* seasonal restrictions on the Edwards Right. Additionally, Rule 60(b)(6), "any other reason justifying relief from the operation of the judgment," applies under the circumstances presented.

The administrative provisions of the *Silkey v. Tiegs* Decree were in the nature of an injunction:

Each and every of the parties hereto and their servants, attorneys, employees and successors in interest are hereby enjoined and restrained from any and all use of the water from their respective wells, except in the manner and to the extent and for the purposes herein provided.

IDWR Trial Exhibit 2 at 7. It is long established that there is continuing jurisdiction to modify or revoke an injunction as changed circumstances may dictate. *See Lapin v.*

Shulton, Inc., 333 F.2d 169, 170 (9th Cir. 1964). For example, in *United States v. Swift & Co.*, 286 U.S. 106, 114-115, 52 S.Ct. 460, 462, 76 L.Ed. 999 (1932), the Court stated:

We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions. . . . Power to modify the decree was reserved by its very terms, and so from the beginning went hand in hand with its restraints. If the reservation had been omitted, in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. . . . [A] court does not abdicate its power to revoke or modify its mandate, if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong.

The final ground of Rule 60(b)(5) allowing relief if it is “no longer equitable that the judgment should have prospective application,” is based on the historic power of a court of equity to modify its decree in light of changed circumstances. *See* Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 2863 at 336. Although the principal application of this ground of Rule 60(b)(5) generally concerns injunctions, it is not limited to that form of relief, nor to relief that would have been granted in courts of equity. *Id.* at 337. Actually, this provision of the Rule applies to any judgment that has prospective effect, as contrasted with those that offer a present remedy for a prior wrong. *Id.* at 337-38.

The case of *Pennsylvania v. Wheeling & Belmont Bridge Company*, 59 U.S. 421, 15 L.Ed. 435 (1856), has been used to illustrate the difference between the present and prospective effects of a judgment. In 1852, the Supreme Court held that a bridge across the Ohio River was an unconstitutional obstruction to commerce and ordered its removal. *Pennsylvania v. Wheeling & Belmont Bridge Company*, 54 U.S. 518, 14 L.Ed. 249

(1852). Later that year, Congress passed a statute declaring the bridge to be lawful and authorizing the company to maintain it at its existing location. The Supreme Court subsequently held that so much of the prior decree as required the bridge to be removed no longer could be enforced:

Now, we agree, if the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of congress. It would have depended, not upon the public right of the free navigation of the river, but upon the judgment of the court. The decree before us, so far as it respect[s] the costs adjudged, stands upon the same principles, and is unaffected by the subsequent law. But that part of the decree, directing the abatement of the obstruction, is executor, a continuing decree, which requires not only the removal of the bridge, but enjoins the defendants against any reconstruction or continuance. Now, whether it is a future existing or continuing obstruction depends upon the question whether or not it interferes with the right of navigation. If, in the meantime, since the decree, this right has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court cannot be enforced.

Pennsylvania, 59 U.S. at 431-432, *quoted in* Wright, Miller & Kane, § 2863 at 339-340.

Consistent with these common law roots, Rule 60(b)(5) refers to some change in conditions that makes continued enforcement of a judgment inequitable. Wright, Miller & Kane, § 2863 at 340. Changed conditions can warrant modifying a prospectively active decree:

Life is never static, and the passing of a decade has brought changes The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us

in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation

U.S. v. Swift & Company, 52 S.Ct. 460, 464, 286 U.S. 106, 119, 76 L.Ed. 999 (1932), *quoted in* Wright, Miller & Kane, § 2863 at 343. On an adequate showing, courts will provide relief under Rule 60(b)(5) if it is no longer equitable that a judgment be enforced, whether because of subsequent legislation, a change in precedent, or a change in the operative facts. Wright, Miller & Kane, § 2863 at 343-347.

For relief under Rule 60(b)(5), it is necessary to show: (1) that the judgment is prospective in nature; and (2) that it is no longer equitable to enforce the judgment as written. *Rudd v. Rudd*, 105, Idaho 112, 118, 666 P.2d 639, 645 (1983). Under the first element, it is only necessary that the judgment have prospective application. Under the second element, it must be shown that there is a sufficient change of circumstances rendering enforcement of the judgment inequitable. *Id.*, 105 Idaho at 119, 666 P.2d at 646.

Clearly, the *Silkey v. Tiegs* seasonal limitations on the Edwards Right are in the form of an injunction and are prospective in nature. Based on various changed circumstances, it is no longer equitable that these seasonal limitations continue to be imposed on the Edwards Right: (1) Statutory changes now authorize IDWR to regulate ground water; (2) the Silkey Rights are no longer diverted exclusively by artesian pressure; (3) Terteling and other parties have claimed junior rights from the SGGA without such seasonal restrictions; (4) the 2002 Settlement Agreement between Terteling

and Edwards is inconsistent with seasonal limitations; (5) Water Right Nos. 63-15 and 63-16 no longer fully observe the *Silkey v. Tiegs* restrictions; and (6) there is no demonstrated benefit to seasonal restrictions and, indeed, available evidence indicates that the proposed seasonal restrictions would have a counterproductive effect. Any one of these considerations would make it inequitable for continued enforcement of the *Silkey v. Tiegs* seasonal restrictions on Edwards Right. Taken together, all of these considerations overwhelming satisfy the second element.

Generally, relief from a judgment on this ground of Federal Rule 60(b)(5) should come from the same court that issued the judgment, as long as a remedy would be available in that same court. Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 2863 at 350. See also *Lapin v. Shulton, Inc.*, 333 F.2d 169, 172 (9th Cir. 1964) (“We do hold that considerations of comity and orderly administration of justice demand that the nonrendering court should decline jurisdiction of such an action and remand the parties for their relief to the rendering court, so long as it is apparent that a remedy is available there.”)

While *Silkey v. Tiegs* was decided in the Ada County District Court, it appears only that the SRBA Court would have jurisdiction over these water right matters today. *Walker v. Big Lost River Irrigation District*, 124 Idaho 78, 81, 856 P.2d 868, 871 (1993); *Devil Creek v. Cedar Mesa Reservoir & Canal Co.*, 126 Idaho 202, 206, 879 P.2d 1135, 1139 (1994); *Sagewillow, Inc. v. Idaho Department of Water Resources*, 135 Idaho 24, 26, 13 P.3d 855, 857 (2000). Since the Ada County Court would not have authority to make findings concerning the Edwards Right, this would be a situation where the

application of Rule 60(b)(5) to the *Silkey v. Tiegs* Decree could not be addressed by the rendering court, but would have to be addressed by the SRBA Court, instead.

Also, it is noted that while the Idaho Rule 60(b) is similar to the Federal Rule 60(b), there are some differences, one of which may give Idaho district courts, other than the rendering court, authority over Rules 60(b) matters. The Idaho Rule contains the following sentence, which is not included in the Federal Rule: “Such motion does not require leave from the Supreme Court, or the district court, as the case may be, as though the judgment has been affirmed or settled upon appeal to that court.” This sentence suggests that the permission of the rendering court may not be necessary for relief under Rule 60(b). In any event, only the SRBA Court currently has subject matter jurisdiction to evaluate the seasonal limitations on the Edwards Right. Therefore, the SRBA Court is the appropriate court to address the application of Rule 60(b)(5) in connection with the *Silkey v. Tiegs* restrictions on the Edwards Right.

To the extent the Court deems Rule 60(b)(5) not to apply, Rule 60(b)(6) provides an alternate basis for relief. This provision gives courts the power to vacate judgments “for any other reason justifying relief from the operation of the judgment.” *See Wright, Miller & Kane*, § 2864 at 350. For example, in *First Security Bank of Idaho v. Stauffer*, 112 Idaho 133, 143, 730 P.2d 1053, 1063 (Ct. App. 1986), the Court found that Rule 60(b)(6) applied where a party was subjected to a judgment amendment without an opportunity for a hearing. *Id.* Likewise, here, unique circumstances would justify relief under Rule 60(b)(6).

A requirement for relief under Rules 60(b)(5) & (6) is that the motion be made “within a reasonable time.” What constitutes a reasonable time depends upon the specific facts in each individual case. Wright, Miller & Kane, § 2866 at 382. In this regard, courts consider whether the opposing party has been prejudiced by a delay in seeking relief and whether the moving party had some good reason for the failure to take action sooner. *Id.* There is no evidence of efforts to enforce the seasonal restrictions on the Edwards Right except for immediately after issuance of the *Silkey v. Tiegs* Decree. Edwards Trial Exhibit 4. During the Water District 63-S proceedings in the 1990’s, IDWR reiterated in several Orders that the SRBA Court would be responsible for re-evaluating the continuing effect of the provisions in *Silkey v. Tiegs*. Edwards Trial Exhibits B, C, D and E. At trial, Ms. Edwards indicated that while the Edwards Family LLC in recent years did attempt to stay within the total annual volume limitation of 250 acre feet, the seasonal volume limitations in the *Silkey v. Tiegs* Decree may not have been satisfied. Tr., p. 314, L. 18 - p. 315, L. 4. The 2002 Settlement Agreement between Edwards and Terteling provides only for annual volume limitations, confirming that the seasonal limitations were no longer deemed important by this time. For all of these reasons, the SRBA is the right time and place for these matters to be addressed, while at the same time there does not appear to have been prejudice as a result of these matters not being raised sooner. The SRBA Court can consider Edwards’ Post-Trial Brief and this Response Brief to constitute motions for relief under Rule 60(b) or, if the Court so instructs, Edwards shall file a separate Rule 60(b) motion.

III. Conclusion

For the foregoing reasons, along with the reasons discussed in Edwards' Post-Trial Brief, the Court should deny Terteling's Objection seeking to impose seasonal limitations on the Edwards Right.

Dated this 12th day of November, 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 12th day of November, 2010, by U.S. Mail postage pre-paid (or by the pre-paid method as otherwise indicated below) to:

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