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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	)	
	)	
Case No. 39576	)	Subcase Nos. 75-10603, 75-14531
	)	
	)	MEMORANDUM IN SUPPORT OF MOTION TO
	)	ALTER OR AMEND
	)	
	)	
	)	

COMES NOW, Claimants/Objectors Heltsley and Felton, by and through their attorneys RINGERT LAW, CHARTERED, and pursuant to the Court's *Order Granting Motion for Continuance and Re-setting Hearing Date*, hereby submit this *Memorandum* in support of their *Motion to Alter or Amend Special Master's Report* on file herein. This *Memorandum* is supported by the record herein, by the *Affidavit of Anne Heltsley in Support of Motion to Alter or Amend*, and by the *Affidavit of Charles L. Honsinger in Support of Motion to Alter or Amend* both of which are submitted concurrently herewith.

INTRODUCTION

Stuart and Mitzi Felton (hereinafter “Felton”) filed their Notice of Claim to Water Right no. 75-10603 in the SRBA claiming a point of diversion from an “unnamed spring” located on property owned by Objector Daryl Hull (hereinafter “Hull”) that is tributary to the North Fork of the Salmon River. The points of diversion claimed were located in T25N R21E Section 15 SESW, and in T25N R21E Section 15 SWNE with the notation that “H. Hanson’s diversion on the North Fork also feeds spring.” IDWR originally recommended the water right with its source listed as a spring. Objectors Hull and Patrick Murphy (hereinafter “Murphy”) objected to the point of diversion on March 18, 2009, erroneously asserting that instead of its being located on the Hull property as originally recommended, it should be located on the same ditch downstream on United States Forest Service property.

Ann M. Heltsley Living Trust (hereinafter “Heltsley”) filed its claim to water right no. 75-14531 in the SRBA claiming two points of diversion: one in T25N R21E Section 15 SESWSW, and a second in T25N R21E Section 15 SWSESW. The claim notes that a “canal diverts entire stream to the POU.” IDWR recommended the water right in the SRBA with a source erroneously listed as “unnamed stream,” and with a point of diversion erroneously located on United States Forest Service property downstream on the ditch from its correctly claimed location on the Hull property. Heltsley objected, requesting that the source and point of diversion be properly upon the Hull property. Responses were filed by Hull and Murphy on August 26, 2009 and the case went to trial.

At the trial on February 26, 2010, through the testimony of its agent Monica Van Bussum, IDWR amended its recommendation of the source and point of diversion for the Felton claim (75-10603) to match the same source and point of diversion erroneously recommended for the Heltsley

claim (75-14531). After trial, despite the evidence and testimony clearly establishing that the source of the two water rights is a spring located on the Hull property with a point of diversion in the same location, the Special Master recommended the source as an "unnamed stream," and the point of diversion in a ditch located on Forest Service property. Felton and Heltsley filed their *Motion to Alter or Amend*, and now file this *Memorandum* to assist the Special Master in properly determining and locating the true source and point of diversion for the water rights.

ARGUMENT

Initially, Felton and Heltsley point out that the reason they are so concerned with the location of their water rights' point of diversion (and thus the reason behind the filing of this *Motion*) is that the removal of their point of diversion downstream from its historical location will result in their inability to maintain the ditch as it runs across the Hull and Murphy properties. This is important because repairs to blow-outs of the ditch located on the Murphy property have been necessary in the past as testified to by Ann Heltsley:

Q. Okay, now, as far as the blow-outs are concerned as your brother testified to, were you present or involved with those, as he indicated?

A. Yeah. I didn't let him far off the leash.

Q. Okay, so let's talk about the -- the first one that he -- he testified to; and that is on the -- on what he described to be the Murphy property as it sits today. Or at least as he pointed out would indicate that it was on the Murphy property. Is that your understanding, as well?

A. Yes.

Q. Can you pinpoint any better than he did as far as where that breach occurred?

A. Well, it was one of those "hurry up, get up here" kind of things, so we grabbed our shovels and went up to help -- help Harold. But it was on Harold's property. It was below the -- the head of the spring. And it was -- it was going out toward the

North Fork. We were losing our water, and Harold attributed that to animals tromping it.

Subcase Nos. 75-10603, 75-14531, 75-14532 Transcript of Digitally Recorded Proceedings (hereinafter “Tr.”), p. 296, ln. 15 - p. 297, ln. 9.

If the ditch through the Murphy and Hull properties cannot be repaired because it is determined to be a “natural stream” instead of a ditch, the claimants may very well lose their water right. Again, Ms. Heltsley explains:

Secondly, if the point of diversion is changed, then we take great peril in being injured with our water right. And in evidence that the department of water resources put in with their pictures, it proves me right. They're not taking care of the ditch. They're allowing all the downfall. They're not keeping it in the channel. You can see from the photograph that they're allowing it to leave the ditch.

Q. Is that different than what you've historically observed?

A. Yes, very different.

Q. Are you concerned that -- that the -- that the -- you will eventually lose your water right, if not unchecked?

A. If that ditch is not repaired, we will lose our water, which will make my land useless.

Tr., p. 299, ln. 24 - p. 300, ln. 14. Accordingly, as can be seen from the excerpted testimony, the determination of the location of the point of diversion for these water rights is of critical importance to both Heltsley and Felton.

Although there was much testimony and evidence at trial that illustrate the error in calling the source of the water rights a “stream” instead of a “spring”, and in locating the point of diversion below the Hull property, there are two primary facts that definitively determine the issue in favor of movants herein. First, although the *Special Master Report* relies upon the

testimony of Monica Van Bussum to the effect that she did not see a spring box during her site visit (see *Special Master Report*, pp. 4,12) to determine that no spring exists, the simple fact is that Ms. Van Bussum never visited the location of the spring box. Accordingly, she could not have seen it. Second, the *Special Master Report* determined that the source of these water rights was a “natural stream until it reached Forest Service land where it was first diverted into the “Spring Ditch.”” However, the evidence establishes that what the Special Master Report refers to as a “natural stream” is in fact a ditch that diverts water from the North Fork Salmon River above the location where it is asserted that it turns into a “stream.” Thus, according to the *Special Master Report*, a ditch diverting water from the North Fork Salmon River transforms itself into a natural stream as it carries water downstream through the Hull property, then, upon reaching the Forest Service property again transforms itself into a ditch. The impossible logic of this situation created by the *Special Master Report* clearly establishes that the ditch is, in fact, a ditch throughout the course of its run from the North Fork Salmon River, including the portion of it that runs through the Hull and Murphy properties.

A. **Ms. Van Bussum did not See the Spring Box Because She Did Not Visit its Location**

The *Special Master Report* based its conclusion regarding the location of the point of diversion and source in part on what it termed uncertain evidence “as to where and how the water claimed by Mr. Felton and the Ann M. Heltsley Living Trust originates.” *Special Master Report*, p. 12. In particular, the *Special Master Report* states that Adele Crawford placed the spring that is the source for these water rights “*above* the dirt road leading to Mr. Murphy’s home,¹” but that

¹The *Special Master Report* discusses that Mr. Murphy stated that the spring testified to by Ms. Crawford is Mr. Murphy’s domestic water supply. *Special Master Report*, p. 12. Notably, Mr. Murphy did not claim this surface water supply in the SRBA.

the “spring claimed by Mr. Felton and Heltsley is *below* the road.” *Id.* In point of fact, neither Felton or Heltsley ever claimed or testified at trial that their spring source was below the road.

More importantly, the *Special Master Report* also relies heavily on the testimony of Monica Van Bussum for its conclusions, and states that “Ms. Van Bussum recalled she saw no spring box during her site visit and none shows in her photographs where the water first rises from the ground.” *Special Master Report*, p. 12.² Monica Van Bussum is the IDWR senior water resource agent who amended the recommendation of the source and point of diversion of the Felton claim (75-10603) from a “spring” to an “unnamed stream” - which is the same source and point of diversion that she recommended for the Heltsley claim (75-14531). Ms. Van Bussum based her recommendations of the source and point of diversion upon her May 1, 2009 site visit to the area with the objectors Murphy and Hull - after they had filed objections to the Felton claim (and after IDWR had issued a recommendation of the right with the source and point of diversion located on the Hull property). *Special Master’s Report*, p. 3. Notably, Ms. Van Bussum did not contact claimants Felton and Heltsley to discuss or confirm the location of the source and point of diversion of the water right either at the time of the May 1, 2009 site visit, nor at any time up until she issued her amended recommendation at trial. Tr., p. 110, lns. 11 - 24.

² Ms. Van Bussum testified at the trial that she did not “recall seeing a structure such as” she “would call a spring box.” Tr. p. 80, lns. 21 - 25. Curiously however, in a later proceeding involving water right 75-10547, Ms. Van Bussum responded to a question regarding the existence of the very same spring box by stating “[t]he spring box and the well are presumed to be two different structures. When Adele Crawford was testifying at trial regarding the spring box location, it was well on the other side of the road, well up from where I conducted my field exam.” *Affidavit of Charles L. Honsinger in Support of Motion to Alter or Amend*, Exhibit B - Transcript from Initial Hearing, p. 15, lns. 15 - 19, SRBA Subcase No. 75-10547(January 6, 2011).

During her testimony, Ms. Van Bussum pointed out various locations on a large map: she discussed a channel on the Hull property “against the hill slope” and the location of the spring and point of diversion asserted by claimants Felton and Heltsley - “just on the north and east side of the Hull property line near this road”. Tr., p. 31, lns. 2 - 6; Ex. 2. She pointed out the yellow dot where IDWR recommended the point of diversion. Tr., p. 31, lns. 7 - 8; Ex. 2. She drew a plum-colored circle around the general area where she understands the spring arises that she believes feeds what she calls the “unnamed stream.” Ex. 2; Tr., p. 31, lns. 9 - 15.

As Ms. Van Bussum was testifying to these items, the Special Master presciently recognized a key issue regarding the location of the spring - he asked whether a culvert crossed the road on the Hull property immediately to the north of the plum-colored circle Ms. Van Bussum had drawn on the map. Although Ms. Van Bussum was unable to testify whether there was a culvert in that location, the Special Master stated as follows: “what I was getting at is if that’s a culvert, which would imply there’s water flowing beyond upgradient from the spring.” Tr., p. 31, ln. 16 - p. 32, ln. 8. Thus, the Special Master recognized at this early point in the trial that water flowing across the road through a culvert would be upgradient from the alleged spring source identified by Ms. Van Bussum, and would, in fact, be the source of the Felton and Heltsley water rights.

The Special Master’s hunch was correct; there is a culvert in the exact location he identified: immediately to the north of the plum-colored circle drawn by Ms. Van Bussum. Ms. Crawford, who lived on the Hull property for twenty years, and owned it for five years, testified to the installation of that culvert and to the location of the spring (the source and point of diversion for the Felton and Heltsley water rights) relative to the culvert:

- Q. And as far as the spring that's been testified to this morning, are you familiar with that spring?
- A. Yes, I am.
- Q. And is it located on the land that you were working and/or owning?
- A. Yes.
- Q. And as far as the point of diversion -- or excuse me, the point that was put in plum this morning, are you familiar with where that location is?
- A. Yes.
- Q. And is that, in your -- When you were located on the land or working the land, is that a location where the spring rose, as far as you're concerned?
- A. No.
- Q. Where did it rise?
- A. On that map, it rose on the north side of the road up to the house.
- Q. And so if you were looking at the map, the plum-colored circle -- When you were there, it actually rose on the other side of the road, the road that would be to the northeast, if I'm looking at that map?
- A. Yes.
- Q. And first of all, for the court's information, was it one main stream and -- spring and other -- I don't want to say spring, but other discharges into the ditch, as far as you were concerned when you were there?
- A. Down further towards the Forest Service ground, yes.
- Q. Okay, how are you so certain that the point of diversion was on the other side of the road?
- A. Because we developed it. Harold and I dug probably a four-by-four hole, and he built a spring box out of wood, two -- probably two-by-sixes. I don't remember the exact size. And dropped it into the hole. We put a pump in, and pipe to go up to the house; a culvert in the road so that the water, the overflow will go on into the existing ditch.

Q. Okay, and you did that while you were there?

A. Yes.

* * * *

Q. (By the Court) Now, the other thing is you said that the spring was on the north side of the dirt road indicated on the --

A. Yes.

Q. And you built a culvert underneath that road?

A. Yes.

Q. Do you know if that culvert's still there?

A. I have no idea. I haven't been there since; in 20 years, 22 years.

Q. Did you dig any of the ditch as opposed to maintaining the ditch?

A. You mean initially to make it a ditch?

Q. Or at any time you were on the property for 20 years.

A. I maintained the ditch. There was water running through the culvert and into what -- what she, Monica -- I can't remember her last name, I'm sorry -- where she maintains is the head of the ditch -- of the spring. There was water running under, from my spring box through the culvert, ditched to -- into where -- at the point where she says is the head of the spring now.

Tr., p. 127, ln. 11 - p. 128, ln. 24; p. 137, ln. 11 - p. 138, ln. 6.

No witness testified either that the culvert installed by Ms. Crawford is no longer in place, or that it never was in place. In fact, the testimony of both Mr. Hull and Mr. Murphy appears to confirm the existence of the culvert testified to by Ms. Crawford. Tr., p. 364, lns. 2-3; p. 389, lns. 18 - 23. Ms. Van Bussum testified that during her site visit she traveled only to what she understood to be the spring source (as indicated by the plum-colored circle she drew on IDWR Exhibit 2), and that she took photographs of the entire stream channel as it traversed the Hull and

Murphy properties starting with what she understood to be the head of the stream. Tr. p. 80, ln. 14 - p. 82, ln. 4. Ms. Van Bussum did not move upstream from the area she understood to be the head of the stream to view either the culvert or the spring box testified to by Ms. Crawford. In the photos identified by Ms. Van Bussum as showing the spring headwaters (in the location of the plum-colored circle on IDWR Ex. 2), water is visible flowing *down to* the headwaters. See IDWR Ex. 3, p. 1.

As explained by the *Special Master Report*, there was much testimony and discussion about the existence of a spring box above the road. Ms. Crawford testified that she helped Harold Hanson install it. Mitzi Felton testified that she walked the length of the ditch to the spring box. Susan Kozacek initially claimed a headbox and open ditch as her means of division.³ *Special Master Report*, p. 12. Velma Ravndal's letter states that the Eldridge property was supplied with water "by *tapping the overflow from a spring on the private property now owned by Harold Hanson*, and building the "Spring Ditch." See Felton Heltsley, Ex. 3 (italicized emphasis added). The letter does not state that Eldridges tapped the overflow from a spring now located on Forest Service land. Ms. Ravndal was very clear about the spring being tapped and diverted on land "now owned by Harold Hanson." She confirmed this understanding by clearly showing the "Spring Ditch" running across private property on the attached map. *Id.*

In opposition to all of these facts, we have the testimony of Ms. Van Bussum that she did

³Although the *Special Master Report* makes note of the Kozaceks' settlement resulting in a change of the location of their point of diversion from private property to Forest Service land, it is important to understand that such was a settlement and that there is no evidence as to why or under what circumstances that particular settlement was reached. Accordingly, the Kozacek's settlement should have no bearing whatsoever on the *Special Master Report* determination of the location of Heltsley's and Felton's point of diversion based on the evidence. See Idaho Rule of Evidence 408.

not see the spring box or the culvert, which is apparently the only fact the *Special Master Report* relied on to determine that the spring box and culvert did not exist.⁴ However, as discussed above, Ms. Van Bussum never visited the site where the spring box and culvert were located. The logical conclusion from the facts is that Ms. Van Bussum did not travel across the road to view either the culvert or the spring box installed by Ms. Crawford, and that water flows down to the area she identified as the spring headwaters is that the source of the water must be further upstream than the plum colored circle drawn on the map during trial. Given the enormous weight of the evidence regarding the existence of the spring box, and that there is no evidence to the contrary, the Special Master must determine that the source of these water rights is the spring located upstream and across the road from Ms. Van Bussum's designation of the source and point of diversion.

B. The Spring Ditch is a Ditch from Its Diversion of North Fork Salmon Water through the Hull, Murphy, and Forest Service Properties

The *Special Master Report* erroneously held that the waterway running from the area identified by Ms. Van Bussum on IDWR Exhibit 2 with a plum-colored circle was a natural stream, and that the source of the subject water rights was therefore a "natural stream." *Special Master Report*, p. 14. In fact, the testimony regarding maintenance of the ditch, and the fact that the waterway is classified as a "ditch" both upstream and downstream of the portion that the Special Master found to be a natural stream mandates a reversal of that finding.

Ms. Van Bussum herself testified that "[i]f there is evidence that it is a constructed and

⁴Again, as discussed hereinabove, although the testimony at trial was that she did not see a spring box, in a later proceeding, Ms. Van Bussum later admitted on the record to the existence of the same. See fn 2 hereinabove.

maintained ditch, then certainly we would call it a ditch.” Tr. p. 89, lns. 15-16. In fact, that evidence was supplied at trial by Adele Crawford who formerly lived on what are now the Hull and Murphy properties, and owned what is now the Murphy property. She definitively testified to the existence and maintenance of the ditch as follows:

Q. Very good. And now, as far as the – And again, obviously, you know the contention with the -- the issue being whether or not this is a creek, whether it's a channel, or whether it's a ditch?

A. Yes.

Q. To begin with, I -- I, you noticed a moment ago, I called it a ditch. *What would you call it?*

A. *A ditch.*

Q. And now let's talk about why you would call that a ditch. What did you -- What -- When you first came to the property, how did it look, as far as this particular ditch is concerned?

A. *In 1968, it looked like a ditch.*

Q. You saw the pictures that were part of the evidence put on by the department this morning, Exhibit 18 Number 4, I believe on that, with a number of pictures. Is that -- What you see depicted there, is that your memory of the way it looked when you were on the property?

A. Absolutely not.

Q. And how is it different?

A. *We maintained it. It looked like a ditch. We took brush out of it, and willows, and kept it flowing in a normal ditch fashion, if there's such a thing.*

Q. And why did you do that? What difference did it make to you?

A. Because the people down below had water rights to that water; and when the Hansons first settled there, they had sheep, and they had a shed down there which everyone -- then everyone around referred to as a lambing shed, which is where they lambed out their sheep. *We needed that ditch for water* to water the lambing shed and for livestock that later -- came later.

Q. And did -- and did any parties below come up and help maintain that ditch?

A. Probably on occasion. I can't remember that far back. It's been quite some time.

Q. *But you maintained the ditch?*

A. *Absolutely.*

Tr. p. 129, n. 3 - p. 130, ln. 16 (italicized emphasis added). Ms. Crawford's strong, definitive testimony regarding the nature of the waterway and her maintenance during her residence on what are not the Hull and Murphy properties, and during her ownership of what is now the Murphy property was not contradicted by any witness.

Later, Mitzi Felton testified to her initial walks and maintenance of the ditch with Harold Hanson, the prior owner of both the Hull and Murphy properties, and her maintenance of the ditch since that time:

A. My husband bought our ranch, which was part of the old Ravndal ranch, in 1979. We became very good friends with the Hansons. At that time Harold Hanson irrigated our property from this ditch, and helped maintain and establish the water right when the -- when we bought the property. He showed us this ditch. From our property, we walked all the way up to the spring box; and he explained maintenance and what his responsibility was as he saw it; and the historic nature of that ditch, how it was built, when it was built, et cetera.

* * *

Q. Okay, and have you joined in or have you been party to maintenance of the ditch?

A. Yes.

Q. And for the entire period of time, or how long?

A. Yes, for the entire period of time. Actually, prior to -- From 1979 until 1992, Harold Hanson was pretty much taking care of the maintenance and the irrigation on our property, along with some cattle ranchers to whom we leased our -- our acreage, because we did not live on the property at that time. We lived -- We moved up to the ranch full-time in 1992.

Q. Okay, but were familiar with it before then?

A. Oh, yes.

Q. And again, as far as the maintenance is concerned, you heard Mrs. Crawford indicate that they felt they were duty-bound to maintain that. Is that the way you understood it?

A. Yes. And we actually walked that ditch with Harold, and he showed me the stretch from the spring box and said that we were welcome to come up there and maintain it any time we saw fit, but he was very concerned that we did it properly and weren't heavy-handed with it or use any kind of heavy equipment.

Q. And so have you kept that requirement?

A. Yes, up until recently. We haven't --

Q. And which change -- which changed recently?

A. Well, the property is -- has been subdivided now, and that stretch from the ditch from the spring to the Forest Service property has -- has not received consistent maintenance by me or anyone, as far as I know.

Q. And why is that?

A. Well, I'm not really sure. I haven't exactly had direct contact with the Murphys or the Hulls, and -- but they had prohibited us from entering their property, but I kind of got that idea.

Q. Have you -- In your opinion, do you believe you had a right to go up there --

A. Yes, I do.

Q. -- to maintain? And it was only because of their prohibition that you did not?

A. That, and the fact that it's -- it's been quite a while since the maintenance of that ditch. It's now starting to sustain some -- some bad habits, and so in the last five years, it's really kind of gotten out of control, and so it's in -- it's in desperate need of maintenance now.

Tr., p. 151, lns. 11 - 21; p. 153, ln. 11 - p. 155, ln. 6.

Ann Heltsley also testified regarding her consistent maintenance of the ditch during the

years that she has owned her property and used the ditch for delivery of her water right:

Q. . . . Before the beavers, it was pretty much like a ditch all the way along?

A. A ditch all the way along.

Q. And you have personal knowledge of that , you were involved with it?

A. I have. Harold Hanson taught me how to take care of it.

Q. And so now continuing on with that, what -- how often would you have to maintain this reach?

A. Every year.

Q. And would you be involved with that every year?

A. Every year.

Q. And how far would you go up the ditch?

A. We went all the way up to the spring.

Q. And -- and when did that cease, going up to the spring?

A. Well, for me, it ceased about five years ago.

Q. Okay, and why was that?

A. Well, my brother and I were headed up there, and we were taking out shrubs and brush and whatever, and we ran across a fence that had "No Trespassing" signs. And I knew that Harold had sold the property and there was a new owner. And I was not familiar with the new owner, and so I told my brother that we should stop. I didn't feel comfortable in trespassing without them knowing what -- who I was and what I was doing.

Q. Did you ever believe you didn't have a right to clean out your ditch?

A. No. I've always had a right to clean out the ditch.

Q. Has everyone -- Has anyone, prior to the present owner, ever curtailed your right to do that?

A. In 110 years, there's never been a problem taking care of the ditch.

Tr. p. 294, ln. 19 - p. 296, ln. 6. Lawrence Heltsley confirmed that he had also participated in maintenance of the ditch as it traversed what is now the Murphy and Hull properties. Tr., p. 263, ln. 4 - 11; p. 271, lns. 3 - 16.

Instead of relying upon the strong, uncontradicted testimony of these four witnesses regarding maintenance of the ditch, the *Special Master Report* relied upon observations of the ditch by Ms. Van Bussum who indicated that the ditch did not look like it had been maintained. However, Ms. Felton, Ms. Heltsley and Mr. Heltsley all explained that they did not maintain that portion of the ditch with heavy machinery, but with hand tools so as to preserve the natural features of the area as they had been taught by Mr. Hanson. Tr., p. 154, lns. 3 - 8; p. 269, ln. 9 - p. 270, ln. 2; p. 297, ln. 14 - p. 298, ln. 7. Thus, the *Special Master Recommendation* relied upon observations of one individual who had spent a portion of one day on the property viewing a portion of the ditch without taking into account any of the testimony of the four individuals who spent years maintaining the ditch.⁵ This conclusion simply makes no sense, and should be reversed given the great weight of the testimony regarding the nature and maintenance of the ditch.

Additionally, the designation of the waterway as a “natural stream” does not make logical sense given that the ditch flows through a culvert crossing the road on the Hull property upstream from the location identified by Ms. Van Bussum as the “source” of the purported “natural stream.” Thus, if the *Special Master Report* is accurate regarding the characterization of the waterway, the ditch “becomes” a natural waterway when it reaches the location identified by Ms.

⁵Again, as discussed hereinabove, Ms. Van Bussum did not have the benefit of speaking with either Felton or Heltsley to discuss the maintenance or nature of the ditch as they were not contacted prior to her May 1, 2009 site visit, or at any time up until trial. Tr., p. 110, lns. 11 - 24.

Van Bussum, and then “becomes” a ditch again when it crosses over the boundary between private property and U.S. Forest Service property. This characterization of a section of the waterway as a natural stream between two sections that are known to be a “ditch” simply does not make sense, and should be reversed.

At trial, Mr. Hull explained how water is diverted out of the N. Fork Salmon River into the ditch across his property:

Q. Because there seems to be a question of the movement of water across some of the fields, could you explain how you irrigate from the North Fork of the Salmon down through your pastures and down into my pasture, since we share the same point of diversion?

A. Yes, I sure can. Can I approach the map, Your Honor?

THE COURT: Please.

A. Outside of this map is a slough (unintelligible) that comes out of the North Fork of the Salmon River. It travels through a fish (unintelligible) *into a diverter box* that goes to both my north pasture -- Which I really can't see on this. It would be up in here. One goes to the north pasture. The other one continues along the slope here and irrigates the south pasture and down into the Murphy property. I do that with -- flood irrigate using dams, arc dams. *There's a ditch all the way down.*

Tr., p. 363, lns 6 - 22 (*italicized emphasis added*).

Mr. Hull testified that a couple times he swamped Mr. Murphy's well. Tr, p. 365, ln. 17. This well is the structure that both Mr. Gregory and Mr. Hull indicated is a vertical culvert - in the location of the spring box on the north side of the road. Tr. p. 346, ln. 15 - p. 348, ln. 1. Both Mr. Hull and Mr. Murphy testified that the ditch crosses the roadway through the culvert. Tr. p. 364, lns. 2-3; p. 389, lns. 20 - 23. The only culvert testified to by any witness was the culvert installed by Adele Crawford. Tr. p. 128, lns. 16-22; p.137, lns. 15 - 16. This culvert (which Ms. Van Bussum never visited) delivers water from the spring source across the road into

the Spring Ditch (which Ms. Van Bussum and the *Special Master Report* characterize as a “natural stream.”). The Spring Ditch then runs across the Hull and Murphy properties to the Forest Service property where it reaches the location of what has been identified as the point of diversion by Ms. Van Bussum and the *Special Master Report*, where it once again turns into a ditch. It makes absolutely no sense whatsoever that the ditch is recharacterized as a natural stream after it passes through the culvert on the Hull property and then is yet again recharacterized as a ditch less than one-quarter of a mile downstream from the point it purportedly becomes a natural stream.

The Special Master must put an end to this illogical conclusion, and hold that the Spring Ditch is a ditch throughout the course of its run from the spring source to the Forest Service land.

C. As an Alternative to Reversing its Decision in the Special Master’s Report, the Court Should Order a New Trial

I.R.C.P. 59(a) states in relevant part that

“[a] new trial may be granted to all or any of the parties and on all or part of the issues in an action for any of the following reasons: 1. Irregularity in the proceedings of the court, jury or adverse party or any order of the court or abuse of discretion by which either party was prevented from having a fair trial . . . 4. Newly discovered evidence, material for the party making the application, which the party could not, with reasonable diligence, have discovered and produced at the trial.”

A new trial should be ordered in this case because of irregularity in the proceedings caused by IDWR’s participation at trial as if it were a party. In particular and most egregiously, as discussed further hereinbelow, IDWR questioned Ms. Van Bussum for a period of time encompassing 25 pages of the trial transcript in an attempt to systematically discredit the evidence introduced by Heltsley and Felton, without similarly questioning her regarding evidence introduced by Hull and Murphy. This unfair and improper conduct cannot be allowed to

influence the decision in this case. A new trial should also be ordered because of evidence discovered after trial indicating an improper and unexplored financial motive for Objector Murphy's participation in these subcases.

1. IDWR Improperly Acted as a Party at Trial

The Snake River Basin Adjudication District Court's Administrative Order No. 1 (hereinafter "AO 1") provides for the involvement of the Idaho Department of Water Resources in proceedings before the Special Master. Specifically, in Class One Subcases, "[e]xcept where a party calls a representative of IDWR as its own witness, the role of IDWR will be limited to presenting geographic information (GIS) in the form of an illustration depicting the place of use and point of diversion" and the provision of "documents such as permits, licenses, decrees or transfers which may be relevant to a claim." AO 1, §10.g. The Special Master in an SRBA subcase may call "a representative of IDWR as its own witness consistent with I.R.E. 706 or 614 for Class One or Class Two Subcases." *Id.* Finally, "[t]he Director of IDWR or a representative shall attend all hearings in contested subcases to serve as a *disinterested, nonparty fact witness.*" AO 1, §10.i (italicized emphasis added).

IDWR's conduct at this trial cannot be considered that of a "disinterested, nonparty fact witness" as mandated by AO 1. First, after IDWR had presented the recommendation of the Director through the testimony of Monica Van Bussum (which should have ended the participation of IDWR), and after the cross-examination by the parties, IDWR's attorney conducted a re-direct examination of Ms. Van Bussum to oppose a point raised by claimants Felton and Heltsley in their cross-examination. Tr., p. 113, ln. 13 - p. 114, ln. 13. This attempt to contest a party's point is certainly not the actions of a disinterested, nonparty fact witness.

Next, IDWR's attorney conducted a cross-examination of witness Adele Crawford (called by the claimants) in an attempt to raise the issue of the location of the spring box she built and raise the fact that she never owned the property now owned by the claimants in these two subcases (an irrelevant fact in any case). Tr., p. 139, ln. 5 - p. 141, ln. 10. IDWR's attorney also cross-examined Nancy Liebrecht - another witness called by the claimants - in what was an obvious effort to discredit her testimony by questioning the extent of her work in the area at issue. Tr., p. 257, ln. 7 - p. 258, ln. 10. Later, during claimant Mitzi Felton's testimony, IDWR's attorney apparently attempted to raise a foundational objection by questioning her as to whether her testimony was based on her personal knowledge. Tr., p. 162, ln. 18 - p. 163, ln. 4. Finally, after all other witnesses had testified, IDWR's attorney re-called Monica Van Bussum to the stand where the questioning resulted in her systematic refutation of the documents introduced into evidence and points raised by claimants Heltsley and Felton. Tr. pp. 412 - 440. The questions and testimony raised by IDWR during this part of the trial became very predictable:

Q. Well, Ms. Van Bussum, let's go ahead and jump to Number 4. And have you seen that document before?

A. Yes, I have.

Q. And does that document support the contention that the stretch between the yellow point and the plum point is a manmade ditch?

A. It does not.

Tr., p. 417, ln. 25 - p. 418, ln. 6.

* * *

Q. Okay. Let's go ahead and jump to Number 5. Have you seen this document before?

A. I have.

Q. And did you consider it in your assessment?

A. I did.

Q. And does this document support the contention of the -- of it being a manmade ditch between the yellow point and the plum point?

A. No, it does not.

Tr. p. 419, lns. 2 - 10

* * *

Q. (By Mr. Baxter) All right, let's jump to Number 6. Have you seen this document before, Ms. Van Bussum?

A. I have.

Q. And did you consider this document in your assessment?

A. I did.

Q. And does this -- in your mind, does this document establish that the -- the stretch between the yellow point and the plum point is a manmade ditch?

A. It does not.

Tr., p. 420, lns. 4 - 14.

This portion of the trial, in which Ms. Van Bussum explained at length and in detail why the documents introduced into evidence by claimants Heltsley and Felton goes on in this vein for some 25 pages of the transcript. This questioning and response between IDWR's attorney and its witness are decidedly not the actions of a disinterested, nonparty fact witness - rather they are the actions of a non-party that is acting like a party and is obviously very interested in defending its position - which in this case is the director's recommendation opposed by the claimants. Finally, to further defend IDWR's recommendation, IDWR's attorney began arguing about the nature of the evidence during claimants' attorney's cross-examination of Ms. Van Bussum, and objecting

to questions raised. Tr., pp. 443 - 449. Such actions are those of an attorney defending a party, not a “disinterested nonparty fact witness.”

Notably, IDWR’s attorney and Ms. Van Bussum did not go through the same process with the documents introduced into evidence by the objectors Hull and Murphy. The Court should completely undo this unfair process and irregular procedure and, as contemplated by I.R.C.P. 59(a), conduct a new trial within which IDWR must be limited to the role prescribed by AO 1. Any outcome other than either a reversal of decision in the Special Master’s Recommendation or a new trial is extremely prejudicial and unfair to Heltsley and Felton.

2. New Evidence Indicates an Improper Motive for Hull’s and Murphy’s Opposition to Heltsley and Felton

Because Objectors Hull and Murphy did not disclose a Wildlife Extension Agreement that may establish a motive for Hull’s and Murphy’s decision to contest the point of diversion and source claimed by Felton and Heltsley, the Special Master should, at a bare minimum, permit discovery to take place and order a new trial regarding this issue.

After the trial of this matter, while claimant Ann Heltsley was straightening up the court room as is her practice, after Objectors Hull and Murphy had left the premises, she placed assorted papers into her files from both her table and Hull’s and Murphy’s table. When she later reviewed her files in preparation for the Motion to Alter or Amend, she came across a document entitled Wildlife Extension Agreement entered into by Objector Patrick Murphy and the U.S. Fish and Wildlife Service. *See Affidavit of Ann Heltsley in Support of Motion to Alter or Amend*, Exhibit A. The 2008 Wildlife Extension Agreement provides that Murphy would conduct certain wildlife management practices upon the property across which the ditch that is the source for Heltsley’s and Felton’s water rights runs. Specifically, the Wildlife Extension Agreement

provides for the fencing of the “large spring complex” that is the ditch through which Heltsley’s and Felton’s water rights are delivered across the Murphy and Hull properties. As part of the Agreement, Murphy was to receive \$4,368 to fund the purchase of materials for the fence. *See* Affidavit of Ann Heltsley, Exhibit A. The Agreement also contemplates future fencing on an adjacent neighbor’s property (presumably Hull’s property, as it is the only adjacent property traversed by the ditch).

As the Court did not order the exchange of information between the parties until approximately two weeks before trial, and because the Agreement was not disclosed to Heltsley and Felton in any case, they could not, by reasonable diligence have obtained it. Because the document provides an obvious motive for Hull and Murphy to contest the designation of the waterway through which the Heltsley and Felton water rights are diverted as a “ditch”, Heltsley and Felton must be given an opportunity to conduct discovery and present evidence and testimony regarding this issue.

CONCLUSION

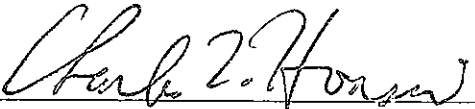
The *Special Master Report* erroneously determined that the Spring Ditch is a “natural stream” and therefore located the point of diversion for these water rights upon U.S. Forest Service land. The Special Master’s Report relied primarily upon Monica Van Bussum’s testimony that she did not see the culvert and spring box that is the point of diversion for these water rights. However, because Ms. Van Bussum did not travel to the culvert and spring box during her visit, her testimony on this point can not be relied upon. The Special Master’s Report also concluded that the Spring Ditch is a natural stream as it traverses the Hull and Murphy properties. This conclusion simply makes no sense whatsoever as the Spring Ditch would turn

from a ditch into a stream and back into a ditch again.

The Special Master must issue a new Report finding that the Point of Diversion is located on the Hull property. Alternatively, the Special Master must conduct a new trial as a result of IDWR's actions as a party at trial despite its status as a disinterested nonparty factual witness. At a bare minimum, the Special Master must reopen the case to permit Heltsley and Felton to explore the issue of Hull's and Murphy's motivation for contesting the points of diversion claimed.

Dated this 14th day of January, 2011.

RINGERT LAW, CHARTERED

By 
Charles L. Honsinger

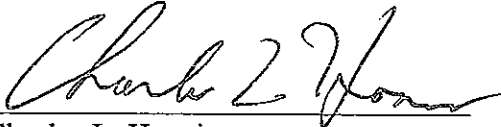
CERTIFICATE OF MAILING

I hereby certify that service of the within and foregoing document was made this 14th day of January, 2011, by mailing a copy thereof, postage prepaid, to each of the parties listed below.

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