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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
FEB - 7 2011	
By _____	Clerk
Deputy Clerk	

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) SPECIAL MASTER'S REPORT
Case No. 39576)
) FINDINGS OF FACT AND
) CONCLUSIONS OF LAW
)
) FOR WATER RIGHT 63-00014

I. FINDINGS OF FACT

A. Claim to Water Right No. 63-00014.

1. Paul W. Edwards claimed water right no. 63-00014 in the Snake River Basin
Adjudication on May 1, 1989, with the following elements:

- A. Priority Date: November 22, 1926
- B. Source: Groundwater
- C. Point of Diversion: T04N R02E, Section 29 SESWNE
- D. Purpose of Use: Irrigation - .20 cfs; Heating - .84 cfs
- E. Season of Use: Irrigation - 3/15 - 11/15; Heating 1/1 - 12/31
- F. Quantity: .84 cfs

See Claim to Water Right No. 63-00014.

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

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

- A. Purpose of Use: Irrigation - .33 cfs; Heating - .84 cfs; Commercial - .84 cfs.
- B. Season of Use: Commercial - 1/1 - 12/31.

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

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

5. Both the May 1, 1989 original claim to water right no. 63-00014 filed by Paul W. Edwards, and the January 14, 2005 amended claim to water right no. 63-00014 listed the basis of the water right as “decreed”, and referenced the *Silkey v. Tiegs* Decree, Ada County Case No. 11748 (August 19, 1930) (“*Silkey Decree*”).

B. The Terteling Company, Inc. Water Rights.

6. The Terteling Company, Inc., has claimed water right nos. 63-00012, 63-00013, and 63-00015 in the Snake River Basin Adjudication for, among other purposes, heating.

7. The basis of water right claims 63-00012, 63-00013, and 63-00015 is the *Silkey Decree*.

8. The Idaho Department of Water Resources recommended water right nos. 63-00012, 63-00013, and 63-00015 in the SRBA essentially as claimed by the Terteling Company, Inc.

9. The Terteling Company, Inc. and T-7, LLC are related entities with respect to management and ownership. In addition to water right claims 63-00012, 63-00013, and 63-00015, The Terteling Company, Inc. and T-7 LLC have asserted the following geothermal rights in the SRBA: 63-31052, 63-03603, 63-07595, 63-31057, and 63-03159. The source of these water rights is hydraulically connected to the source for water rights 63-00012, 63-00013, 63-00014, and 63-00015.

10. In 1997, The Terteling Company, Inc. purchased the Silkey and Tiegs rights (63-00012, 63-00013, and 63-00015) and the associated land located at 36th Street and Hill Road in Boise. Shortly thereafter, The Terteling Company, Inc. filed Transfer Application No. 68558 to

add the Terteling Ranch property, approximately 2 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.

C. Silkey v. Tiegs Decree.

11. The Ada County, Idaho District Court of the Third Judicial District issued its Decree in the case of *Silkey v. Tiegs, Edwards, and Ryan* on June 13, 1930. See IDWR Exhibit 2.

12. The *Silkey Decree* resulted in the allotment of groundwater to the parties to the decree, including: (1) Thomas F. Edwards, the predecessor-in-interest in water right no. 63-00014 to Paul W. Edwards and the Edwards Family, LLC; (2) Francis Silkey, the predecessor-in-interest in water right nos. 63-00012 and 63-00013 to The Terteling Company, Inc.; and (3) H.W. Tiegs, the predecessor-in-interest in water right no. 63-00015 to The Terteling Company, Inc. *Id.*

13. The *Silkey Decree* resulted in the decree to Thomas F. Edwards of water right no. 63-00014 in the amount of “forty-two miners’ inches of water . . . for irrigation, domestic, stock and heating purposes with priority dating from November 22, 1926.” The water right was decreed as appurtenant to Thomas F. Edwards’ lands. *Id.* ¶3.

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

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

Id., ¶7

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

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

Id., ¶10

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

The court retains jurisdiction of this cause for a period of two years from this date to adjust the allowance of water permitted to be used from the wells of the defendants, in case it should hereafter appear from said record of measurement that more or less water than herein provisionally fixed may or should be permitted to flow from the wells of said defendants, or any of them, without infringement of the rights herein decreed in accordance with their respective priorities.

Id., ¶11.

17. With respect to the hydraulic connection between the source of supply for the water rights at issue in the *Silkey Decree*, the court stated: “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”

18. In addition to there being a hydraulic connection between the source of supply for the water rights at issue in the *Silkey Decree* (i.e. 63-00012, 63-00013, 63-00014, 63-00015, and 63-00016), there is also a hydraulic connection between all the wells that are included in Water District 63-S. The hydraulic connection is such that water flowing or withdrawn from one well will affect the other wells, and the farther apart the wells are the longer it will take for the effect to manifest. Tr. p. 283, ln. 7-16. Additionally, the aquifer that constitutes the source of supply for the wells in Water District 63-S has a relatively rapid response time, with water pressure

reductions occurring in August or September as a result of withdrawals from the aquifer being able to be recovered by the end of the year. Tr. p. 278, ln. 10-16.

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

19. On or about December 20, 2000, The Terteling Company, Inc., filed an Application for Transfer of Water Right no. 68558 with the Idaho Department of Water Resources. The Application sought to add alternate points of diversion to water right nos. 63-00012, 63-00013 and 63-00015 for the use of the rights at an additional location. *See* Edwards Ex. 9.

20. On or about December 22, 2000, Edwards Family, LLC filed a protest to Application for Transfer of Water Right no. 68558 with the Idaho Department of Water Resources. *See* IDWR Ex. 3, p. 2.

21. On January 24, 2002, The Terteling Company, Inc., and Edwards Family, LLC entered into a written agreement to settle Edwards Family, LLC's protest to The Terteling Company, Inc.'s Application for Transfer of Water Right no. 68558 (the "Settlement Agreement"). *See* IDWR Exhibit 3.

22. The Settlement Agreement provides that "Edwards shall divert a maximum of 250 AFA from the Stewart Gulch Geothermal aquifer under the Edwards Right." *See* IDWR Ex. 3, ¶4.

23. The Settlement Agreement provides that "Terteling shall divert a combined maximum total of 400 AFA from the Stewart Gulch Geothermal aquifer under the Silkey and Tiegs Rights." *Id.* The "Silkey Rights" are water right nos. 63-00012 and 63-00013, and the "Tiegs Right" is water right no. 63-00015.

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

25. The Settlement Agreement provides: “Each Party may divert water at the rates ultimately authorized by the respective final Snake River Basin Adjudication (“SRBA”) partial decrees for the Silkey Rights and the Edwards Right.” *Id.*, ¶5.

E. Recommendation of Water Right No. 63-14

26. The Idaho Department of Water Resources issued a *Director’s Report* for water right no. 63-00014 recommending the elements of the right essentially as claimed pursuant to the Amended Claim described hereinabove. *See* IDWR Ex. 1.

27. The Idaho Department of Water Resources recommended a volumetric limitation of 250 AFY (acre feet per year) for water right claim 63-00014. *Id.*

F. Objections to Water Right No. 63-14

28. The Terteling Company, Inc., filed an objection in the Snake River Basin Adjudication to the *Director’s Report* for water right claim no. 63-00014, objecting to the quantity element, specifying that it should be “[l]imited to the quantities listed in” the *Silkey Decree*; and objecting to the period of year element, specifying that it should be “[a]s specified in” the *Silkey Decree*.

29. Edwards Family, LLC also filed an objection to the *Director’s Report* for water right 63-00014, objecting to the quantity element, and specifying that the “annual volume limitation only should appear in the ‘Other Provisions’ section in reference to private agreement.”

G. Historical and Current Use of Water Under 63-14.

30. In the early years of its existence, water right 63-00014 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 was used primarily for irrigation and, also, for heating. Tr. p. 298, ln. 19 – p. 300, ln. 1. *See also Silkey I*, 51 Idaho at 346-347 (“The location and soil render [the lands] chiefly valuable for truck gardening purposes although hay and other crops are also grown thereon. The hot water from the wells is utilized to heat their homes and hotbeds as well as for irrigating crops.”).

31. Presently, water right 63-00014 is primarily used for heating purposes in connection with raising plants and flowers in the greenhouses owned and operated by the Edwards Family, LLC. Tr. p. 300, ln. 2 – p. 305, ln. 22.

32. Edwards Family LLC presently beneficially uses water right 63-00014 year round. However, as presently used, Edwards Family LLC has a greater demand for the water during the winter months, starting approximately October 15 or November 1, and continuing through May. Tr. p. 305, ln. 23 – p. 306, ln. 3.

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

II. CONCLUSIONS OF LAW

1. Neither The Terteling Company, Inc., nor Edwards Family, LLC is asserting through this litigation that the annual volumetric limitation placed upon water right no. 63-00014 should be any less or greater than 250 AFY as it is currently recommended by the Idaho Department of Water Resources. Both parties are precluded from making such assertions by the following language from their 2002 Settlement Agreement:

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

2. The Terteling Company, Inc.'s position with respect to its objection is that the volumetric limitation of 250 AFY recommended in the *Director's Report* for water right no. 63-00014 does not reflect the seasonal limitations of .30 cfs (15 miners' inches) from 10/1 to 4/1 (the "Winter Months") and .4 cfs (20 miners' inches) from 4/1 to 10/1 (the "Summer Months") that were placed on that right by the *Silkey Decree*.

3. Vicky Music is a Senior Water Resource Agent with the Idaho Department of Water Resources. Tr. p. 40, lns. 9-14. Ms. Music is an expert in the investigation and recommendation

of claims in the SRBA. Tr. p. 49, ln. 21 – p. 50, ln. 4. Ms. Music prepared the director's recommendation for water right no. 63-00014. Tr. p. 50, ln. 21 – p. 52, ln. 19.

4. Ms. Music testified that a diversion rate of 20 miners' inches for the six Summer Months would generate a volume of 145.2 acre-feet, and that a diversion rate of 15 miners' inches for the six Winter Months would generate a volume of 108.3 acre-feet. Tr. p. 71, ln. 1 – p. 72, ln. 20. The total of these two volumes is 253.5 acre-feet. Tr. p. 72, ln. 23 – p. 73, ln. 2.

5. Ms. Music testified that although she conducted many hypothetical calculations of the proper volumetric limitation to impose upon water right no. 63-00014, the sole basis of her recommendation of the 250 acre-feet per year volumetric limitation on water right no. 63-00014 was the limitation on that right of 250 acre-feet per year contained in the Settlement Agreement between The Terteling Company, Inc., and Edwards family, LLC. Tr. p. 64, ln. 4 – p. 65, ln. 6.

6. Because Ms. Music did not see that the seasonal rate of flow limitations imposed by the *Silkey Decree* were addressed either in the Settlement Agreement or in any of the myriad of documents she reviewed, she assumed they were temporary and therefore did not incorporate them into her recommendation. Tr. p. 65, ln. 18 – p. 66, ln. 9; Tr. p. 73, ln. 8 – p. 74, ln. 7.

7. However, Ms. Music admits that there was nothing in either the documents she reviewed to prepare the recommendation or the Settlement Agreement that precluded the imposition of the seasonal rate of flow limitations imposed by the *Silkey Decree*. Tr. p. 74, lns. 8-19; Tr. p. 75, ln. 19 – p. 77, ln. 12; Tr. p. 78, lns 1-6.

8. After issuance of the *Silkey Decree*, the defendant Thomas F. Edwards (the predecessor-in-interest of Edwards Family, LLC in water right no. 63-00014) appealed the case in part on the grounds that the District Court erred in imposing the "seasonal limitations" on water right no. 63-00014. *Silkey v. Tiegs*, 51 Idaho 344, 354, (1931) ("*Silkey I*"). The Idaho Supreme Court responded to Thomas F. Edwards' complaint by stating:

Appellants assign as error what their counsel terms "a seasonal limitation upon the right of appellant, Edwards, to the use of the water," to which he is found entitled as set forth in paragraph seven of the decree, *supra*. The court decreed him forty-two

miner's inches of water "for irrigation, domestic, stock, and heating purposes." The amount of water that he was permitted to flow from his well was "provisionally fixed and limited" as set out in paragraph seven of the decree, *supra*. As argued by respondent, this provision of the decree is clearly in the interest of appellant Edwards. He is permitted to use the excess normal flow from the basin, estimated at from fifteen to twenty inches above the forty miner's inches appropriated by respondent. The testimony indicates that there is more flow during the later period [April 1 to October 1] than in the first period mentioned in the decree [October 1 to April 1]. It is not an attempt to fix one duty of water for one part of the irrigation season and a higher duty of water for another part, as was the case in *Muir v. Allison*, 33 Ida. 146, 191 Pac. 206, cited by appellants, where the court held that one entitled to a continuous flow of the waters of a stream could not be deprived of his right thereto by decree without his consent. The purpose of the decree here is to provisionally fix the total amount of water to be taken from the respondent's and appellant Edwards' wells. Sixty miner's inches is the amount found by the court to be the normal flow from said basin. In any event this provision is not final and is in effect an administrative one, subject to change by the trial court in case it should later develop that said appellant is entitled to more or less than the amounts so permitted to flow from his well.

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

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

The affidavits and showings . . . are not sufficient to show that any good, without possible continuing hazard to respondent's rights, would be accomplished by continuing the provisional portion of the decree, even though the affirmance of the former decree was not an adjudication that two years was the maximum period for such

study, fixing that as the limit, which point we do not decide, as unnecessary.

Silkey II, at 129.

10. A private adjudication such as that resulting in the *Silkey Decree* binds parties and privies to the adjudication. *State v. Hagerman Water Right Owners* (in Re SRBA Case No. 39576), 130 Idaho 736, 742 (1997).

11. The provision in the *Silkey Decree* at issue herein is not an element of water right 63-00014, but rather it is a provision for the administration of said water right, limiting the withdrawal of water therefrom for the purpose of protecting the artesian flow of the two wells located in T04N R02E Section 29 NENESE used under water rights 63-00012 and 63-00013.

12. Subsequent to the *Silkey Decree* (1930), the Idaho legislature passed the Ground Water Act (1951), I.C. § 42-226 *et. seq.* Under the Ground Water Act, the Director of the Department of Water Resources is empowered:

To supervise and control the exercise and administration of all rights to the use of ground waters and in the exercise of this discretionary power he may initiate administrative proceedings to prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available. To assist the director of the department of water resources in the administration and enforcement of this act, and in making determinations upon which said orders shall be based, he may establish a ground water pumping level or levels in an area or areas having a common ground water supply as determined by him as hereinafter provided. Water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge.

I.C. § 42-237a(g).

13. Water right no. 63-00014 is subject to administration by the Director under the authority quoted above for the purpose of protecting the present or future use of prior rights 63-00012 and 63-00013.

14. Idaho Rule of Civil Procedure 60(b) states in relevant part:

On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (5) . . . it is no longer equitable that the judgment should have prospective application.

15. A party seeking equitable relief from the prospective application of a judgment is required to show that the judgment is prospective and that it is no longer equitable to enforce the judgment as written. *Devine v. Cluff*, 111 Idaho 476, 725 P.2d 181 (Ct. App. 1986).

16. "A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need." *U.S. v. Swift & Co.*, 286 U.S. 106, 114, 52 S.Ct. 460, (1932) citing *Ladner v. Siegel*, 298 Pa. 487, 494, 495, 148 A. 699, 68 A. L. R. 1172; *Emergency Hospital v. Stevens*, 146 Md. 159, 126 A. 101; *Larson v. Minn. N. Electric Ry. Co.*, 136 Minn. 423, 162 N. W. 523; *Lowe v. Prospect Hill Cemetery Ass'n*, 75 Neb. 85, 106 N. W. 429, 108 N. W. 978.

17. The provision from the *Silkey Decree* sought by The Terteling Company to be incorporated into the SRBA partial decree for water right 63-00014 is prospective in that it is a provision encumbering the use of water right 63-00014 for the benefit of preserving the artesian flow of water from the wells originally associated with the Silkey water rights.

18. The statutorily declared public policy of the State of Idaho is that water resources of the state be devoted to beneficial use in reasonable amounts through appropriation. I.C. § 42-226.

19. There may be future circumstances under which the artesian flow of water from the wells originally associated with the Silkey water rights will not require the additional protection of restricting the Edwards right 63-00014 to 108.3 acre-feet during the period from October 1 to

April 1 during a particular year. For example, at times when The Terteling Company is withdrawing water under water rights 63-00012 and 63-00013 from the Windsack well rather than the original Silkey wells, it is inconsistent with the statutory objectives of the state to restrict the Edwards right for the purpose of protecting the unused potential of withdrawals of water from the original Silkey wells by The Terteling Company. Another example would be where the Stewart Gulch Geothermal aquifer has sufficiently recovered from its typical low in August in an amount that is sufficient to allow wintertime withdrawals by Edwards in excess of 108.3 acre feet without affecting the artesian flow of water from the original Silkey wells.

20. It is no longer equitable for the seasonal limitations in the *Silkey Decree* to apply to water right 63-00014 year in and year out, without regard to whether such restrictions are needed in any particular year to accomplish the purpose of protecting the artesian pressure for use under water rights 63-00012 and 63-00013 at the points of diversion of the original Silkey wells. Rather, the seasonal restriction should be evaluated on an ongoing basis by the watermaster and implemented only under circumstances where such restriction is necessary for the protection of flows from the original Silkey wells.

21. Since the time of the *Silkey Decree*, the Ground Water Act constitutes a significant change in the law which provides for the supervision by the Director of withdrawals from the Stewart Gulch Geothermal Aquifer. I.C. § 42-226 *et seq.* This supervision provides a protection to the original Silkey points of diversion that was not available at the time of the *Silkey Decree*. This significant change in law provides a basis for relieving Edwards from the prospective application of the administrative provision sought to be perpetuated by The Terteling Company.

22. Since the time of the *Silkey Decree*, there have been significant changes in the factual circumstances relative to the need to curtail withdrawals from the Edwards Family, LLC's well to 108.3 acre feet during the period of October 1 through April 1. These changed factual circumstances include: (1) the formation of Water District 63-S and the appointment of a watermaster to measure and supervise the withdrawal of water from the Stewart Gulch Geothermal Aquifer; (2) the opening of wells junior to the Edwards water right 63-00014 and withdrawal of water from said wells from the Stewart Gulch Geothermal Aquifer; (3) the transfer of the points of diversion associated with the original Silkey Wells, making the

Windsock well an additional point of diversion for these rights; (4) the change in the annual usage pattern of the Edwards right from irrigation for a truck farming operation to a greenhouse operation; and (5) changes in the cyclical seasonal variations in artesian pressure in the aquifer since the time of the *Silkey Decree*.¹ These significant changes in factual circumstances provide a basis for relieving Edwards from the prospective application of the administrative provision sought to be perpetuated by The Terteling Company.

23. The partial decree issued for water right 63-00014 should contain the following remark: "This right may be limited to a total of 108.3 AF during the period from October 1 through April 1 and/or 145.2 AF during the period April 1 to October 1 for the purpose of protecting the artesian flow of water from the two wells used under water rights 63-00012 and 63-00013 and located in T04N R02E Section 29 NENESE."

24. The provision in the Settlement Agreement stating that "Edwards shall divert a maximum of 250 AFA from the Stewart Gulch Geothermal aquifer under the Edwards Right" is unambiguous. IDWR Ex. 3, ¶4.

25. The provision in the Settlement Agreement stating that "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" is unambiguous.

26. 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.*

27. The Settlement Agreement is silent with respect to the administrative provision at issue. The subject administrative provision is not inconsistent with either the diversion rate

¹ The evidence presented at trial indicates that the recent seasonal variations in the artesian pressure of the aquifer have a low point in August or September, and a peak in occurring at the end of each year. Tr. p. 277 ln. 14 – p. 278 ln. 16. In contrast, at the time of the *Silkey v. Tiegs* litigation, apparently the seasonal lows were occurring during the non-irrigation season period of October 1 through April 1, as mentioned in *Silkey I*, at 355 ("The testimony indicates that there is more flow during the later period than in the first period mentioned in the decree").

provision or the annual volumetric limitation provision of the Settlement Agreement. Therefore, The Terteling Company is not prohibited by the terms of the Settlement Agreement from pursuing its objection in the SRBA.

28. “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 a waiver was intended or consented to.” *Motor Carrier Operations v. Idaho PUC*, 83 Idaho 351, 357-358 (1961) (ellipses in original).

29. The evidence presented at trial is insufficient to show that The Terteling Company, Inc. intended to waive the seasonal diversion rates set forth in the *Silkey Decree*. Furthermore, there has been no showing that Edwards Family LLC has been misled by conduct on the part of The Terteling Company, Inc. into honestly believing that such a waiver was intended or consented to.

30. The Terteling Company, Inc. is not entitled to the protection of the artesian pressure in the wells that constitute the original points of diversion of the Silkey rights to the extent that water under those rights is diverted from the Windsock well. In other words, The Terteling Company, Inc. is not entitled to such protection solely for the purpose of providing an unused potential of artesian pressure from those two wells.

31. “The doctrine of quasi-estoppel requires that the offending party must have gained some advantage or caused a disadvantage to the party seeking estoppel; including 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." *Schooner v. Bonner County*, 113 Idaho 916, 750 P.2d 95, 99 (1988).

32. The evidence presented at trial does not show that Edwards Family LLC has changed its own position regarding the seasonal flow limitations set forth in the *Silkey Decree*. Although the use of water by Edwards Family LLC and its predecessors-in-interest has changed over the years from being more heavily used in the summer months for irrigation associated with its truck farming operation, to being more heavily reliant on wintertime use in connection with its current greenhouse operation, there is no indication that this change was occasioned in reliance on the conduct of The Terteling Company. Furthermore, there is no evidence to suggest that The Terteling Company has derived a benefit from taking a position that is inconsistent with the position that it now takes.

33. The doctrine of judicial estoppel prohibits a party from taking one 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). The doctrine of judicial estoppel is an equitable doctrine that protects 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 application of the doctrine is discretionary with the court. *Sword v. Sweet*, 140 Idaho 242, 252, 92 P. 3d 492 (2004).

34. The Terteling Company Inc., is not judicially estopped from asserting the perpetuation of the seasonal flow restrictions from the *Silkey Decree*. The Terteling Company Inc. was not a party to *Silkey v. Tiegs*, but rather is the successor-in-interest to the water rights decreed therein. As a non-party, The Terteling Company, Inc., asserted no position in the *Silkey v. Tiegs* litigation, but now is simply asserting the perpetuation of the administrative provisions set forth therein. The Edwards Family, LLC likewise asserted this position in its original claim. In an exercise of discretion, this Special Master concludes that the dignity of the judicial process is not offended by the assertions made by the Terteling Company, Inc. and therefore finds that judicial estoppel is not applicable.

35. The elements for 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 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).

36. The original claim for water right 63-00014, filed on May 1, 1989, included the seasonal limitations now sought by The Terteling Company, Inc. Therefore, the relevant period of time with respect to analyzing whether there was a delay by The Terteling Company, Inc., in asserting its rights is prior to that date.

37. The evidence in the record is insufficient to demonstrate that prior to May 1, 1989, that there was increased use of water during the winter months by Edwards, that such increased use of water affected the flow of water from the original Silkey wells. The record also does not establish that the then owners of water rights 63-00012 and 63-00013 delayed in asserting its rights under the *Silkey Decree*. As to the element of laches regarding the lack of knowledge by Edwards Family LLC or its predecessors-in-interest that the then owner of water rights 63-00012 and 63-00013 would assert its rights, the record does not establish any such lack of knowledge. Simply put, the record does not establish the elements of a defense of laches in this case.

Having weighed the entirety of the evidence presented and considered the applicable law, IT IS RECOMMENDED that water right 63-00014 be decreed with the elements as set forth in the attached *Recommendation for Partial Decree Pursuant to I.R.C.P. 54(b)*.

Dated Feb. 7, 2011



Theodore R. Booth
Special Master
Snake River Basin Adjudication

In Re SRBA) PARTIAL DECREE PURSUANT TO
)
) I.R.C.P. 54(b) FOR
Case No. 39576)
)
) Water Right 63-00014

PAGE 1
Feb-03-2011

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

Commercial use is included as an accomplished transfer pursuant to Section 42-1425, Idaho Code.

The quantity of water decreed for this water right for domestic use is not a determination of historical beneficial use.

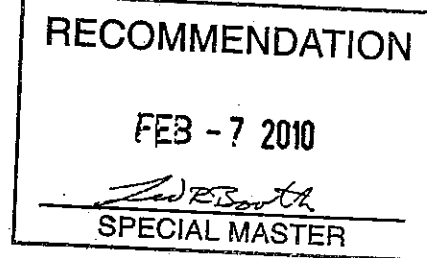
This water right is subject to the terms of a private Agreement dated January 24, 2002, recorded at the Ada County Recorder's Office on August 27, 2002, as Instrument No. 102097169.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Eric J. Wildman
Presiding Judge of the
Snake River Basin Adjudication



DISTRICT COURT - SRBA	
Fifth Judicial District	
County of Twin Falls - State of Idaho	
FEB - 7 2011	
By _____	Clerk
_____	Deputy Clerk

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)
)
Case No. 39576)
)
_____)

NOTICE OF ISSUANCE OF
SPECIAL MASTER'S
RECOMMENDATION

Water Right(s) : 63-00014

On February 07, 2011, Special Master THEODORE R. BOOTH issued a SPECIAL MASTER'S RECOMMENDATION for the above subcase(s) pursuant to SRBA Administrative Order 1 (AO1), Section 13a.

Pursuant to SRBA Administrative Order 1, Section 13a, any party to the adjudication including parties to the subcase, may file a Motion to Alter or Amend on or before the 28th day of the next month.

Failure of any party in the adjudication to pursue or participate in a Motion to Alter or Amend the SPECIAL MASTER'S RECOMMENDATION shall constitute a waiver of the right to challenge it before the Presiding Judge.

DATED February 07, 2011.



DIANA R. DELANEY
Deputy Clerk

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
FEB - 7 2011	
By _____	Clerk
Deputy Clerk	

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)

Case No. 39576)

CERTIFICATE OF MAILING

Water Right(s): 63-00014

CERTIFICATE OF MAILING

I certify that a true and correct copy of the SPECIAL MASTER'S REPORT, SPECIAL MASTER'S RECOMMENDATION FOR PARTIAL DECREE and NOTICE OF ISSUANCE OF SPECIAL MASTER'S REPORT AND RECOMMENDATION were mailed on February 07, 2011, with sufficient first-class postage prepaid to the following:

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

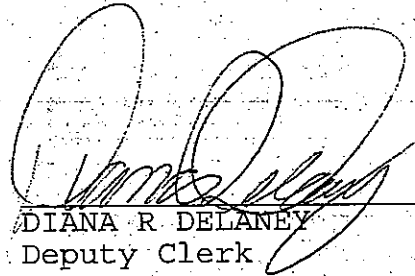
THE TERTELING CO INC
Represented by:
CHARLES L. HONSINGER
455 S THIRD ST
PO BOX 2773
BOISE, ID 83701-2773
Phone: 208-342-4591

EDWARDS FAMILY LLC
Represented by:
DANA L. HOFSTETTER
608 WEST FRANKLIN STREET
BOISE, ID 83702
Phone: 208-424-7800

CERTIFICATE OF MAILING

PAGE 1
02/07/11

EDWARDS FAMILY LLC
Represented by:
DEBRA K. ELLERS
PO BOX 1030
MCCALL, ID 83638
Phone: 208-315-2827



DIANA R. DELANEY
Deputy Clerk