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APR 27 2012

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 No: 22-13509

**MEMORANDUM IN SUPPORT OF
MOTION FOR RECONSIDERATION, OR IN
THE ALTERNATIVE, MOTION FOR STAY OF
ASSOCIATED PARADISE SPRINGS
SUBCASES**

David W. Miller, Larry J. Miller, Ralph P. Miller, M. Phillip Miller, Lewis J. Miller, Daniel D. Miller and Ronald K. Miller (collectively the "Millers"), by and through their counsel of record, Robert L. Harris of Holden, Kidwell, Hahn & Crapo, PLLC, pursuant to I.R.C.P. 11(a)(2)(B), hereby moves this court for reconsideration of its *Amended Order on Show Cause Hearing* issued on March 14, 2012 (hereinafter, "*Order*") regarding Subcase No. 22-13509.

The *Order* is an interlocutory order, and therefore subject to a motion for reconsideration pursuant to I.R.C.P. 11(a)(2)(b) because no final judgment has been rendered yet on the above subcase. When considering a motion for reconsideration, the court should take into account new

facts presented by the moving party. See *Coeur d'Alene Mining Co. v. First Nat'l Bank*, 118 Idaho 812, 800 P.2d 1026 (1990). However, while a party may present new evidence, it is not required to do so. See *Johnson v. Lambros*, 143 Idaho 468, 147 P.3d 100 (Ct. App. 2006).

For the reasons set forth below—just as the Special Master previously held in her *Order* with regards to the other two water rights grouped with 22-13509 (Water Right Nos. 22-11639 and 22-13854)—22-13509 should be decreed consistent with the elements of its SF5 and the trial currently scheduled for this subcase should be vacated.

I. INTRODUCTION AND BACKGROUND

Water Right No. 22-13509 is one of the Paradise Springs subcases, which has been an ongoing matter in the SRBA for a number of years. Counsel for the Millers is a fairly recent newcomer to the Paradise Springs litigation, having taken over representation of the Millers from TJ Budge when a conflict arose. Shortly after agreeing to represent Miller, the parties agreed to attend a settlement conference in November of 2010, which nearly all of the parties to the Paradise Springs subcases participated in. It was counsel for the Millers that proposed the framework that the parties accepted at that meeting.

The parties reached an agreement at the settlement conference with regards to how the parties would *pro rata* allocate the 2.0 cfs and 100 acres of the JJ Miller water right (Water Right No. 22-405), and then file late beneficial use claims for the remaining acres desired by each water right holder. The parties present were in unanimous agreement on the framework and accounting contemplated in the settlement agreement, recognizing that additional paperwork had to be filed by the parties. At the request of the attorneys present, Michael Holliday prepared and sent a letter (dated January 24th) to the Paradise Springs water right holders explaining what each

water right holder had to do to make their water rights—as well as their late claim beneficial use water rights—consistent with the settlement framework.¹ In other words, the January 24th letter was a memorialization of an agreement between the parties.

As expected, it took some time for the late beneficial use claims to be filed, reviewed, recommended, and processed. The progress of the parties with regards to three Paradise Springs subcases—22-11639, 22-13509, 22-13854—progressed without incident, and was due for updating before the SRBA court on October 12, 2011, at 10:00 a.m. to determine where the SF5s for these water rights were at in terms of processing. Regarding a separate Paradise Springs water right, Mr. Reid had filed a motion to set aside partial decree for Water Right No. 22-13212, and that motion was scheduled to be taken up on October 12, 2011 as well.

The only water right that is the subject of this motion for reconsideration is 22-13509. The entire recording of the October 12, 2011 status conference is contained on Exhibit A to the *Affidavit of Attorney of Robert L. Harris* (hereinafter, “*Harris Aff.*”), and the relevant portions for 22-13509 is transcribed at Paragraph 4 of the *Harris Aff.* The transcript demonstrates, quite clearly, that Mr. Reid had agreed to the settlement framework for 22-13509, even though he stated he did not receive the SF5 paperwork for 22-13509. Mr. Reid stated repeatedly that he agreed to the global settlement, except for an issue with subordination language to 22-13212, which is a water right that previously went to trial. He also stated that as long as the recommendation for the elements of 22-13509 was consistent with the settlement agreement, he was in agreement with the SF5s in that subcase. As further explained below, the SF5 for 22-

¹ To remain consistent with the Special Master, the Michael Holliday letter is hereinafter referred to as the “January 24th letter.”

13509 was consistent in every way with the settlement reached between the parties (a water right for .51 cfs and irrigation of 25.5 acres).

Here is the entire transcript (to avoid any claim of a quote being taken out of context), with the significant and relevant portions regarding 22-13509 between the Special Master and Mr. Reid emphasized where necessary:

[RECORDING 10:09:37 AM through 10:14:37 AM]

ANDREA COURTNEY: Yep, so that does leave, the . . . one, two, three—three that you mentioned.

SPECIAL MASTER BILYEU: OK.

ANDREA COURTNEY: But I do know that Mr. Reid had contacted the Department a week and a half ago about and his understanding of some of the language on one of the SF5s was different than what was on the draft. I asked him to contact TJ Budge so make sure that that what his proposed change was was acceptable to those objectors, and it was my understanding that that proposed change was acceptable. Last I knew, he was in the midst of getting the correct subcase numbers for that revised language, and then the Department had offered to send around electronically SF5s for signatures in hopes to expedite it before today's hearing, but that's the last I had heard.

SPECIAL MASTER BILYEU: All right, very good. Mr. Budge maybe I'll turn the time over to you next. Can you give us any update, and it looks like from, from our records, it looks like we've got SF5s for 587A, 11537, 13211—we had that one in August—13511, so that leaves us with three, that at least the court doesn't have SF5s on—11639, 13509, and 13854. Can you give us any information on those and correct my numbers if I've got those wrong.

TJ BUDGE: OK, to my knowledge 13509, that's the Ron Miller group . . .

SPECIAL MASTER BILYEU: Yes.

TJ BUDGE: . . . who is represented by Rob,

SPECIAL MASTER BILYEU: OK

TJ BUDGE: I understood that had been returned to Michael Holliday.

SPECIAL MASTER BILYEU: OK.

TJ BUDGE: What had happened, I think Rob's clients had multiple SF5s, and thought he had returned all of them to Michael, but had found one had been omitted . . .

SPECIAL MASTER BILYEU: Got it.

TJ BUDGE: . . .and I believe that's the one. I could be wrong on that. But that's my understanding concerning 13509.

[CROSS TALK]

SPECIAL MASTER BILYEU: Would it be true that we are not waiting for any signatures on 13509, it's just been sent.

TJ BUDGE: I don't know if it had to go then to Mr. Reid or anybody else. I don't recall.

SPECIAL MASTER BILYEU: OK, OK.

ANDREA COURTNEY: Special Master, it's Andrea. On September 26th, the Department forwarded 13509 and 13854 to Mr. Reid.

SPECIAL MASTER BILYEU: OK, great.

TJ BUDGE: OK. That's helpful. And then the last one would be 11639, and that's the one water right owned by Mr. Reid that Andrea explained needed to have some change to the language and let me explain where we're at. I'm not quite sure that's buttoned up. That water right—let me back up—if you remember when we went to trial, Mr. Reid ended up for a water right for four and a half acres with a 1904 priority that wasn't subordinated.

SPECIAL MASTER BILYEU: That's 13212. Right.

TJ BUDGE: That was—Correct.

SPECIAL MASTER BILYEU: OK.

TJ BUDGE: Is that the one that, let me back up. Andrea, which water right were you expecting changes to the SF5 on?

ANDREA COURTNEY: Yeah, TJ, I'm sorry. It's 13212. I realize we're taking that one as the second group.

SPECIAL MASTER BILYEU: You can talk about that one now though if you want to. I just had it separately on my list, but that's the one we went to trial on, 13212, and that's the one where there's a motion to set aside the partial decree on. 11639, I don't know, that one, there was a partial decree issued in 2008, and it looks like that one might have a motion to set aside on it also.

TJ BUDGE: OK. I had those backwards. So, 11639 I think is ready for SF5.

ANDREA COURTNEY, was that one also sent to Mike Reid with the others a couple of weeks ago?

ANDREA COURTNEY: I believe that one was sent to his, the other Reids. Michael, I think those are your parents, on August 18th. Ray's note said "the Reids," so I think, I don't know that it went to you first because both of the signatures were required, both theirs and yours, but yeah, we had sent that one in August.

TJ BUDGE: OK, so my understanding then is 13509, 11639, 13854 are all have SF5s pending and are waiting for the signatures of Mr. Reid and his parents.

SPECIAL MASTER BILYEU: OK.

TJ BUDGE: Andrea, is that—

[RECORDING ENDED]

[RECORDING 10:14:37 AM through 10:19:38]

TJ BUDGE: —correct?

SPECIAL MASTER BILYEU: Mr. Reid—

ANDREA COURTNEY: Yeah, that's—

SPECIAL MASTER BILYEU: OK, sorry, Andrea, go ahead.

ANDREA COURTNEY: Yeah, nope, that's what my notes show too.

SPECIAL MASTER BILYEU: OK, very good. So, Mr. Reid, it looks like the ball is in your court. We were expecting to get those prior to today. Can you give us an update on where those are?

MICHAEL REID: Yes, thank you Special Master. First off, I'd like to apologize for if it seems I'm not active or diligent in settling these cases. I think all of you know I haven't been getting regular mail service this summer. And in fact, until the middle of September, that's the way it was, and in fact, I had to write a four page letter to Salt Lake City to get any action at all. In the middle of September, I received most of these SF5s. I then immediately opened them, the next day I had to go on a trip that took me about a week and then when I got back, **essentially I do have 13854 has been signed and forwarded to Larell Kunz. 13509 I don't believe I have, and 11639, I scanned in the signature page and I'm just waiting for my parents to sign that and then scan it back in and email it back to me and that's where we are at with those.**

SPECIAL MASTER BILYEU: OK, so one you mailed off, you said. 11639 has not been signed. 13509, tell me that one again.

MICHAEL REID: 13509 I don't have. I got three SF5s, so, that may need to still be forwarded to me for signature by Mr. Harris or by somebody else.

SPECIAL MASTER BILYEU: OK. Mr. Reid, I will just mention that the hearing that we had last time where we could have made a lot of progress was not one that you needed to get through the mail because it was one that we set on the record at the hearing previous to that when you were here. So, you know, the court's requirements are that we send things through the mail, and I realize there are apparently have been difficulties up there, but, we set things on the record, and the reason for that is because it gives people an additional time to get ready. So if it seems like we're a little bit strong in wanting these things to get done as soon as we can, there's a reason for that. So, you know, today what we said was 13212, I'm going to deny the motion to set aside unless you've got everything in. So, we're kind at the end of the diligence time here, so tell me where those are—
[CROSSTALK]

MICHAEL REID: **I think I can make it easier for the court even further. I emailed Mr. Budge a couple days ago and the global settlement is fine with everybody except for me and him.** But, I've already told him I want to dissolve our agreement and withdraw my motion to open up that decree today—to reopen that partial decree today. The material items that I got as part of the settlement, the State essentially took some of those away, and Mr. Budge initialed them even though he may have known better. And then Mr. Budge and I had a disagreement over over the other material part of this settlement that was going to get made, you know, as part of something that I wanted, and so, **essentially I don't think I've gotten what I've wanted out of the global agreement, at least between the agreement that I had with Mr.**

Budge. And I've told him that I think that I'm moving to dissolve the agreement between he and I, and then I'm going to withdraw the motion to open the, reopen the partial decree in 13212.

SPECIAL MASTER BILYEU: OK, well I'm still a little bit confused. So, 13854, you've agreed to the elements that went out from IDWR in September. You agree to those, is that true?

MICHAEL REID: That's true.

SPECIAL MASTER BILYEU: OK. That helps me . . .

MICHAEL REID: And I don't think I have a problem with 13509, and I know I don't have a problem with 11639. The only one I have a problem with 13212, and so, I don't think I'm going to sign that and like I said, I've told Mr. Budge that I think that agreement has been essentially dissolved for lack of any material participation.

SPECIAL MASTER BILYEU: OK, well, let me just go back. 13509.

Reid: Yes.

SPECIAL MASTER BILYEU: You agree to those to the elements that IDWR has sent to you?

MICHAEL REID: You know, I can't—I think so, I don't—I haven't seen it, but, and it may yet need to just be forwarded to me . . .

[END RECORDING]

[RECORDING 10:19:38 AM through 10:24:38 AM]

MICHAEL REID: 509, but if that's the Ron Miller right that Rob Harris represents, then I'm fine with what we decided at the settlement and as long as it appears as what it was at the settlement, which I think it will, because everything else has been the same except for my right, then I totally agree with that, and the same with 13854.

SPECIAL MASTER BILYEU: 13509, I believe that's Ron Miller. I don't have my computer, but my notes are showing Ron Miller and his brothers. I'm not sure what that meant . . .

MICHAEL REID: And I can come into IDWR and sign that today. I actually have to be in Idaho Falls today.

SPECIAL MASTER BILYEU: Oh, that would be great.

Reid: So, if that's convenient, I know Michael Holliday is not on the phone right now, but I will stop by the office and if that's there, I'd be happy to sign it today.

SPECIAL MASTER BILYEU: Yeah, and Janet is just confirming that 13509 shows several Miller claimants, so I think it was . . .

Reid: Larry, David, Don, Daniel.

SPECIAL MASTER BILYEU: Yeah. Yep. That sounds right. OK. So then the next one, 11639, and I believe that's the one that is claimed by your parents.

[CROSSTALK]

MICHAEL REID: Well, it's me and my parents.

SPECIAL MASTER BILYEU: OK. Yeah.

MICHAEL REID: And generally, we were in a partnership, and generally I signed for them, but that did not seem to be legal in this case, so like I said, I scanned in the signature page and I'm just waiting for them to sign it and scan it and send it back to me, and I did that a couple of days ago, so it's possible that I can mail that yet this week.

SPECIAL MASTER BILYEU: OK. All right. So it looks like all the ones on this first group are signed and agreed to, or at least agreed to on the record, and maybe the easiest thing we could do, we could do orders to show cause on those if we don't get the signatures, let's say in a week, and that way if, you know, nobody disagrees with them, they just, you now, at least we've given notice and they go through that way. So, let me just circle around to the parties before we get to 13212. Ms. Courtney, any loose ends on the three that we don't have documents on?

ANDREA COURTNEY: Special Master, I'll contact Ray and have him resend 13509 to Michael so he'll have that for Mr. Reid's appearance later today.

SPECIAL MASTER BILYEU: Perfect. And then, Mr. Reid, if we don't get signatures from your parents here in a week, we'll go ahead and send an order to show cause out on 11639 or any of the other two. We can get it done if they don't sign it, we can get it done with an order to show cause, because then that gives notice. And we'll attach—

MICHAEL REID: I don't think—

SPECIAL MASTER BILYEU: the elements.

MICHAEL REID: I don't think there will be any problem.

SPECIAL MASTER BILYEU: OK. Well, we'll wait a week until that comes in so we don't have to do that if we don't need to. So, Mr. Budge, any follow up on this first group, and again, we're talking about 13854, 13509, and 11639. Sounds like we're close to getting those all wrapped up, maybe most of them by the end of today.

TJ BUDGE: No, I'm just looking forward to finalizing those, so, I'm glad we've got this far.

SPECIAL MASTER BILYEU: All right. Anybody have any comments on this first group before we go to 22-13212?

[No response].

SPECIAL MASTER BILYEU: All right, and again, we are hoping to get the 13854 and 13509 sent or signed with the Department before the end of today and that will give us a wrap on those two, and 11639, the court will issue an order to show cause why the master's report and recommendation should not have the elements that the SF5 has if we don't get that here by the end of, within a week. So a week from today we'll send out an order to show cause and put that on our calendar at some point. So, that's how we'll get that one wrapped up, and again, we do expect to get those and appreciate Mr. Reid's help that way. OK, so the final one then is we've got a continued motion to set aside partial decree in 22-

13212 and that's the one that went to trial and that we have the decision on that one, and Mr. Reid's comments in the previous discussion make it sound like there may have been some hitches in the settlement with regard to that one, but . . . [END RECORDING].

Harris Aff. ¶4.

Despite his “total” agreement articulated at the October 12, 2011 status conference, as well as his commitment to go to Idaho Falls **that very day** to sign the SF5 for 22-13509, Mr. Reid did not sign the SF5 for 22-13509. Mr. Reid did not sign the SF5s for the other two subcases either. Instead, due to his inaction, the SRBA court was forced to issue an *Order to Show Cause* in November of 2011, and a hearing was held on December 7, 2011 on that order.

At the *Order to Show Cause* hearing, Mr. Reid declared that the global settlement agreement was no longer in effect. Mr. Reid's position relative to the global settlement agreement was later confirmed in his *Objection to Amended Director's Report Subcases 22-13853, 22-11639[,], 22-13509 and 22-13854* filed on March 7, 2012 (“The ‘global settlement agreement’ concerning these water rights has been dissolved.” *Id.* at 1). The other Paradise Springs water users disagreed, pointing to the January 24th letter and the subsequent actions of the water right holders—their performance under the settlement—consistent with that agreement.

The Special Master issued an *Amended Order on Show Cause Hearing* (Subcase Nos. 22-11639, 22-13509, and 22-13854) on March 14, 2012. After explaining, in great detail, Idaho law and SRBA precedent that oral agreements are binding on the parties, the Special Master held (1) that the January 24th letter was not a binding settlement agreement in and of itself, and (2) even though the January 24th letter was not a binding settlement agreement, there was evidence on the court's record indicating that Mr. Reid had stipulated to the elements contained in the SF5s for

two out of the three subcases at issue, and therefore, as to 22-11639 and 22-13854 there was a binding agreement, but as to 22-13509, there was no settlement agreement.

The Special Master must reconsider both aspects of the *Order*—whether the January 24th letter was a binding settlement agreement, and second, even if it was not, that Mr. Reid stipulated on the record to the elements of 22-13509 as long as it comported with the framework of the settlement—and reverse her decision relative to 22-13509. Arguments on both aspects of the Special Master’s decision are set forth below in reverse order, with the second analysis discussed first.

In the alternative to the above, it is undisputed that the settlement framework was intended to apply to all of the listed subcases on the January 24th letter: “Because of the global nature of the settlement of Paradise Springs, SF5 settlement documents will be prepared once the late claims and amended claims are ready for resolution. In other words, all the subcases are tied together and are anticipated to progress through the SRBA resolution process as a group.” *Order* at Exhibit 1 (January 24th letter at 1). Therefore, in the alternative to the above, the Special Master should stay the proceedings on the Paradise Springs subcases listed in the January 24th letter pending resolution of 22-13509.

II. ARGUMENT.

- A. The Special Master erred by not reviewing the October 12, 2011 court recording and finding that Mr. Reid stipulated on the record that 22-13509 should be decreed as set forth on the SF5 as long as it comported with the settlement framework, which it did.

SPECIAL MASTER BILYEU: OK, well, let me just go back. 13509.

Reid: Yes.

SPECIAL MASTER BILYEU: You agree to those to the elements that IDWR has sent to you?

MICHAEL REID: You know, I can't—I think so, I don't—I haven't seen it, but, and it may yet need to just be forwarded to me . . .

[END RECORDING]

[RECORDING 10:19:38 AM through 10:24:38 AM]

MICHAEL REID: 509, but if that's the Ron Miller right that Rob Harris represents, then I'm fine with what we decided at the settlement and as long as it appears as what it was at the settlement, which I think it will, because everything else has been the same except for my right, then I totally agree with that, and the same with 13854.

Harris Aff. at ¶4.

We agree entirely with the case law cited to and discussed in the *Order* regarding oral agreements and their enforceability under Idaho law. *Order* at 2-3. Furthermore, in the SRBA, it is well-known that “[s]ubcases may be resolved orally on the record.” AO1 Rule 4d(3).

A recent and thorough recitation of black letter law on the issue of oral stipulations and contract formation is contained in *Lawrence v. Hutchinson*, 146 Idaho 892, 204 P.3d 532 (Ct. App. 2009). This case is cited to and briefly quoted in the *Order*, but additional language from that case is instructive, and is quoted in its entirety here:

Stipulations for the settlement of litigation are regarded with favor by the courts and will be enforced unless good cause to the contrary is shown. Generally, oral settlement agreements do not have to be reduced to writing to be enforceable. Oral stipulations are binding when acted upon or entered on the

court records. However, an attempted stipulation is ineffective when it is clear from the record that the parties never assented to it. An agreement entered into in good faith in order to settle adverse claims is binding upon the parties, and absent a showing of fraud, duress or undue influence, is enforceable either at law or in equity.

Oral settlement agreements must comply with the requirements for contracts. Such a contract stands on the same footing as any other contract and is governed by the same rules that are applicable to contracts generally. Formation of a valid contract requires that there be a meeting of the minds as evidenced by a manifestation of mutual intent to contract. This manifestation takes the form of an offer and acceptance. In a dispute over contract formation it is incumbent upon the plaintiff to prove a distinct and common understanding between the parties. There must be a meeting of the minds on the essential terms of the agreement. A contract must be complete, definite, and certain in all its material terms, or contain provisions which are capable in themselves of being reduced to certainty.

Whether the parties to an oral agreement or stipulation become bound prior to the drafting and execution of a contemplated formal writing is largely a question of intent. The intent of the parties is to be determined by the surrounding facts and circumstances of each particular case. The stipulations are best evaluated by looking to the very words of counsel and their clients. Circumstances which have been suggested as being helpful in determining the intention of the parties are: whether the contract is one usually put in writing; whether there are few or many details; whether the amount involved is large or small; whether it requires a formal writing for a full expression of the covenants and promises; and whether the negotiations themselves indicate that a written draft is contemplated at the final conclusion of the negotiations.

Lawrence v. Hutchinson, 146 Idaho 892, 898, 204 P.3d 532, 538 (Idaho App. 2009) (internal citations omitted).

Based on these principles, as explained in the following section, the January 24th letter was a binding settlement agreement. However, even if we assume for the sake of argument that it is not, and the Special Master's continuing analysis as to 22-11639 and 22-13854 remains, the court must reconsider its analysis as to 22-13509 in light of the statements made by Mr. Reid on October 12, 2011.

In its analysis, the court is not entirely clear as to what facts distinguished 22-13854 and 22-13509.² However, the court stated that “Mr. Reid asserted during the October 12, 2011 Status Conference that he had not yet received a Standard Form 5 for this right.” *Order* at 8. Mr. Reid had received a copy of the SF5 for 22-13854, which Mr. Reid later has issues with, but the court still found an agreement existed:

Mr. Reid stated on the record on October 12, 2011 that he received the SF5 for 22-13854, had signed it, and had sent it along to additional parties. Mr. Reid’s statements indicated that a meeting of the minds occurred, that an offer and acceptance had taken place, and that the elements were correctly set forth in writing in the SF5. Therefore, the Court finds that a valid oral agreement was in place for this water right, that the essential elements were set forth on the record on October 12, and in the SF5 attached to the *Order to Show Cause*. Therefore, 22-13854 shall be recommended consistent with the SF5 attached to the *Order to Show Cause*.

Order at 7 (bolding and italics in original).

We agree with the court’s analysis as to 22-13854. However, despite the same factual circumstances existing as to 22-13509—except for the existence of an SF5 in the hands of Mr. Reid—we are left to conclude that the absence of a written SF5 was the basis for the court’s differing treatment of 22-13509 and 22-13854. In the court’s words, “[t]he analysis is quite different for 22-13509 since there was no oral agreement by Mr. Reid[,]” *Order* at 9, and presumably no oral agreement existed because there was no SF5. In this regard, the court’s analysis is incorrect because the court apparently did not have the benefit of reviewing the recording of the October 12, 2011 status conference, and may have only relied on notes taken at the hearing in its analysis.

² As to 22-11639, Mr. Reid agreed to amendments to this SF5 on the record on December 7, 2011, at the *Order to Show Cause* hearing, where the court stated that “[w]here the elements of 22-11639 were clearly established in the Order to Show Cause, and where the parties put the agreement on the record, the parties entered into a binding settlement agreement.” *Order* at 6.

As the court is well aware, settlement agreements often require future action of the parties pursuant to their terms. Thus, the inquiry here is not whether Mr. Reid had seen the SF5 for 22-13509, rather, it is whether he had agreed on the record to the framework for resolving the Paradise Springs subcases (which includes 22-13509), at the October 12, 2011 status conference, and as long as the SF5 for 22-13509 comported with that, he was bound by agreement.

Mr. Reid clearly did agree to the framework for resolving 22-13509 when he stated: “I’m fine with what we decided at the settlement and as long as it appears as what it was at the settlement, which I think it will, because everything else has been the same except for my right, then I totally agree with that, and the same with 13854.” *Harris Aff.* at ¶4.

This new evidence is dispositive that Mr. Reid agreed “totally” with the settlement framework. The analysis must be based upon whether the SF5 for 22-13509 appeared as it was previously agreed (which was memorialized in the January 24th letter), not on whether Mr. Reid had a copy of the proposed SF5. If the two matched, then Mr. Reid unequivocally stated he was in agreement with resolution of this subcase. Why? In his words, “because everything else has been the same except for my right.” Stated another way, all of the other Paradise Springs water rights were based on the same framework, and 22-13509 was no different.

The January 24th letter provided, on the front page, that 22-13509 was to have 25.5 decreed acres, and a decreed quantity of water for .51 cfs. See *Order*, Exhibit 2, at 1. The SF5 for 22-13509 described a water right for 25.5 decreed acres and a decreed amount of .51 cfs. *Order*, Exhibit 1, at *12 (SF5 for 22-13509). Therefore, based on Mr. Reid’s representation, there was a meeting of the minds as to the resolution of 22-13509, complete with offer and acceptance, as well as performance. In short, there was an agreement based on the court’s

analysis and logic contained in the *Order* when considering the additional information provided in the recording of the October 12, 2011 status conference.

Where there may perhaps be confusion in the court's notes is Mr. Reid's representation at the October 12, 2011 status conference that he had an issue with the settlement agreement **as to 22-13212 only**, but no such representation was made as to the other subcases. This is demonstrated through this exchange between Mr. Reid and the Special Master, which describes a remaining subordination language problem with 22-13212:

MICHAEL REID: I think I can make it easier for the court even further. I emailed Mr. Budge a couple days ago and **the global settlement is fine with everybody except for me and him**. But, I've already told him I want to dissolve our agreement and withdraw my motion to open up that decree today—to reopen that partial decree today. The material items that I got as part of the settlement, the State essentially took some of those away, and Mr. Budge initialed them even though he may have known better. And then Mr. Budge and I had a disagreement over over the other material part of this settlement that was going to get made, you know, as part of something that I wanted, **and so, essentially I don't think I've gotten what I've wanted out of the global agreement, at least between the agreement that I had with Mr. Budge. And I've told him that I think that I'm moving to dissolve the agreement between he and I, and then I'm going to withdraw the motion to open the, reopen the partial decree in 13212.**

SPECIAL MASTER BILYEU: OK, well I'm still a little bit confused. So, 13854, you've agreed to the elements that went out from IDWR in September. You agree to those, is that true?

MICHAEL REID: That's true.

SPECIAL MASTER BILYEU: OK. That helps me . . .

MICHAEL REID: And I don't think I have a problem with 13509, and I know I don't have a problem with 11639. **The only one I have a problem with 13212,** and so, I don't think I'm going to sign that and like I said, I've told Mr. Budge that I think that agreement has been essentially dissolved for lack of any material participation.

Harris Aff. ¶4. The only water right concern Mr. Reid had on October 12, 2011, as stated on the record, was with 22-13212. He had no issues with 22-13509. Mr. Reid cannot now claim that he had a problem with all of the Paradise Springs subcases because he has now changed his mind

after the fact. He had already agreed to settle the subcases based on the framework established during settlement, which he confirmed on the record before the court. He even stated that he was ready to drive to Idaho Falls and sign the SF5 for 22-13509, as long as it was consistent with the settlement agreement memorialized by the January 24th letter, which it was. This was an unequivocal acceptance of the elements of the water right for 22-13509. The fact that he claims to have not received the SF5 for 22-13509 is not dispositive of whether there was an agreement. Mr. Reid's statements on the record—an oral stipulation before a court—is sufficient evidence of that agreement before the SRBA. *See* AO1 Rule 4d(3).

Not to belabor the point, but with regards to the discussion of the three grouped subcases—22-11639, 22-13509, and 22-13854—and before moving onto the single water right Mr. Reid did have a problem with (22-13212), this final exchange occurred between those on the line on October 12, 2011:

SPECIAL MASTER BILYEU: OK. All right. So it looks like all the ones on this first group are signed and agreed to, or at least agreed to on the record, and maybe the easiest thing we could do, we could do orders to show cause on those if we don't get the signatures, let's say in a week, and that way if, you know, nobody disagrees with them, they just, you now, at least we've given notice and they go through that way. So, let me just circle around to the parties before we get to 13212. Ms. Courtney, any loose ends on the three that we don't have documents on?

ANDREA COURTNEY: Special Master, I'll contact Ray and have him resend 13509 to Michael so he'll have that for Mr. Reid's appearance later today.

SPECIAL MASTER BILYEU: Perfect. And then, Mr. Reid, if we don't get signatures from your parents here in a week, we'll go ahead and send an order to show cause out on 11639 or any of the other two. We can get it done if they don't sign it, we can get it done with an order to show cause, because then that gives notice. And we'll attach—

MICHAEL REID: I don't think—

SPECIAL MASTER BILYEU: the elements.

MICHAEL REID: I don't think there will be any problem.

SPECIAL MASTER BILYEU: OK. Well, we'll wait a week until that comes in so we don't have to do that if we don't need to. So, Mr. Budge, any follow

up on this first group, and again, we're talking about 13854, 13509, and 11639. Sounds like we're close to getting those all wrapped up, maybe most of them by the end of today.

TJ BUDGE: No, I'm just looking forward to finalizing those, so, I'm glad we've got this far.

SPECIAL MASTER BILYEU: All right. Anybody have any comments on this first group before we go to 22-13212?

[No response].

Harris ¶4. The failure to object at this point further demonstrates that Mr. Reid was just fine with 22-13509 as it was previously agreed to (which was memorialized in the January 24th letter), as long as it had the same elements that were agreed to. It did. Mr. Reid only indicated he had a problem with 22-13212 when he stated "I think I can make it easier for the court even further. I emailed Mr. Budge a couple days ago and the global settlement is fine with everybody except for me and him. But, I've already told him I want to dissolve our agreement and withdraw my motion to open up that decree today—to reopen that partial decree today." *Harris Aff.* ¶4.

Based on this new information contained in the recording of October 12, 2011 status conference, the court should therefore reverse its decision relative to 22-13509, and find that a binding settlement agreement occurred on the record for this subcase. 22-13509 is no different than 22-13854. To hold otherwise, and allow Mr. Reid yet another attempt to continue litigating the Paradise Springs subcases, would undermine the purposes for which settlement is so strongly encouraged and "regarded with favor." *Lawrence v. Hutchinson*, 146 Idaho 892, 898, 204 P.3d 532, 538 (Idaho App. 2009) (internal citations omitted).

Because the agreement for 22-13509 was entered into in good faith, and "absent a showing of fraud, duress or undue influence," which has not been shown by Mr. Reid, the

agreement is enforceable. *Id.* 22-13509 should therefore be recommended for partial decree consistent with the SF5 attached as Exhibit 1 to the *Order*.

B. The January 24th letter was and is a binding settlement agreement.

In its initial analysis, the Special Master concluded that the January 24th letter “shows a mutual interest in resolving the subcases on Paradise Springs because it sets forth the structure of the discussion of the November 2010 meeting.” *Order* at 5. The court further described the letter as described process “moving towards a global settlement.” *Id.* at We submit the letter memorializes more than “mutual interest” in resolving these matters, but it established a formulaic framework that resolved the subcases.

The court seems hung up on the word “tentative” in the letter, as well as the phrase that late claims need to be made “before the settlement can be finalized.” *Id.* We submit that the context of this language was to ensure all of the affected subcases needed to proceed as one group. This is evidenced by the following language from the letter: “Because of the global nature of the settlement of Paradise Springs, SF5 settlement documents will be prepared once the late claims and amended claims are ready for resolution. In other words, all of the subcases are tied together and are anticipated to progress through the SRBA resolution process as a group.” *Order*, Exhibit 2 at 1.

In short, these subcases could not be treated in a piecemeal fashion, but had to be resolved as an “all for one, and one for all” basis. Ironically, the very thing that IDWR attempted to make clear in its letter is now occurring with 22-13509, which is now being treated separately and differently than the other subcases. IDWR’s use of the “tentative” and “finalized” reflects that there was still paperwork that needed to be filed and processed in the future, but

nowhere did IDWR suggest that the concepts agreed to at the settlement was still open for negotiation. The framework, which is relatively uncomplicated, had been established—divvy out all 100 acres of the JJ Miller right *pro rata*, and then have parties file late beneficial use claims for remaining acres they irrigate above the 100 acres.

It is commonplace to have settlement agreements that requires additional actions of the parties. Perhaps consideration of an analogous situation would be helpful. Consider a dispute between neighbors regarding Neighbor A's use of a piece of property. After years of litigation, the parties agree to a settlement with a component where Neighbor A agrees to sell the property to a new owner who will not use the property in the manner that Neighbor B objected to. A necessary component of this settlement is execution of a deed by Neighbor A conveying the property in the future once the property is sold. In exchange for the future sale of Neighbor A's property, at the same time the settlement document is signed, Neighbor B immediately executes a deed conveying another piece of property to Neighbor B.

After a year of diligent efforts, Neighbor A's property is sold, but at the closing, Neighbor A refuses to sign the deed conveying the property to the new buyer. Neighbor A would clearly be in breach of the settlement agreement, and it is illogical to presume that the original settlement agreement was somehow unenforceable because the final paperwork was not done at the time the settlement agreement was entered into. Neighbor A—who relied upon the settlement to buy their peace—would certainly have a right to sue for breach of the agreement. Execution of the warranty deed is a process that the parties already agreed to, even if it was to occur in the future.

The same is true here. Mr. Reid agreed to a framework that would require future action of the parties. In addition to 22-13509 being described in an SF5 just as shown in the letter, the Millers filed a late claim for their beneficial use component (22-13999). In short, they did exactly what they said they would do. Mr. Reid's refusal to sign the final paperwork—the SF5 for 22-13509—does not absolve him of his legal obligations in this matter. His acceptance of the settlement framework is evident from his failure to object to the January 24th letter after it was sent out by Michael Holliday, as well as his statements on the record on October 12, 2011. The January 24th letter was a memorialization of that formulaic framework, which states: “The table below lists the amount agreed upon during the settlement conference followed by the tasks that need to be completed before the settlement can be finalized.” *Order*, Exhibit 2, at 1. The parties agreed to the amounts, and the description of 22-13509 in the proposed SF5 will look exactly like the Miller's listing in the table on the January 24th letter. Because that is the case, the January 24th letter is a settlement document that is enforceable by its terms, and is more than an “agreement in principle.” *Order* at 9. It is an agreement in fact.

In short, the Special Master should reverse the *Order* as to its holding that the January 24th letter was not a binding settlement agreement. Because 22-13509 is proposed to look exactly like it is described in the January 24th letter, the court should recommend it for partial decree consistent with those elements, and the trial in this matter should be vacated.

C. In the alternative to the above, the court should stay any further proceedings on the subcases listed in the January 24th letter because the agreement called for the subcases to proceed as a single comprehensive group.

The court has no doubt been involved in subcases that must proceed as a group with common issues. Otherwise, if one water right goes to partial decree based on an established

principle that is later changed, the remaining water rights would be negatively affected. This is precisely the situation with the Paradise Springs subcases, and clearly evidenced in the January 24th letter:

Because of the global nature of the settlement of Paradise Springs, SF5 settlement documents will be prepared once the late claims and amended claims are ready for resolution. In other words, all of the subcases are tied together and are anticipated to progress through the SRBA resolution process as a group.

Order, Exhibit 2 at 1. In other words, these subcases could not be treated in a piecemeal fashion, but had to be resolved as a group. Therefore, in the alternative to the above, the Special Master should stay the proceedings on the Paradise Springs subcases listed in the January 24th letter pending resolution of 22-13509.

Ironically, the very thing that IDWR attempted to address in its letter—to ensure the subcases proceed together—is now not occurring with 22-13509, and this Paradise Springs water right is now treated separately and differently than the other Paradise Springs subcases. With any settlement decision, risk is assessed and decisions made on the facts on the case, some of which may be good facts for a particular party, and some of which are not favorable. The balancing of risk is why parties resolve cases through settlement. To allow 22-13509 to now be subject to the potentially unfavorable facts, while the remaining Paradise Springs subcases enjoy the peace they have negotiated, would put 22-13509 in an untenable and fundamentally unfair situation. It is unclear at this point what IDWR's Director's Report at trial will be on 22-13509, or what it would be on the remaining Paradise Springs subcases if they were forced to trial, but the elements may very well be different than those outlined in the SF5s of these water rights.

The point is simply that all of these subcases should be in the same boat, and either be subject to the same factual scrutiny by the Department if 22-13509 is forced to go to trial (or a

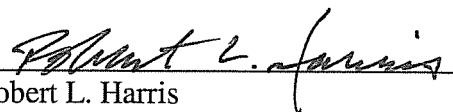
notice of challenge) just as they should all enjoy the benefits of settlement as a group. To hold 22-13509 to a different standard is contrary to the intent of the settlement agreement. ("The table below lists the amount agreed upon during the settlement conference followed by the tasks that need to be completed before the settlement can be finalized." *Order*, Exhibit 2, at 1). Therefore, in the alternative to the above, the Special Master should stay the proceedings on the Paradise Springs subcases listed in the January 24th letter pending resolution of 22-13509.

III. CONCLUSION

For the reasons set forth above, upon reconsideration, and in light of the new evidence presented, the Special Master should reverse her prior decision regarding 22-13509 and whether Mr. Reid is bound to the settlement of this subcase on the court's record, or alternatively, based on the terms of the January 24th letter itself.

In the alternative, the Special Master should stay the proceedings on the Paradise Springs subcases listed in the January 24th letter pending resolution of 22-13509.

Dated this 25th day of April, 2012.


Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, PLLC

CERTIFICATE OF MAILING

I certify that on this 25th day of April, 2012, I mailed the original and copies of this form, including all attachments, to the following persons by mailing the original and/or copies, postage prepaid and addressed as follows:

1. ORIGINAL TO:

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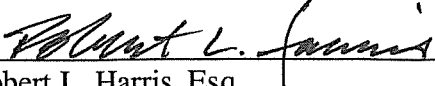
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