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JUN 14 2012
DEPARTMENT OF
WATER RESOURCES

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 PERMISSIVE REVIEW OF
THE SPECIAL MASTER'S AMENDED ORDER
ON SHOW CAUSE HEARING (MARCH 14,
2012) AND ORDER ON MOTION FOR
RECONSIDERATION (MAY 22, 2012)**

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, hereby submit this memorandum in support of their *Motion for Permissive Review of the Special Master's Amended Order on Show Cause Hearing (March 14, 2012) and Order on Motion for Reconsideration (May 22, 2012)* submitted contemporaneously herewith.

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 T.J. 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

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

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 permissive review 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.*”), which was previously submitted to the court. The relevant portions for 22-13509 are transcribed at Paragraph 4 of the *Harris Aff.* The transcript demonstrates, quite clearly, that Mr. Reid had stipulated on the record 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 22-13509 was consistent in every way with the settlement reached between the parties (a water right for .51 cfs and irrigation of 25.5 acres). In short, Mr. Reid stipulated on the record to resolve this subcase.

In addition to his stipulation for 22-13509, the associated Miller beneficial use right—22-13999—has already received a partial decree (dated March 1, 2012), which references the agreed-to combined acres with 22-13509 of 35 acres. Reid’s failure to object to this associated

beneficial use claim is further evidence that he was in total agreement with what the parties' contemplated agreement and his stipulation the record.

Despite his "total" agreement articulated at the October 12, 2011 status conference, Mr. Reid did not sign the SF5 for 22-13509 which was to memorialize what he agreed to on the record. 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 Millers thereafter filed a motion for reconsideration based upon the transcript of the October 12, 2011 status conference. Despite the evidence, the Special Master did not reverse her prior decision. The Special Master did vacate the June 20-21 trial dates, ordered a mandatory settlement conference, and rescheduled the trial for September.

However, prior to the trial, it is critical for resolution of this subcase for the Presiding Judge to review whether Mr. Reid's stipulation on the record satisfies the requirements of Rule 4d(3), and second, whether the January 24th letter was the memorialization of a binding settlement agreement. For the reasons set forth below, permissive review should be granted.

II. ARGUMENT.

A. The issue decided in the *Order* is a “controlling question of law.” Therefore, since “an Immediate Appeal May Materially Advance the Orderly Resolution” of this subcase, permissive review is warranted.

Idaho law provides the standard for when a permissive appeal may be taken from an interlocutory order:

Generally, an appeal under I.A.R. 12 will be permitted when the order involves a controlling question of law as to which there is substantial grounds for difference of opinion and that an immediate appeal may materially advance the orderly resolution of the litigation.

State v. Maynard, 139 Idaho 876, 880 (2004). AO1 9.e echoes this standard:

Permissive Review - A Special Master or any party to the subcase may seek permissive review by the Presiding Judge of the Special Master's interlocutory determination which involves a controlling question of law as to which there are substantial grounds for difference of opinion and on which immediate consideration of the determination may advance the orderly resolution of the litigation following the procedures set forth in I.A.R. 12. The Special Master shall review the motion and responses and recommend, with findings, whether it should be granted or denied. The motion and the Special Master's recommendation shall be forwarded to the Presiding Judge for determination.

Recently, the Court granted the right to permissive review of certain objectives involving water rights in Basin 01. There, the Special Master recommended permissive review because “the general agreement was that, depending on the outcome of permissive review, most of the subcases will be resolved.” *Recommendation to Grant Motion for Permissive Review of Interlocutory Determinations, Subcase Nos. 01-04, et al.* (Feb. 16, 2011).

Similarly, here, the ultimate issue needs to be determined as to whether there was a binding oral stipulation (or agreement) on the record for Subcase No. 22-13509. This is a controlling question of law, and a decision on this issue will facilitate an orderly and expedient resolution of this subcase.

The question centers on whether statements made by Mr. Reid on the record on October 11, 2011 satisfied the requirements of Rule 4d(3). Mr. Reid stated the following at the October meeting:

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. 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, the issue remains whether the requirements of Rule 4d(3) were met with the statements made by Mr. Reid on October 12, 2011.

In its analysis, the Special Master was 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 had 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).

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.

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 at the time the oral stipulation was made—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.

The absence of an SF5 in the hands of the objector at the time of an oral stipulation simply cannot be the standard for what is required for an oral resolution of a subcase under Rule 4d(3). This makes no sense. An oral stipulation contemplates that there is not yet a written SF5 in the hands of the objector, and in fact, it does not appear that an SF5 is necessary if there is an oral stipulation **on the record**. Permissive review should be granted to allow the Presiding Judge to rule on this issue.

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 that agreement, and the evidence of that is his oral statements **on the record**. Such statements on the record are different than typical out of court oral agreements that need to be reduced to writing. Making oral agreements before the court is the record of the stipulation or agreement, and provides the necessary veracity for

agreement of its terms because the agreement is recorded either through a recording or the minutes of the meeting.

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. Mr. Reid agreed “totally” with the settlement framework. Therefore, the correct 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 Presiding Judge should review whether or not the Special Master incorrectly analyzed this issue.

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 oral stipulation and agreement on the record.

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. 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).

In sum, because the agreement for 22-13509 was stipulated to on the record pursuant to Rule 4d(3), and was done 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*. The Special Master was incorrect to hold otherwise, and because this is such a dispositive issue, permissive review should be granted.

Additionally, permissive review should be granted to determine whether the January 24th letter was, in and of itself, the memorialization of 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. 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.

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), which has now been decreed. 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, and his failure to object to 22-13999. 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 was incorrect with regards to how to treat the January 24th letter, and permissive review should be granted to determine whether the holding on this issue was correct or not. This issue is a controlling question of law, and will lead to an orderly resolution of the subcase. Because 22-13509 is proposed to look exactly like it is described in the January 24th letter, it should be recommended for partial decree consistent with those elements.

III. CONCLUSION

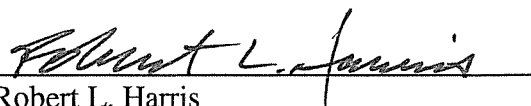
Rule 4d(3) of AO1 states quite clearly: “Where parties reach an agreement on a contested water right recommendation, they shall file either a stipulation with the court using a Standard Form 5 or some other stipulation acceptable to the court. **Subcases may also be resolved orally on the record.**” (Emphasis added). There is no SRBA precedent on what is required to have an oral agreement on the record, but in the above subcase, despite clear statements of agreement on the record before the Special Master, the Special Master nevertheless determined that this was not enough to bind the parties. Permissive review on this issue should be granted in order to understand the parameters of what is meant by Rule 4d(3). The Millers believes they had a binding settlement agreement with the objector in this matter, Michael Reid, who agreed on the record to resolution of 22-13509 as spelled out in a letter from IDWR agent

Michael Holliday. His agreement to the settlement parameters were then confirmed **on the record** before the Special Master.

Before the parties engage in expensive litigation, a critical threshold issue is to flesh out the parameters of how a subcase can be resolved orally on the record before the SRBA court. The evidence and arguments are straightforward, and will not result in significant time or expense to brief. Before engaging in the trial process that will cost a significant amount of the parties' time, money, and other resources, permissive review should be permitted. It is in the interests of judicial economy to address the threshold issue of whether or not there was a binding oral agreement to resolve 22-13509, just as a number of other similarly-situated Paradise Springs subcases were resolved. The Millers are currently on the outside looking in to a global resolution of these subcases, with everyone but them enjoying the peace that often comes with such a settlement of disputed and uncertain matters. Given their singular status as the only party who, at this point, do not enjoy these benefits, it is little to ask to allow them to have the matter of whether Rule 4d(3) means anything reviewed before the Presiding Judge before they engage in the expensive litigation they had hoped to avoid through settlement.

Accordingly, the Special Master should grant Millers' request for permissive review of the March 14, 2012 *Amended Order on Show Cause Hearing* and the May 22, 2012 *Order on Motion for Reconsideration*, in the above subcase.

Dated this 12th day of June, 2012.


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

CERTIFICATE OF MAILING

I certify that on this 12th day of ~~April~~ ^{June}, 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:

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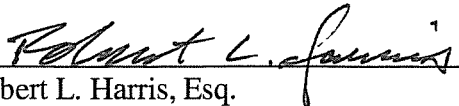
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