IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

	)	**Subcase: 91-00005-34**
In Re SRBA	)	
	)	**ORDER ON ORDER TO SHOW**
	)	**CAUSE HEARING ENFORCING**
Case No. 39576	)	**SETTLEMENT AGREEMENT; AND**
	)	**ORDER STAYING DISCOVERY**
	)	**AND TRIAL SCHEDULE ON**
_____	)	**BASIN-WIDE ISSUE 5-34**

I.
SUMMARY OF RULING

This order upholds and enforces the agreement entered into by the parties on February 13, 2001; stays the discovery and trial schedule as it applies to Basin-Wide 5-34 objections; and orders that the objections on the season of use provisions are to proceed to trial.

II.
APPEARANCES

Bill Hollifield of the firm Hollifield and Bevan, Twin Falls, Idaho, attorney for Larmen D. Anderson, Lawrence Babcock and Dale Smith;
Patrick Brown, Jerome, Idaho, attorney for Mountain Springs Ranch, G. David and Heather M. Nelson, Robert Unger and Simmons Trusts;
Harriet Hensley, Deputy Attorney General for State of Idaho;
Candace McHugh and Susan Hamlin, Deputies Attorney General for State of Idaho, Department of Water Resources;
Mitchell Sorensen, Moore, Idaho, *pro se*;
Y. Harvey Walker, Arco, Idaho, *pro se*;
Herb Whitworth, Mackay, Idaho, *pro se*;
Reva W. Walker, Arco, Idaho, *pro se*.

III.
MATTER FULLY SUBMITTED FOR DECISION

A hearing was held on ***Order to Show Cause*** on March 12, 2001. This matter is deemed fully submitted for decision on the next business day or March 13, 2001.

IV.
PROCEDURAL BACKGROUND

1. In order to put the complete matter into context, a certain amount of procedural background is necessary to show the scope of the subcase and the efforts that have been taken by the parties and the Court to either get the issues to trial or otherwise settled by the parties. The matter before the Court involves the enforcement of a settlement agreement entered into by the parties participating in the issues designated collectively by the SRBA Court as Basin-Wide Issue 5-34. Basin-Wide 5-34 concerns the objections and responses to the general provisions recommended by the Idaho Department of Water Resources ("IDWR") which apply exclusively to Basin 34. Basin 34 covers approximately 1,400 square miles including portions of Custer, Butte, Bonneville, and Jefferson Counties in eastern Idaho and consists primarily of the Big Lost River drainage.

The general provisions at issue are designated as:

General Provision 1 – "Definitions";
General Provision 2 – "2B Gauge and stock watering during irrigation season";
General Provision 3 – "Rotation with storage";
General Provision 4 – "Back channel";
General Provision 5 – "Separate streams";
General Provision 6 – "Howell Gauge – connected/non-connected."

2. On January 18, 1996, Judge Daniel C. Hurlbutt, Jr., then Presiding Judge of the SRBA, issued an ***Amended Order Designating Basin-Wide Issue No. 5***, which designated certain general provisions as Basin-Wide Issues. Also on that date, Judge Hurlbutt issued an ***Order Designating Basin-Wide Issue No. 5B***, which designated certain general provisions

unique to Basin 34 as Basin-Wide Issues, and referred these issues to Special Master Brigette Bilyeu.

3. On April 26, 1996, Judge Hurlbutt issued a ***Memorandum Decision and Order Re: Basin-Wide Issue 5***, which collectively addressed issues pertaining to the general provisions recommended in each of the three test basins. Judge Hurlbutt ultimately determined that the general provisions were not necessary to define or efficiently administer the water rights.

4. On June 28, 1996, Special Master Bilyeu issued a ***Special Master's Report and Recommendation on Basin-Wide Issue No. 5B***. Judge Hurlbutt adopted the ***Special Master's Report and Recommendation*** in full. ***Memorandum Decision*** (Feb. 12, 1997).

5. Judge Hurlbutt's decision in Basin-Wide Issue 5 was appealed to the Idaho Supreme Court, which remanded it to the SRBA District Court. *A& B Irrigation District v. Idaho Conservation League*, 131 Idaho 411, 958 P.2d 568 (1997).

6. Judge Hurlbutt's decision in Basin-Wide Issue 5B was appealed to the Idaho Supreme Court, which remanded to the SRBA District Court. *State v. Nelson*, 131 Idaho 12, 951 P.2d 943 (1998).

7. On December 9, 1998, Judge Hurlbutt issued an ***Order Requesting Supplemental Director's Reports from Idaho Department of Water Resources for Irrigation Season and Conjunctive Management General Provisions in Reporting Areas 1, 2 and 3.***

8. On June 24, 1999, IDWR filed its *Supplemental Director's Report, Reporting Area 1, IDWR Basin 34, Regarding Revisions of the Following: Period of Use (for Irrigation Water Uses), Conjunctive Management General Provisions (Supplemental Director's*

Report). The deadline for objections to the *Supplemental Director's Report* was July 30, 1999.

9. On August 31, 1999, December 3, 1999, and December 20, 1999, Judge Barry Wood entered a series of three orders setting forth the procedural history and the SRBA Court's posture for resolving those general provisions previously designated as Basin-Wide Issues following the Idaho Supreme Court's remand in *A& B Irrigation District v. Idaho Conservation League*, 131 Idaho 411, 558 P.2d 568 (1998); *State v. Nelson*, 131 Idaho 12, 951 P.2d 943 (1998); and *State v. Idaho Conservation League*, 131 Idaho 329, 955 P.2d 1108 (1998). For a detailed discussion, *see* ***Order of Consolidation/Separation of Issues (Realignment and Redesignation of Issues) of Basin-Wide Issues 5, 5A and 5B; AO1 § 11*** (Aug. 31, 1999); ***Amended Order of Consolidation/Separation of Issues (Realignment and Redesigantion of Issues) of Basin-Wide Issues 5, 5A and 5B; AO1 § 11*** (Dec. 3, 1999); ***Second Amended Order of Consolidation/Separation of Issues (Realignment and Redesignation of Issues) of Basin-Wide Issues 5, 5A and 5B; AO1 § 11*** (Dec. 20, 1999). In the August 31, 1999, ***Order***, Judge Wood realigned and redesignated the issues by particular Basin (*i.e.*, Basin 34, 36, and 57).

10. Because of the large number of objections and the different bases for the objections, Judge Wood held a scheduling conference on October 20, 1999, to discuss the various issues raised in the objections and to craft a case management plan. As a result of the conference and in an effort to identify and align issues for trial, Judge Wood entered an order requiring all objecting parties to file more definite statements. *See* ***Order Setting Deadline for Filing More Definite Statement*** (Nov. 10, 1999). On January 13, 2000, Judge Wood held another status conference. Following that, parties were given the opportunity to file written questions with the Court regarding IDWR's basis for its recommendation. Judge Wood then ordered IDWR to issue an I.R.E. 706 report in response to the questions raised by the parties. *See* ***Order Requiring Supplemental Report from IDWR on Certain Issues in Basin Wide Issue 5-34; I.R.E. 703, 705, 706; I.C. § 42-1412(4)*** (Jan. 27, 2000) ("706

Report"). Also at the January 13, 2000, status conference, the parties discussed the viability of settling the objections to the General Provision 5 "separate streams" provision and requested that Judge Wood segregate the issue for settlement purposes, appoint a settlement facilitator and order the matter to settlement. Judge Wood appointed Special Master Thomas R. Cushman as facilitator and ordered the matter to settlement. As a result of the settlement efforts, General Provision 5 was settled pursuant to stipulation on June 19, 2000. In the ***Settlement Conference Report*** issued by Special Master Cushman, it was represented that the remaining Basin-Wide 5-34 issues might also be amenable to settlement.

11. On March 27, 2000, IDWR filed a "706 Report" in the form of a *Supplemental Director's Report* which addressed the issues raised by the parties.

12. On April 11, 2000, after notice to all parties, IDWR held a "virtual tour" and field trip to enable the Court and interested parties to view the premises which are the subject of each of the proposed general provisions. I.R.C.P. 43(f).

13. On April 28, 2000, Judge Wood appointed Special Master Thomas R. Cushman as facilitator for the remaining Basin-Wide 5-34 issues. The order appointing Special Master Cushman made it clear that the settlement efforts and litigation schedule would proceed independently or on "dual tracks." *See* ***Order Appointing Special Master Cushman As Settlement Facilitator for Remaining Basin-Wide Issues 5-34*** (Subcase 91-00005-34, April 28, 2001).

14. On June 14, 2000, Judge Wood issued a comprehensive scheduling order setting forth discovery and motion cut-off dates and the trial date for February 5, 2001. *See* ***Order Setting Trail Dates, Final Pre-trial Conference, Discovery Deadlines, and Pre-trial Motions for Basin-Wide Issue 5-34*** (General Provisions unique to Basin 34); I.R.C.P. 16 (Subcase 91-00005-34, June 13, 2000).

15. Pursuant to the April 28, 2000, order appointing Special Master Cushman as settlement facilitator, two settlement conferences were held on July 12, 2000 and September 12, 2000, respectively. On September 15, 2000, Special Master Cushman issued a ***Settlement Conference Report on General Provisions 1-4 and 6***.

16. On September 22, 2000, Judge Wood entered an order staying the entire proceeding as a result of the Idaho Supreme Court's decision to replace the Presiding Judge of the SRBA. On December 11, 2000, Judge Wood entered an order requesting available dates for a final mandatory settlement conference. The settlement conference was set for February 13, 2001.

17. On December 18, 2000, the Honorable Roger S. Burdick replaced Judge Wood as the Presiding Judge of the SRBA.

18. On January 16, 2001, the Court held a status and scheduling conference for purposes of resuming the trial schedule. An ***Amended Trial Scheduling Order*** was entered on January 26, 2001. The trial was set for May 14, 2001. *See* ***Amended Order Setting Trail Date, Final Pre-trial Conference, Discovery Deadlines and Pre-trial Motions for Basin-Wide Issues 5-34 (General Provisions)***, ***Including Remaining Issue on General Provision 5 "Separate Streams" and Objection to Irrigation Period of Use Provision – I.R.C.P. 16*** (Jan. 26, 2001). So as not to burden the parties with discovery prior to the final settlement conference, at the request of the parties, the Court limited the scope of the discovery which could be conducted prior to the final settlement conference.

19. The final settlement conference wherein the settlement agreement was executed was held as scheduled on February 13, 2001. Special Master Cushman issued a ***Second Settlement Conference Report on General Provisions 1-4 and 6*** on February 20, 2001. The report indicated that after the parties had reached agreement, certain parties later notified

Special Master Cushman in writing that they were withdrawing their consent to the agreement.

20. In response to the information contained in the ***Settlement Conference Report***, on February 22, 2001, this Court issued an ***Order to Show Cause*** to allow the withdrawing parties to show cause as to why they should not be bound by the agreement.[1] A hearing was held on the ***Order to Show Cause*** on March 12, 2001. The subcase is currently set for trial on May 14, 2001.

V.
FACTUAL FINDINGS

1. The issues involved in this matter arise as a result of a settlement agreement reached by the parties at the conclusion of the February 13, 2001, settlement conference. The February conference was the last of a series of three conferences. The order for settlement was issued at the parties' request. For reasons set forth in Section VIII below, each of the three settlement conferences was mandatory. The April 28, 2000, order appointing Special Master Cushman as settlement facilitator contained the following language:

> It is further hereby ordered that in addition to the docket sheet notice, all parties who have previously filed objections and/or responses in this matter shall also be served by mail of any notice related to settlement conference proceedings. Parties are hereby notified that failure to appear at the settlement conference will result in the withdrawal of the non-appearing party's objection or response. Parties failing to appear at the settlement conference will then have the opportunity to show cause in the district court as to why their objection and/or response should not be withdrawn.

[1] In *Conley v. Whittlesey*, 126 Idaho 630, 888 P.2d 884 (Ct. App. 1995), the concurring opinion by Judge Lansing expressed concern over the trial court *sua sponte* initiating enforcement proceedings via an order to show cause. *Id.* at 637. This situation is not analogous. Each of the orders setting the settlement conference required mandatory participation of all objectors. Parties not attending the settlement conferences were notified in the respective orders that failure to attend would result in the Court issuing an order to show cause as to why they should not be bound by any settlement reached. The ***Order to Show Cause*** issued by this Court expressly stated that failure to attend the show cause hearing <u>would not</u> result in contempt of court, but the failure to attend would result in the non-attending party being deemed to have consented to the terms of the agreement reached. At the show cause hearing, the Court took evidence and heard argument from the parties seeking to withdraw from the agreement as well as the parties seeking to have the agreement enforced.

The order setting the February 13, 2001 mandatory settlement conference contained the following language:

> Parties and their attorney(s) of record must be personally present. No one may attend by proxy or by telephone. Each party is required to be present with the individual having full settlement authority on every aspect of the remaining contested matters.
>
> Attendance is mandatory. Parties are hereby notified that failure to appear at this settlement conference will result in the withdrawal of the non-appearing party's objection or response. Parties failing to appear at the settlement conference will then have the opportunity to show cause in the district court as to why their objections and/or response should not be withdrawn.

The February 13, 2001, conference was held at the SRBA District Courthouse in Twin Falls, Idaho.

2. The format at each of the three settlement conferences was similar. The proposed general provisions were projected onto the wall from a laptop computer. Revisions as negotiated were indicated with the aid of a "strike out" program. Stricken language was shown as crossed out and added language was highlighted in red. Dave Tuthill from IDWR, because of his familiarity with the computer program, acted as scrivener for the negotiations. The negotiations began with proposed General Provision 1 "Definitions" and proceeded in chronological order to the next provision once all parties were in agreement. All participants had the unlimited opportunity to participate in the drafting of the revisions. No participant indicated during the process that they felt uncomfortable, threatened, or pressured to agree with the revision, or was uncomfortable with not having his or her attorney present.

3. The parties made little progress at the July 12, 2000, conference, but mainly identified their respective positions. However, at the September 12, 2000, conference, the parties were able to reach tentative agreement as to General Provisions 1-4, but were at impasse as to provision 6. The agreement on General Provisions 1-4 was "tentative" because the parties viewed any resolution as a "package deal"; meaning that if all the provisions could not be settled, then the parties would proceed to trial on all provisions. All parties

were making compromises on the various provisions, and if the entire matter could not be settled, they did not want to be bound by the compromise made on the individual provisions.

4. In addition to Special Master Cushman, those parties present at the July 12, 2000, settlement conference included:

Dave Tuthill and Carter Fritschle of IDWR;
Susan Hamlin, Esq., representing IDWR;
Harriet Hensley, Esq., representing the State of Idaho;
Patrick Brown, Esq., representing Mountain Springs Ranch, Simmons Trust, G. David and Heather Nelson, and Robert Unger;
Josephine Beeman, Esq., representing the North Snake River Ground Water District (NSGWD);
Amy Chestnut, Esq., representing Mark Gates;
Harvey Walker, *pro se*;
Matea McCray, *pro se*;
Seth Beal, *pro se*;
Mitchell Sorenson, *pro se*;
Lawrence Babcock, *pro se*;
Larmen Anderson, *pro se*; and
Herb Whitworth, *pro se*.

5. In addition to Special Master Cushman, those parties present at the September 12, 2000, settlement conference included:

Dave Tuthill and Carter Fritschle of IDWR;
Susan Hamlin, Esq., and Garrick Baster, Esq., representing IDWR;
Harriet Hensley, Esq., representing the State of Idaho;
Patrick Brown, Esq., representing Mountain Springs Ranch, Simmons Trust, G. David and Heather Nelson, and Robert Unger;
Harvey Walker, *pro se*;
Matea McCray, *pro se*;
Seth Beal, *pro se*;
Mitchell Sorenson, *pro se*;
Lawrence Babcock, *pro se*;
Larmen Anderson, *pro se*; and
Herb Whitworth, *pro se*.

6. In addition to Special Master Cushman, those parties present at the February 13, 2001, settlement conference included:

Dave Tuthill and Carter Fritschle of IDWR;

Candace McHugh, Esq., representing IDWR;
Harriet Hensley, Esq., representing the State of Idaho;
Patrick Brown, Esq., representing Mountain Springs Ranch, Simmons Trust, G. David and Heather Nelson, and Robert Unger;
Harvey Walker, *pro se*;
Matea McCray, *pro se*;
Mitchell Sorensen, *pro se*;
Herb Whitworth, *pro se*;
Lawrence Babcock;
Larmen Anderson; and
Dale Smith.

7. Since the tentative agreement was reached on General Provisions 1-4, the February 13 conference began with, and focused primarily on, General Provision 6. No modifications were made to General Provisions 1-4.[2] In brief, General Provision 6 addresses when the Big Lost River will be administered as two separate river systems above and below the Mackay Dam. The negotiated changes to General Provision 6 included a revision of the language in part B, increasing the rate of flow at which the river would be administered as two systems, and the addition of part C, concerning the installation of flow gauges.

8. The participants worked all day refining the language, but took rest breaks as well as a break for lunch. All participants were permitted to participate in the drafting of the language. Carter Fritschle from IDWR was present to demonstrate to the parties how each proposed revision would affect individual water rights.

9. At approximately 4 p.m. on February 13, 2001, Mr. Tuthill printed and distributed to the participants a copy of the final negotiated language of the proposed general provisions. Mr. Tuthill left shortly afterward. After some discussion, at approximately 4:30 p.m., Special Master Cushman asked each participant to either approve or disapprove the final draft. Mr. Babcock requested and received at least a 10-minute break in order to discuss the settlement provisions. During the break, Messrs. Babcock, Anderson, and Smith discussed the matter and the three agreed that it would be too expensive to litigate the matter, they just

[2] General Provision 5 was previously settled. *See infra*, Section IV, ¶ 10.

wanted to be through with the litigation, and would therefore agree to the revised provisions. It was clear that they were not fully satisfied with the language of the provisions, but did not want to proceed to trial. However, it was also clear that the other parties were also making compromises in an effort to avoid trial.

10. After the break, the parties returned to the courtroom. Special Master Cushman indicated that he did not want any problems with claims of what had or had not been agreed upon. He proceeded to ask each of the participants whether or not they agreed to the provisions. Each of the participants understood that they had to agree to all the terms or none at all. In an effort to avoid any uncertainty or confusion in the future, the Special Master also required that those individuals agreeing to the proposed general provisions initial beside their name on the attendance roster. *See* Brown Exhibit 7. The request to initial the roster was prompted as a result of a statement made by Mr. Babcock at the beginning of the conference inquiring whether the parties had previously agreed on General Provisions 1-4.

11. As the attendance roster was circulated around the table, Ms. McCray indicated that she was not ready to sign off on the general provisions, as revised. A discussion ensued between Ms. McCray and Special Master Cushman in which Ms. McCray expressed dissatisfaction with issues in Basin 34 unrelated to the general provisions. Ms. McCray then inquired as to what would happen if she forced the case to trial on grounds other than the issues pertaining to the general provisions. Special Master Cushman reminded Ms. McCray that if she went to trial on a frivolous matter or in an unreasonable manner, she could be liable for the other parties' costs and attorney's fees. At the time that comment was made, most of the participants had already initialed the attendance roster, including Messrs. Anderson and Smith. Following that comment, Mr. Babcock initialed the attendance roster. Mr. Babcock testified at the ***Order to Show Cause*** hearing that he did not want to pay the costs and fees of the other parties.

12. It was the admitted intent of Messrs. Babcock, Anderson and Smith to show their agreement with the proposed revisions by initialing the attendance roster. Mr. Babcock testified that he was not intimidated by Special Master Cushman and felt competent to negotiate in the settlement conference. Mr. Anderson testified that he felt qualified to analyze the settlement. Mr. Smith had not attended the two prior settlement conferences. Mr. Smith testified that he had come to this session of the settlement conference with the purpose of settling because he could not financially afford to go to trial. He initialed the attendance roster with the full understanding that if he did not, the matter would go to litigation.

13. While Messrs. Babcock, Anderson and Smith are represented by counsel—Bill Hollifield, Esq.—none of the three had asked Mr. Hollifield to attend the settlement conferences. Mr. Babcock testified that he specifically instructed Mr. Hollifield not to attend the settlement conference because he could not afford it, but felt he could just report what happened to his attorney. Mr. Babcock also testified that he understood what he could or could not accept. At no time during the negotiations did any of the three request to have Mr. Hollifield review the final document or contact Mr. Hollifield for advice on the revisions.[3]

14. Ms. McCray requested and received 48 hours to consider the proposed language. No other participants requested additional time to consider the proposal.

15. Ms. McCray was the only participant who had not initialed the attendance roster, although everyone heard Ms. McCray's request and Special Master Cushman's agreement to the 48-hour period. On February 15, 2001, the Court received a letter from Ms. McCray expressing her intent to withdraw from the entire process concerning Basin-Wide 5-34, General Provisions 1-6. *See* Brown Exhibit 2.

[3] A practice that probably occurs more in the SRBA than in other court is that parties sometimes attend settlement conferences without counsel. The rationale is that the party typically understands the mechanics of his or her particular water right, and the parties seek to avoid the cost of having counsel attend a settlement conference.

16. Mr. Babcock testified that 15 or 20 minutes following the February 13, 2001, settlement conference, as he left Twin Falls, he changed his mind about the agreement. Messrs. Anderson and Smith also changed their minds about the agreement. The three sent, by fax, identical letters to the Court on February 15, 2001, stating: "[A]ny verbal or written support previously given is hereby withdrawn." *See* Brown Exhibits 3, 4 and 5. The letters indicated that each did not agree with General Provisions 3, 4 and 6 as written. None of the three indicated in their letters that they had felt intimidated or pressured into agreeing to the general provisions, or that the reason they had signed off on the general provisions was due to the financial burden associated with trial.

17. Mr. Babcock also contacted Reva Walker, who has some interest in the matter due to water rights held by the Walker Family Trust. Mr. Babcock urged Ms. Walker to send a letter to the Court objecting to the general provisions, which she did on February 15, 2001. *See* Brown Exhibit 6. Ms. Walker's letter also indicated that she did not agree with General Provisions 3, 4 and 6 as written. Mr. Babcock also told her that he had originally agreed with the general provisions, but had changed his mind. Ms. Walker has never attended any of the settlement conferences. Ms. Walker has experienced health problems, having heart surgery on October 18, 2000, and not returning to her home until February 27, 2001. However, Ms. Walker has received all notices from IDWR and this Court related to the settlement conferences. She testified that her mail was forwarded to her during her convalescence. Although Mr. Hollifield is the attorney of record for the Walker Family Trust, Ms. Walker never asked Mr. Hollifield or anyone else to attend the settlement conferences on behalf of the Walker Family Trust. Nor had Ms. Walker, prior to the February 15, 2001, letter faxed to the Court, ever indicated that she was interested in participating in the mandatory settlement conferences, but was precluded from doing so because of health problems. Ms. Walker testified that she just forgot about the July 2000 settlement conference.

VI.
STANDARD OF REVIEW AND APPLICABLE LAW

The agreement reached by the parties at the conclusion of the February 13 settlement conference was effectively a stipulation. Stipulations are ordinarily entered into for the purpose of saving time, trouble or expense, *Call v. Marler,* 89 Idaho 120, 127, 403 P.2d 588, 592 (1965), and are regarded with favor by the court. *Conley v. Wittlesey,* 126 Idaho 630, 634, 888 P.2d 804, 808 (Ct. App. 1995). As a general rule, parties are bound by their stipulations. *Call v. Marler,* 89 Idaho at 127. "However a court may in its sound discretion relieve against a stipulation entered into through mistake or misunderstanding of fact or entered into inadvertently, inadvisedly, or improvidently where under all the circumstances its enforcement would work an injustice." *Id.* It is the duty of the court to do so when enforcement of the stipulation "would be inequitable and when . . . all parties to the action will, by vacating the stipulation, be placed in exactly the same condition they were in before it was made." *Id.* (citing *Koepl v. Ruppert,* 29 Idaho 223, 158 P. 319 (1916)). An agreement to settle litigation may also be set aside due to fraud, duress or undue influence. *St. Alphonses Regional Medical Center, Inc. v. Krueger,* 124 Idaho 501, 507, 861 P.2d 71, 77 (Ct. App. 1992).

The burden of proof lies with the party seeking to have the stipulation set aside. *See St. Alphonses Regional Medical Center,* 124 Idaho at 507; *Cross v. Moulton,*114 Idaho 884, 886, 761 P.2d 1236, 1238 (Ct. App. 1988). The reasons for setting aside a stipulation to settle litigation must be shown by clear and convincing evidence. *Lomas & Nettleton Co. v. Tiger Enterprises, Inc.*, 99 Idaho 539, 542, 585 P.2d 949, 952 (1978).

Showing that mistake or duress occurred is not, by itself, enough to have the stipulation set aside. In order to show excusable mistake, it must be established how the mistake occurred and who made the mistake. *Cross,* 114 Idaho at 886. "Duress must result from the opposing party's wrongful and oppressive conduct and not from the claimant's necessities." *St. Alphonses Regional Medical Center,* 124 Idaho at 507 (citing *Lomas & Nettleton Co.,* 99 Idaho at 542). The party claiming duress or economic coercion must show: (1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted

no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party. *Lomas & Nettleton Co.*, 99 Idaho at 542 (quoting *W.R. Grimshaw Co. v. Nevil C. Withrow Co.*, 248 F.2d 896, 904 (8th Cir. 1957)). A party claiming economic duress or business compulsion must make a showing that "the demand by one party must be wrongful or unlawful, and the other party must have no other means of immediate relief from the actual or threatened duress than by compliance with the demand." *Id.* at 543 (quoting *Inland Empire Refineries, Inc. v. Jones*, 69 Idaho 335, 206 P.2d 519 (1949)).

VII.
ADMISSIBILITY OF THE CONTENT OF THE SETTLEMENT CONFERENCE

A district court is authorized to order settlement conferences under Rule 16 of the Idaho Rules of Civil Procedure. I.R.C.P. 16(k)(4). Discussions held during mediation under Rule 16 are confidential and not admissible as evidence to prove liability or the invalidity of a claim. I.R.C.P. 16(k)(11); I.R.E. 408 and 507. However, "[t]his rule does not require the exclusion [of evidence] if the evidence is offered for another purpose." I.R.E. 408. The decision of whether to allow the admission of evidence from a settlement negotiation for "another purpose" is committed to the sound discretion of the trial court. *Soria v. Sierra Pacific Airlines, Inc.*, 111 Idaho 594, 606, 726 P.2d 706, 718 (1986). "Whether the evidence is admissible shall be determined by rules concerning relevancy and possible outweighing prejudice." *Id.*

Initially, in order to protect the confidentiality of the settlement negotiations and the sanctity of the settlement process, the Court was inclined to limit the evidence to conduct that occurred after the settlement negotiations had concluded and the settlement agreement was executed. Counsel for Babcock, Anderson and Smith initially objected to the admission into evidence of matters pertaining to the settlement negotiations. No other party objected. Because one of the causes of action for withdrawing from the settlement agreement directly related to conduct that occurred during settlement negotiations—specifically whether Babcock, Anderson and Smith were unduly pressured during the negotiation to enter into agreement—the Court ruled that the parties could not have it both ways. To the extent the

parties sought to raise the defense, the Court allowed admission of the evidence of what occurred during the negotiations. Again, no other party objected.

VIII.
CONCLUSIONS OF LAW AND ANALYSIS

A. MS. WALKER IS BOUND BY THE TERMS OF THE SETTLEMENT AGREEMENT FOR FAILURE TO ATTEND THE SETTLEMENT CONFERENCE OR OTHERWISE NOTIFY THE COURT OF HER INABILITY TO ATTEND.

Ms. Walker is bound by the terms of the settlement agreement for failure to attend any of the settlement conferences or have counsel appear on her behalf. Ms. Walker received notice of each of the orders setting the mandatory settlement conferences. Each of the orders made explicitly clear the consequences for failure to attend. Although Ms. Walker experienced health problems which may have prevented her from attending, she did not notify the Court or the settlement facilitator of her situation and attempt to have the matter rescheduled or have someone appear on her behalf.

The Court made the settlement conferences mandatory for specific reasons. Most of the parties specifically requested that the Court order the matter to settlement. In this case, as in most water cases, the general consensus was that the parties could negotiate a settlement that would be more favorable to all parties concerned than the Court could order following a trial. Basin-Wide 5-34 involves a large number of litigants and, therefore, scheduling times that are favorable to all is sometimes impossible. As such, parties have to make sacrifices in their daily lives in order to attend. In this case, because of the large number of parties involved, the combined total resources and time devoted to the settlement conferences were substantial. Therefore, in order to make the settlement process effective, and in fairness to those who attend and participate in good faith, participation at the settlement conferences needs to be mandatory and the parties attending must have authority to settle. The process is rendered meaningless if interested parties do not attend negotiations but still retain the ability to veto any agreement reached. Accordingly, any party who did not attend the settlement conferences is bound by the terms of the agreement ultimately reached.

Although Ms. Walker had valid medical reasons for her non-attendance, she failed to have her attorney attend on her behalf or notify the Special Master of her condition in order to attempt to have other arrangements made. Because Ms. Walker did not attend any of the three conferences, or otherwise make her intent in participating known, the parties were entitled to assume that she did not intend to participate in the negotiations. Consequently, allowing Ms. Walker to effectively veto the agreement reached would not only be contrary to the Court's prior orders but would also result in a gross injustice to those who participated in good faith.

B. MESSRS. BABCOCK, ANDERSON AND SMITH HAVE NOT SHOWN GOOD CAUSE WHY THEY SHOULD NOT BE BOUND BY THE STIPULATION.

Messrs. Babcock, Anderson and Smith have not shown good cause as to why they should not be bound by the agreement. Brown Exhibit 1. Once the attendance roster was initialed, the roster together with the finalized draft of the General Provisions effectively became a stipulation. Brown Exhibit 7. Messrs. Babcock, Anderson and Smith did not request additional time prior to initialing the roster. Each testified that at the time the roster was initialed, each intended to be bound by the agreement. Thus, this is not a situation where there is a question of whether the parties intended to be bound by the agreement. *Cf. Conley v. Whittlesay*, 126 Idaho 630, 888 P.2d 804 (Ct. App. 1995) (issue was whether parties intended to be bound by stipulation). All three testified that they did not necessarily agree with the provisions as written but felt that they could not financially afford to go to trial on the matter. In this case, it is undisputed that each intended to be bound by the agreement, but that only after further reflection they changed their minds.

Messrs. Babcock, Anderson and Smith essentially raise two arguments for having the Court set aside the agreement: First, that each felt pressured by Special Master Cushman's statement to Ms. McCray regarding the payment of the other parties' attorney's fees if the matter proceeded to trial; and second, the lateness in the day in which the finalized version was circulated and the inadequacy of time to review the finalized version. The Court finds both of these arguments to be without merit.

Messrs. Babcock, Anderson and Smith all testified that they had agreed to sign the agreement during the recess requested by Mr. Babcock. At that time, Special Master Cushman had not even had the discussion with Ms. McCray. Each testified that during the recess they discussed the costs of proceeding to trial, decided they could not afford to proceed to trial, and just wanted the matter to be over. After the break, when the roster was circulated for initialing, Anderson and Smith initialed the roster before Ms. McCray had her discussion with Special Master Cushman. Mr. Babcock was the only party left to sign after Ms. McCray's discussion. Special Master Cushman's statement was made in the context of a response to an inquiry made by Ms. McCray regarding the consequences for forcing the matter to trial on an unrelated matter. The Court cannot feasibly conclude that Mr. Babcock interpreted the statement to mean that if he decided to go to trial on the relevant issues that he would have to pay the other parties' costs and fees. The testimony was that no party was pressured or forced into initialing the agreement. Mr. Babcock testified that he did not feel intimidated or pressured by Special Master Cushman. The execution of the agreement was voluntary. Lastly, if there was genuine concern over the payment of attorney's fees, any of the parties could have requested additional time to consult with counsel. Such a request was not made.

Next, although the finalized version was printed off for distribution at the end of the day, the parties had been negotiating the specific language the entire day. The finalized version was just a compilation of the language that had been negotiated, agreed upon and displayed on the wall. General Provisions 1-4 had already been tentatively agreed upon and were only tangentially addressed at the February 13, 2001, conference. General Provision 5 had already been settled in a prior settlement conference. Thus, only General Provision 6 was modified during the day. Yet Messrs. Babcock, Anderson and Smith indicated in their letters that they did not agree with General Provisions 3 and 4, as well as 6. Carter Fritschle demonstrated to all who asked how the particular changes would affect individual water rights. Mr. Babcock testified that Mr. Fritschle even explained to him how the changes would affect his rights. During the recess, Messrs. Babcock, Anderson and Smith used the time to discuss the financial costs associated with going to trial instead of reviewing the

finalized draft. Mr. Babcock also made the statement that he could live with the provisions as proposed.

Accordingly, this is not a situation where the provisions were "sprung" on the parties in a last minute effort to finalize a deal. The parties were "fine-tuning" provisions that had been recommended since June 24, 1999, and had been the subject of over two years of legal proceedings directed at clarifying their meaning and narrowing related issues for trial, as well as the subject of two prior settlement conferences. Additionally, provisions 1-5 were not even at issue during the course of the final settlement conference.

Lastly, none of the parties seeking to withdraw from the agreement have factually demonstrated any inequity, injustice or prejudice that would occur to their specific water right, or a result that would be otherwise unconscionable or unduly harsh by enforcing the agreement. The General Provisions at issue apply to most of the irrigation water rights in Basin 34, and as such, the General Provisions affect most irrigation water rights in Basin 34 to one degree or another. However, no party demonstrated how the agreed upon revisions would specifically affect his or her right other than in expressing general dissatisfaction. On the other hand, the prejudice and inequity that would result to the other parties who participate in good faith at the settlement conference is apparent. The discovery schedule has been abbreviated to allow for settlement efforts. The parties have effectively put trial preparation on hold pending attempts to settle this matter. The parties have also devoted a considerable amount of time and resources in arriving at a settlement. To allow parties to start backing-out absent a showing of good cause does not outweigh the considerable prejudice to those who attended the settlement conference and participated in good faith.

IX.
CONCLUSION

For the above-stated reasons, the Court holds that Messrs. Babcock, Anderson and Smith, and Ms. Walker have not shown good cause as to why they should not be bound by the February 13, 2001, settlement agreement.

X.
TRIAL SCHEDULE AND DISCOVERY ON BASIN WIDE 5-34 IS STAYED PENDING FURTHER ORDER OF THE COURT—OBJECTIONS ON IRRIGATION SEASON OF USE SHALL PROCEED IN ACCORDANCE WITH COURT'S JANUARY 26, 2001, SCHEDULING ORDER

On August 28, 2000, Judge Wood issued an ***Order Consolidating Irrigation Period of Use Provision Issue for Basin 34 with Basin-Wide Issues Unique to Basin 34***. Pursuant to that order, the objections to the recommended irrigation period of use provisions for Basin 34 were consolidated with Basin–Wide Issue 5-34 for purposes of pretrial scheduling, trial, and settlement conferences, and ordered to proceed in accordance with the June 13, 2000, scheduling order entered for Basin-Wide Issue 5-34.

On January 26, 2001, this Court issued an ***Amended Order Setting Trial Date, Final Pre-trial Conference, Discovery Deadline, and Pre-trial Motions for Basin-Wide Issues 5-34 (General Provision Unique to Basin 34), Including Remaining Issue on General Provision 5 "Separate Streams" and Objections to Irrigation Period of Use Provision I.R.C.P. 16***, (the "***Amended Scheduling Order***"), which maintained the consolidation for trial of the "global" objections to the recommended season of use provision. The ***Amended Scheduling Order*** shall remain in force as to those objections.

Apparently due to time constraints, the season of use objections were not addressed at the February 13, 2001, settlement conference. It is not clear whether the stipulated revisions eliminated some of the objections to the recommended season of use provisions. However, the objections to the season of use provision will still proceed in accordance with the ***Amended Scheduling Order*** and the amendment to the discovery schedule issued on February 22, 2001. The portion of the trial concerning objections to Basin-Wide Issue 5-34 is STAYED until further order of the Court, pending the Court's review of the stipulated General Provisions and the issuance of an order of partial decree.

Although the parties have effectively stipulated to resolve the objections in Basin-Wide Issue 5-34, as is the case with unobjected claims, the SRBA Court is charged with independently reviewing the agreement (or claim) to ensure that it complies with the law.

See Higginson v. United States, 128 Idaho 246, 258, 919 P.2d 614, 626 (1995) (citing I.R.C.P. 55).

XI.
PURPOSES OF APPEAL

This order is not certified as final for purposes of I.R.C.P. 54(b). Once the Court has reviewed the agreement, if approved, the Court will enter an order of partial decree for the General Provisions for Basin 34. At that time, the Court will certify the partial decree as final pursuant to I.R.C.P. 54(b). The time for appeal will run as of the date of the I.R.C.P. 54(b) certification. I.A.R. 11(a) and 14.

IT IS SO ORDERED.

DATED:

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ROGER BURDICK
Presiding Judge of the
Snake River Basin Adjudication