LAWRENCE G. WASDEN
Attorney General

DARRELL G. EARLY
Deputy Attorney General
Chief, Natural Resources Division

GARRICK L. BAXTER, ISB #6301
EMMI L. BLADES, ISB #8682
ANDREA L. COURTNEY, ISB #7705
MICHAEL C. ORR, ISB # 6720
Deputy Attorneys General
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098
Telephone: (208) 287-4800
Facsimile: (208) 287-6700
garrick.baxter@idwr.idaho.gov
emmi.blades@idwr.idaho.gov
andrea.courtney@idwr.idaho.gov
michael.orr@ag.idaho.gov

Attorneys for Appellants

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF ACCOUNTING FOR DISTRIBUTION OF WATER TO THE FEDERAL ON-STREAM RESERVOIRS IN WATER DISTRICT 63 BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES.	Supreme Court Docket No. 44746-2017 Ada County District Court No. CVWA-2015-21376 (Consolidated Ada County No. CVWA-2015-21391)
BALLENTYNE DITCH COMPANY; BOISE VALLEY IRRIGATION DITCH COMPANY; CANYON COUNTY WATER COMPANY; EUREKA WATER COMPANY; FARMERS' CO-OPERATIVE DITCH COMPANY; MIDDLETON MILL DITCH COMPANY; MIDDLETON IRRIGATION ASSOCIATION, INC.; NAMPA & MERIDIAN IRRIGATION DISTRICT; NEW DRY CREEK DITCH COMPANY; PIONEER DITCH COMPANY; PIONEER IRRIGATION DISTRICT;	**DEPARTMENT'S MOTION FOR JUDICIAL NOTICE AND STATEMENT IN SUPPORT**

SETTLERS IRRIGATION DISTRICT; SOUTH BOISE WATER COMPANY; and THURMAN MILL DITCH COMPANY,

Petitioners-Respondents,

vs.

BOISE PROJECT BOARD OF CONTROL, and NEW YORK IRRIGATION DISTRICT,

Petitioners-Respondents,

vs.

THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN, in his capacity as the Director of the Idaho Department of Water Resources,

Respondents-Appellants,

and

SUEZ WATER IDAHO, INC.,

Intervenor-Respondent.

MOTION FOR JUDICIAL NOTICE

Appellants the Idaho Department of Water Resources and Gary Spackman, in his capacity as Director of the Idaho Department of Water Resources (collectively, "Department"), by and through their attorneys of record, hereby move this Court to take judicial notice of the documents appended hereto. As discussed below, the appended documents are part of this Court's record in a previous appeal, *State of Idaho, et al. v. Idaho Conservation League, et al. (In re SRBA Case No. 39576—Basin-Wide Issue # 5A)*, 131 Idaho 329, 955 P.2d 1108 (1998), and

pertain to the District Court's conclusion that "[t]he Director's reliance on [this] case is misplaced." R. 001065-67.

STATEMENT IN SUPPORT OF MOTION FOR JUDICIAL NOTICE[1]

While the Idaho Appellate Rules do not explicitly provide for taking judicial notice of documents not included in the record on appeal, this Court has taken judicial notice of documents outside the appellate record. *See, e.g., Frantz v. Hawley Troxell Ennis & Hawley LLP*, 161 Idaho 60, 65 n.6, 383 P.3d 1230, 1235 n.6 (2016) ("The Court takes judicial notice of the Memorandum Decision and Order entered by U.S. District Judge Edward J. Lodge on August 31, 2016 . . . ."); *City of Caldwell v. Roark*, 98 Idaho 897, 899 n.1, 575 P.2d 495, 497 n.1 (1978) ("We take judicial notice of the record in the Roark's prior appeal to this Court . . . .").

In addition, taking judicial notice of documents outside the appellate record is implicitly authorized by Idaho Appellate Rule 48, which states that "where no provision is made by statute or by these rules, proceedings in the Supreme Court shall be made in accordance with the practice usually followed in such or similar cases, or as may be prescribed by the Court or a Justice thereof." The "practice usually followed" in seeking judicial notice is to make an oral or written request pursuant to Rule 201 of the Idaho Rules of Evidence.[2] This rule specifically authorizes a court to take judicial notice of records in the court's files "in the same or separate case." I.R.E. 201(c), (d).

---

[1] I.A.R. 32(d) provides that "[a]ll motions shall include or be accompanied by a brief, statement, or affidavit in support thereof . . . ."

[2] I.R.E. 201 addresses "Judicial notice of adjudicative facts" and provides as follows:

> **(a) Scope of Rule.** This rule governs only judicial notice of adjudicative facts.
> **(b) Kinds of Facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Further, this Court has held that a court may take judicial notice of its own records. *Lewiston Pistol Club, Inc. v. Bd. of Cty. Comm'rs of Nez Perce Cty.*, 96 Idaho 137, 140 & n.5, 525 P.2d 332, 335 & n.5 (1974); *see also City of Caldwell*, 98 Idaho at 899 n.1, 575 P.2d at 497 n.1 ("We take judicial notice of the record in the Roark's prior appeal to this Court . . . ."). A court may take judicial notice of such records "at any stage of the proceeding," I.R.E. 201(f), and a motion to take judicial notice on appeal "may be made at any time, before or after oral argument." I.A.R. 32(c).

The Department's motion for judicial notice requests that this Court take judicial notice of two documents that are part of this Court's record in *State of Idaho, et al. v. Idaho Conservation League, et al. (In re SRBA Case No. 39576—Basin-Wide Issue # 5A)*, 131 Idaho 329, 955 P.2d 1108 (1998) ("*State v. ICL*"). The two documents are appended hereto as "Attachment 1" and "Attachment 2." Attachment 1 is a copy of the *Special Master's Recommendation on Basin-Wide*

> **(c) When Discretionary.** A court may take judicial notice, whether requested or not. When a court takes judicial notice of records, exhibits, or transcripts from the court file in the same or a separate case, the court shall identify the specific documents or items that were so noticed.
> **(d) When Mandatory.** When a party makes an oral or written request that a court take judicial notice of records, exhibits or transcripts from the court file in the same or a separate case, the party shall identify the specific documents or items for which the judicial notice is requested or shall proffer to the court and serve on all parties copies of such documents or items. A court shall take judicial notice if requested by a party and supplied with the necessary information.
> **(e) Opportunity to Be Heard.** A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
> **(f) Time of Taking Notice.** Judicial notice may be taken at any stage of the proceeding.
> **(g) Instructing Jury.** In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

Issue 5, In re SRBA, Case No. 39576, Subcase No. 91-00005A (Apr. 11, 1996). Attachment 2 is a copy of the SRBA District Court's *Memorandum Decision Re: Basin-Wide Issue 5A In re SRBA, Case No. 39576, Subcase No. 91-00005A* (Jul. 19, 1996). These documents are cited and discussed in this Court's decision in *State v. ICL. State v. ICL,* 131 Idaho at 331-35, 955 P.3d at 1110-14. The District Court held that this Court's decision in *State v. ICL* "d[id] not address Idaho Code § 42-201(2) and [is] otherwise factually distinguishable." R. 001065-67. Attachment 1 and Attachment 2 are relevant to this holding.

Attachment 1 and Attachment 2 may be judicially noticed because they are part of this Court's record in a prior appeal. *City of Caldwell*, 98 Idaho at 899 n.1, 575 P.2d at 497 n.1; I.R.E. 201(c), (d). This Court should take judicial notice of Attachment 1 and Attachment 2 because the Department has submitted a timely written request for judicial notice, and also because Attachment 1 and Attachment 2 may assist this Court in analyzing the issues and arguments raised in connection with the District Court's conclusions regarding this Court's decision in *State v. ICL.*

CONCLUSION

For the reasons set forth above, the Department respectfully requests that this Court take judicial notice of the documents appended hereto as Attached 1 and Attachment 2.

RESPECTFULLY SUBMITTED this 6TH day of April 2018.

LAWRENCE G. WASDEN
Attorney General

DARRELL G. EARLY
Deputy Attorney General
Chief, Natural Resources Division

GARRICK L. BAXTER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6TH day of April 2018, I caused to be served a true and correct copy of the foregoing document by the method(s) indicated:

Original to: Clerk of the Court IDAHO SUPREME COURT 451 W. State Street Boise, ID 83303-2707	☐ U.S. Mail, postage prepaid ☒ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☐ Email
Daniel V. Steenson S. Bryce Farris Andrew Waldera SAWTOOTH LAW OFFICES, PLLC P.O. Box 7985 Boise, ID 83707 dan@sawtoothlaw.com bryce@sawtoothlaw.com andy@sawtoothlaw.com	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
Albert P. Barker Shelley M. Davis BARKER ROSHOLT & SIMPSON, LLP P.O. Box 2139 Boise, ID 83701-2139 apb@idahowaters.com smd@idahowaters.com	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
Charles F. McDevitt P.O. Box 1543 Boise, ID 83701 chas@mcdevitt.org	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
Christopher H. Meyer Michael P. Lawrence GIVENS PURSLEY, LLP P.O. Box 2720 Boise, ID 83701-2720 chrismeyer@givenspursley.com mpl@givenspursley.com	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email

Garrick L. Baxter
Deputy Attorney General

ATTACHMENT 1

Special Master's Recommendation on Basin-Wide Issue 5, In re SRBA, Case No. 39576, Subcase No. 91-00005A (Apr. 11, 1996)

4/11

MAIL

37612

1996 APR 11 PM 4:34

DISTRICT COURT-SRBA
TWIN FALLS CO. IDAHO
FILED

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	**Case No. 91-00005A** **SPECIAL MASTER'S RECOMMENDATION ON BASIN-WIDE ISSUE 5A**

Basin-Wide Issue 5A ("BWI 5A") was designated by the District Court on January 21, 1996 as follows:

> **Whether general provision no. 2 in the Amended Director's Report for Reporting Area 2 (Basin 57) is necessary for the definition of the rights or for the efficient administration of the water rights.**

For the reasons outlined as follows, this court recommends that **GENERAL PROVISION 2 NOT BE DECREED.**

I. PROCEDURAL AND HISTORICAL BACKGROUND

BWI 5A involves General Provision 2 contained in the *Amended Director's Report Part 1 For Reporting Area 2 (Basin 57)*. General Provision 2 includes portions of the decree entered in Owyhee County Case Number 3456 ("Reynolds Creek Decree"). The Reynolds Creek Decree was based on a long-standing dispute between Upper and Lower Reynolds Creek Basin users.

There has been a series of water adjudications involving Reynolds Creek. The first decree was called the Bernard Decree entered in 1899. In 1911, the Gifford Decree was entered adjudicating rights to the Upper Reynolds Creek Basin (Upper Basin). In 1973, the Benson Decree was entered adjudicating ten rights in the Lower Reynolds Creek Basin (Lower Basin). Subsequently, an action

was brought by J. H. Nettleton, an Upper Basin user, against the Idaho Department of Water Resources (IDWR). The dispute involved an order by IDWR to the Reynolds Creek watermaster to distribute the waters in the Upper Basin as if the Upper Basin and Lower Basin were one district. At the time of the dispute, Reynolds Creek was divided into two separate water districts. While the case was pending, IDWR combined the Upper and Lower Basins into one district.

Having lost on summary judgment, Nettleton appealed to the Idaho Supreme Court. On appeal, the Idaho Supreme Court in *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977), held that IDWR prematurely combined the Upper and Lower Basins. On remand, the Court required the Director of IDWR to hold a public hearing to consider whether a general stream adjudication was necessary to determine all water rights in the Reynolds Creek Basin. There being a significant dispute as to interrelationship of all rights in the Reynolds Creek Basin, a general stream adjudication was ordered. The case was designated Owyhee County Case Number 3456. In that case, specific water rights were determined. After those rights were determined, the parties entered into a stipulation dealing with, among other areas, the ability of water users in both the Upper and Lower Basins to use "excess" water. The stipulation was made a part of the Reynolds Creek Decree by order of the court on March 18, 1988.

The stipulation addressed the administration of water between the Upper and Lower Basin users. The primary purpose of the stipulation was to address "excess" water. Reynolds Creek is a mountain stream. Like many mountain streams, the flow of the stream is high during spring runoff. As the year progresses, the flow dwindles drastically from marginal to nonexistent. During spring runoff, Reynolds Creek water users have used the "excess" flow to saturate their fields. Without this "excess" flow, users claim their land would be unproductive.

In a nutshell, the stipulation sets out two methods of administration and delivery of water depending on the flow of Reynolds Creek. When there is "excess" water, the Upper and Lower Basins are considered separate. During "excess" or "high" flow, the Upper Basin users are allowed to divert water in "excess of the amounts specified for their respective water rights in the Findings." General Provision 2. Lower Basin users waived their right to object to the use of this "excess" water by Upper Basin users. If any "excess" water remains, Lower Basin users are allowed to use and store "excess" water. Any Lower Basin user who makes an application for a permit to store water waives any right to require Upper Basin users to cease diverting "excess" water. New appropriators who

were not parties to the Reynolds Creek Adjudication would be subject to the terms of the stipulation as a term and condition of obtaining a permit and licence.

In the Snake River Basin Adjudication (SRBA), the same provisions contained in the stipulation and Reynolds Creek Decree were included as General Provision 2 in the *Amended Director's Report Part 1 For Reporting Area 2 (Basin 57)*. The State of Idaho, United States and Jerry Hoagland, a user in the Upper Basin, filed *Notices of Intent to Participate* supporting inclusion of General Provision 2. The Idaho Conservation League, Idaho Rivers United and Idaho Wildlife Federation (Conservation Groups) filed a *Notice of Intent to Participate* contesting the necessity and legality of General Provision 2.

During the litigation on the necessity of General Provision 2, the parties held an informal settlement conference. The result of the settlement conference was a stipulation modifying the terms of General Provision 2. The only significant difference between the two provisions was insertion of the term "high flow" in place of "excess" water. All parties agree that the two provisions are the same in effect. The court declined to accept the proposed stipulation prior to hearing evidence and argument on the necessity of any proposed general provisions. On March 18, 1996, the court held an evidentiary hearing to consider the necessity of decreeing General Provision 2.

II. STANDARD OF REVIEW

General provisions are appropriate if necessary to define and administer all water rights. I.C. § 42-1411(3). Administrative provisions contained in decrees involving water rights are necessary if the court deems such matters necessary in the "absence of legislative action on the subject, and of the necessity which manifestly exist[s] for supervising the use of the stream by those having the right to take the water in accordance with the decree . . . ." *Silkey v. Tiegs*, 51 Idaho 344, 358, 5 P.2d 1049, 1055 (1931), *citing Montezuma Canal Co. v. Smithville Canal Co.*, 218 U.S. 371 (1910).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. General Provision 2 Is Not a General Provision As Defined Under Idaho Code Section 42-1411(3).

Pursuant to I.C. § 42-1411(3) "[t]he director may include such general provisions in the

director's report, as the director deems appropriate and proper, to define and to administer all water rights." (emphasis added). The inquiry is whether General Provision 2 fits within this statutory definition of a general provision. A resolution of this inquiry involves the application of basic principles of statutory construction.

> It is a basic rule of statutory construction that, unless the result is palpably absurd, we must assume that the legislature means what is clearly stated in the statute. It is also well established that statutes must be interpreted to mean what the legislature intended the statute to mean, and the statute must be construed as a whole. Statutory interpretation always begins with an examination of the literal words of the statute. In so doing, every word, clause and sentence should be given effect, if possible. The clearly expressed intent of the legislature must be given effect and there is no occasion for construction where the language of a statute is unambiguous. Finally, when construing a statute, its words must be given their plain, usual and ordinary meaning.

Rim View Trout Farm v. Higginson, 121 Idaho 819, 822, 828 P.2d 848, 851 (1994) (citations omitted).

There were 215 rights decreed in the Reynolds Creek Adjudication. There were 2,455 water rights reported or abstracted in Basin 57. Exhibit 29 at 5. General provisions are appropriate "to define and to administer all water rights." I.C. § 42-1411(3). Applying a literal interpretation to the clear and unambiguous words of the statute, it is clear that General Provision 2 does not apply to "all" water rights in Basin 57. Therefore, General Provision 2 does not meet the requirements of a general provision as defined under I.C. § 42-1411(3).[1] Since the words of the statute are clear and unambiguous, there is no need for further statutory interpretation. *Sherwood v. Carter,* 119 Idaho 246, 254, 805 P.2d 452, 460 (1991).

The court concludes that General Provision 2 is not a general provision within the meaning of I.C. § 42-1411(3) because it does not apply to "all" water rights in Basin 57.

B. General Provision 2 Is Not Necessary to Define or Administer Water Rights.

1. General Provision 2 is not necessary for definitional purposes.

The first inquiry is whether General Provision 2 is necessary to define rights to

---

[1] If an administrative or definitional provision does not apply to all water rights, the provision could be included as a remark to an individual water right. I.C. § 42-1411(2)(k) allows for "such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director." However, General Provision 2 could not be included as a remark to a specific water right because none of the existing decreed rights include rights to "excess" water. There is no specific right to which "excess" water rights could be attached.

"excess" water. The parties urge this court to adopt General Provision 2 because it recognizes the parties custom and practice to use "excess" water. While the parties may have historically used "excess" water and may possibly have constitutionally based rights to such water, General Provision 2 does not define any rights to "excess" water.

The importance of listing all required elements of water rights in a decree is not a novel principle of Idaho water law. For example, in *Sarret v. Hunter*, 32 Idaho 536, 185 P. 1072 (1919), the trial court entered a judgment which failed to address "how much, if any, water appellants were entitled to, or the date of the appropriation." *Id.* at 540. As a result of this deficiency, the Idaho Supreme Court held:

> In an action to quiet title to water rights, where the issue joined is one of priority, the court should find the actual appropriation made by each appropriator, giving the time the appropriation was made, the quantity of water appropriated and the date of its application to a beneficial use. Otherwise it is impossible for this court to determine whether a proper decree has been entered. **The fact that the findings are deficient in this respect necessitates a reversible case.**

Id. (emphasis added).

In *Nettleton v. Higginson* the case which suggested the instigation of the Reynolds Creek Adjudication, the Court stated:

> When one considers the magnitude of the watermaster's problem of water delivery in his water district, it is evident that a proper delivery can only be effected when the watermaster is guided by some specific schedule or list of water users and their priorities, amounts, and points of diversion.
>
> **Only by having a specific list reciting the names of the water users, with their dates of priority, amounts, and points of diversion can such a system be administered.**

Id. at 91, *citing DeRousse v. Higginson*, 95 Idaho 173, 505 P.2d 321 (1973) (emphasis added).[2]

---

2 Hoagland cites *Avondale Irrigation District v. North Idaho Properties, Inc.*, 99 Idaho 30, 577 P.2d 9 (1978), for the proposition that courts are not necessarily required to address quantity of water in terms of cubic feet per second or acre feet per year. *Id.* at 15. "We do not reach the issue wether Idaho law requires in all cases that water rights be stated in cubic feet per second or acre feet per year. *Cf. Village of Peak v. Denison*, 92 Idaho 747, 450 P.2d 310 (1969) (decided prior to the enactment of I.C. § 42-1409 and construing I.C. § 42-102)." *Id.* at 41 (emphasis added). I.C. § 42-1409 specifically requires quantity to be measured in cubic feet per second or acre feet per year. Since *Village of Peck* was decided prior to the enactment of I.C. § 42-1409, its holding is not binding on this court.

The importance of establishing elements to water rights was also recognized by the Idaho Legislature in 1994.

> The legislature finds that existing water rights are not uniformly described. Many old water rights were simply defined by source, priority date and diversion rate. Over time, the legislature and courts have made this original description of a water right more specific by the addition of other elements. Because of the increasing demand for water, it is important that the elements of a water right be standardized to allow for fair and efficient administration of the limited water supply. One (1) purpose of chapter 14, title 42, Idaho Code, is to establish, through an adjudication a uniform description for surface water rights, ground water rights and water rights which include storage.

I.C. § 42-1427(1)(a).

When decreed or licensed rights are missing required elements, the director is mandated to include the missing elements in the director's report.

> If a licensed or decreed water right does not describe all elements of a water right required in section 42-1409, Idaho Code, the **director *shall* include in his report recommendations for those elements not defined by the prior license or decree** based upon the extent of beneficial use of the water right as of the date of the commencement of an adjudication.

I.C. § 42-1427(2) (emphasis added).

Once water rights have been reported, the court has a duty to address each element of a water right. "The decree shall contain or incorporate a statement of each element of a water right as stated in subsections (2) and (3) of section 42-1411, Idaho Code." I.C. § 42-1412(6).[3] Despite the duty of the court to address all elements of a water right, Hoagland argues that the director may report only those elements "he deems appropriate." "The Director will determine which elements are or may be necessary for any individual water right, basically on a case-by-case basis." *Hoagland Post Trial Brief* at 10. In so arguing, Hoagland cites I.C. § 42-1411(2) which reads as follows: "The Director shall determine the following elements, to the extent the director deems appropriate and proper, to define and administer the water rights acquired under state law."

---

[3] The standard under I.C. § 42-1412(6) is for objected-to claims. Since the Conservation Groups objected to General Provision 2, this is the standard the court adopts. Even if no objection is lodged, the court is still mandated to address each element of a water right contained in the director's report under I.C. § 42-1412(7).

Assuming Hoagland's interpretation of I.C. § 42-1411(2) is correct, there is a direct conflict with I.C. § 42-1427(2) which mandates that the "director **shall** include in his report recommendations for those elements not defined by the prior license or decree."[4] (emphasis added). If the two statutes conflict, I.C. § 42-1427(2) would control since it is a specific provision outlining the director's report in response to prior decrees. "[W]hen there are specific statutes addressing an issue, those statutes control over the more general statutes." *City of Sandpoint v. Sandpoint Independent Highway District,* 126 Idaho 148, 149, 879 P.2d 1078 (1994). Any rights to "excess" water necessarily relate to the Reynolds Creek Decree. If that prior decree is missing any or all elements to "excess" water, then the director has a duty under I.C. § 42-1427(2) to address those missing elements.

Additionally, an argument that the director is not obligated to report elements of a water right under I.C. § 42-1411(2) is irrelevant given the statutory obligation of the claimants and court to address each required element of a water right. Whether or not the director addresses each element of a right, claimants still have the burden of establishing each element of a claimed water right.

> Each claimant of a water right acquired under state law has the ultimate burden of persuasion for each element of a water right. Since the director's report is prima facie evidence of the nature and extent of the water rights acquired under state law, a claimant of a water right acquired under state law has the burden of going forward with the evidence to establish any element of a water right which is in addition to or inconsistent with the description in a director's report.

Idaho Code § 42-1411(5).

Assuming Hoagland's argument is correct and the director does not report all elements of a water right, a claimant would still need to establish all elements of a water right "which are in addition to or inconsistent" with the director's report. Either the director must report or a claimant must produce evidence addressing each element of a water right. Without evidence of the required elements of a water right, the court cannot meet its obligation to decree each element of a water right under I.C. § 42-1412(6). To summarize,

---

[4] The court assumes Hoagland's interpretation of I.C. § 42-1141(2) is correct only for purposes of discussion. However, the court is not deciding that any particular interpretation of I.C. § 42-1411(2) is correct as a matter of law.

if General Provision 2 does not address all the required elements of a right to "excess" water, this court cannot decree those rights.

The inquiry then is whether rights to "excess" water are adequately defined. In deciding whether General Provision 2 defines the required elements of a water right, the court notes that General Provision 2 was taken verbatim from the Reynolds Creek Decree. Since General Provision 2 is a decreed provision, principles of decree interpretation apply. "The same rules of construction applicable to contracts . . . apply to our interpretation of [a] decree." *DeLancey v. DeLancey*, 110 Idaho 63, 65, 714 P.2d 32, 33 (1986).[5] "If the contract is clear and unambiguous, the determination of the contract's meaning and legal effect are questions of law, and the meaning of the contract and intent of the parties must be determined from the plain meaning of the contract's own word." *City of Idaho Falls v. Home Indemnity Co.*, 126 Idaho 604, 607, 888 P.2d 383, 386 (1995) (citations omitted).

The court need look no further than the face of General Provision 2 to determine that the required elements of alleged rights to "excess" water right are not defined. In fact, General Provision 2 specifically acknowledges that priority and quantity are not addressed.[6] "The parties to this Stipulation **do not intend hereby to establish or set the priorities or quantities** of any rights to excess water, or to establish that any presently perfected right does or does not include or authorize the use of excess water."[7] General Provision 2, ¶ 5 (emphasis added).[8] The elements to "excess" water have not been reported as required by Idaho Code § 42-1427(2).

Despite the aforementioned quoted language taken from the Reynolds Creek Decree, Hoagland argues that the specific individual decreed rights along with General Provision 2 adequately describe rights to "excess" water. "Taken together, General Provision 2 and the

---

5 *Citing, Evans v. City of American Falls, Idaho*, 52 Idaho 7, 18, 11 P.2d 363, 367 (1932).

6 IDWR concedes that General Provision 2 does not address the required elements of alleged "excess" water: "As that language was being prepared, it recognized the inability of the parties to be able to define excess-flow water rights in terms of priority, quantity, point of diversion, place of use with all the elements that water rights would normally be defined with." (Tr., p. 52 Ll. 13-24.)

7 The confusion surrounding priority dates was evidenced by the parties' beliefs as to the priority date to "excess" water. Hoagland guessed his priority date to be 1863 or "thereabouts." (Tr., p. 83 Ll. 10-22). The State asserts the priority date to be the date of the Reynolds Creek Decree or 1988. (Tr., p. 110 Ll. 18-21). The Conservation Groups allege a priority date of 1978 or the date the Reynolds Creek Adjudication began. (Tr., p. 123 Ll. 1-3).

8 *See also*, Exhibit 20 (Stipulation for Decree) and Exhibit 22 (Decree).

Findings describe and define the water rights of Reynolds Creek." *Hoagland Post Trial Brief* at 5. The court disagrees. First, General Provision 2 specifically states that priority and quantity are not defined. Second, the parties acknowledge that none of the presently perfected rights authorize the use of excess water. Finally, General Provision 2 describes "excess" water as that water which may be used "in excess of the amounts specified for their respective findings."

> When the flow of water at the Outlet weir is more than 57 cfs, the Lower Users shall not have the right to object to the diversion by the Upper Users of water in excess of the amounts specified for their respective water rights in the Findings, or to require that the Upper Users limit their diversions to the amounts specified for their respective water rights in the Findings.

General Provision 2, ¶ 3(b). Even if the stipulation addressing "excess" water uses incorporated the specific water rights determined by the Reynolds Creek Court, the court finds that quantity, priority and annual volume of consumptive use to alleged "excess" water rights were not defined.[9]

The manner in which "excess" water uses were decreed is further evidence that rights to "excess" water were not defined. "The Stipulation by certain defendants for entry of Decree adjudicating water rights addresses the **administration** and delivery of water rights which are listed in the proposed findings." Exhibit 22, at 3 (emphasis added). The stipulation was accepted and decreed pursuant to I.C. § 42-1412(8) (Supp. 1987). Under that statute, decrees could contain provisions "necessary for the efficient **administration** of the water rights." I.C. § 42-1412(8) (Supp. 1987) (emphasis added). Unlike I.C. § 42-1411(3) which provides for general provisions necessary to **define** and **administer** water rights, I.C. § 42-1412(8) (Supp. 1987) did not provide for the **definition** of water rights.[10] The court incorporated the stipulation addressing "excess" water into the decree as a purely administrative provision necessary for the delivery of water. In summary, the Reynolds Creek

---

9 IDWR acknowledges that the specific water rights contained in the Findings prepared by the Reynolds Creek Court do not address "excess" water. (Tr., p. 49 Ll. 16-21.)

10 The fact that a 1987 provision, I.C. § 42-1412(8) allowing for an administrative provision, was replaced by a 1994 provision, I.C. § 42-1411(3) allowing for administrative and definitional general provisions, is significant because "[w]hen a statute is amended, it is presumed that the legislature intended the statute to have a meaning different before [the] amendment." *Intermountain Health Care v. Board of County Commissioners of Madison County*, 109 Idaho 685, 687, 710 P.2d 595 (1985).

Court allowed "excess" water to be used as a matter of administration without decreeing any rights to "excess" water.

Finally, the fact that the Reynolds Creek Decree did not create any rights to excess water is evidenced by the treatment of the prior decree by IDWR. On one hand, IDWR states that Reynolds Creek users were decreed "uses" to excess water. On the other hand, "[i]f a dispute as to competing lawful uses of 'excess' water could not be resolved among the water right holders, then a water right holder who desired to enforce their use by curtailing another's use would need to file an application for permit with IDWR and complete the statutory appropriation procedure." Exhibit 29 at 3. If a right to "excess" water existed, there would be no requirement to go through any statutory permitting process.

The court finds that General Provision 2 is deficient for purposes of defining a water right because the required elements of alleged rights to "excess" water are not defined as required by I.C. §§ 42-1409 and 42-1427(2). Since the director's report fails to address all the required elements of a water right as mandated by I.C. § 42-1427(2), this court cannot decree all the required elements of a water right as mandated by I.C. §§ 42-1412(6) and (7). Therefore, the court concludes that General Provision 2 is not necessary to define any alleged right to "excess" water.

2. General Provision 2 is not necessary for administrative purposes.

For numerous reasons, General Provision 2 is not necessary to administer water rights in Basin 57. First, having concluded that the General Provision 2 does not define any rights to "excess" water, it is not necessary for this court to decree provisions for the administration of nonexistent water rights. "The decree entered in a general stream adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated system. . . ." I.C. § 42-1420 (Supp. 1986). Since the Reynolds Creek Court did not establish any rights to "excess" water, this court must assume that such rights do not exist. Since rights to "excess" water have not been decreed and there is no claim pending for such rights, this court cannot allow the use of "excess" water as a matter of administration. "No person shall divert any water from a natural watercourse or apply water to land without having obtained a valid water right to do so, or apply it to purposes for which no valid water rights exists." I.D. § 42--201(2). Any decree which grants relief which is not within the powers of the court

is void. *Nieman v. Nieman,* 105 Idaho 796, 797, 673 P.2d 396, 397 (1983). (A judgment is void if "the court that rendered the judgment lacked subject matter jurisdiction or *in personam* jurisdiction, or if the decree granted relief which was not within the powers of the court.")

Second, in addition to allowing water to be appropriated without a decreed or licensed right, the administration of water under General Provision 2 would violate the prior appropriation doctrine.[11] Water must be administered "first in time, first in right." Const., art. 15, § 5; I.C. § 42-106; *Musser v. Higginson,* 125 Idaho 392, 871 P.2d 809 (1994). General Provision 2 does not establish rights to "excess" water because the required elements of a alleged rights to "excess" water have not been addressed. Even though there is no right to use "excess" water, new water users in the Lower Basin seeking permits for storage purposes would be required to waive their right to require Upper Basin users to cease using "excess" water as a condition of obtaining a permit. "The use of 'excess' water cannot be the basis to curtail water use by others pursuant to the individually described rights, or pursuant to future appropriations completed in accordance with the statutory appropriation procedure." Exhibit 29 at 3. Those holding valid water rights have a constitutional right to have water administered "first in time, first in right." Const. art. 15, § 5. IDWR cannot require subordination of legal water rights to nonexistent illegal water uses.

Finally, even if this court could include General Provision 2 for administrative purposes, the provision is not necessary. Although the Reynolds Creek Court decreed water uses, those water users who dispute another's use of "excess" water are required to go through the statutory appropriation process prior to any involvement of IDWR in the dispute. The purpose of going through the statutory appropriation procedure in case of a dispute is that an aggrieved person would obtain a priority date for a water right which could then be enforced under the prior appropriation doctrine. IDWR acknowledged that after an appropriation has been completed in the case of a dispute, rights could be administered pursuant to existing statutes and constitutional provisions. (Tr., p. 55, L. 15-p. 56, L. 13).

---

11 Again, "[t]he decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system." I.C. § 42-1420. Since no rights to "excess" water were decreed because of the failure to define the required elements of a water right, this court must assume that rights to "excess" water do not exist.

If rights can be administered under existing rules, statutes or constitutional provisions, then by definition the proposed general provision is not necessary. Provisions are necessary only "in the absence of legislative action on the subject." *Silkey v. Tiegs.*

For the reasons stated above, the court is not bound to include General Provision 2 for administrative purposes.

C. THE SRBA COURT IS NOT BOUND BY *RES JUDICATA* TO ACCEPT GENERAL PROVISION 2.

"[I]n an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim but also as to every matter which might and should have been litigated in the first suit." *Kawai Farms, Inc. v. Longstreet,* 121 Idaho 610, 614, 826 P.2d 1322, 1326 (1992).[12] "*Res judicata* prevents the litigation of causes of action which were finally decided in a previous suit." *Gubler v. Brydon,* 125 Idaho 107, 110, 867 P.2d 981, 984 (1994). The State argues that *res judicata* requires the SRBA Court to include General Provision 2 because the language was taken from the Reynolds Creek Decree. The SRBA Court is not bound to include general provisions under *res judicata* principles for a number of reasons.

First, the parties to the Reynolds Creek Adjudication and SRBA are not the same. Without identity of parties or privities, *res judicata* does not apply. *Lambrix v. Frazier,* 31 Idaho 382, 386, 171 P. 1134 (1918); *Mays v. District Court,* 34 Idaho 200, 207, 200 P. 115 (1921); *Anderson v. Dewey,* 82 Idaho 173, 182, 350 P.2d 734 (1960). Second, the SRBA involves a different claim or demand than the Reynolds Creek Adjudication. The Reynolds Creek Court determined rights in a particular stream. The jurisdiction of the SRBA Court is over all rights in the Snake River Basin and includes thousands of claimants. Because the claim and demand are different, *res judicata* does not apply. *Kawai Farms, Inc. v. Longstreet.* The Idaho Supreme Court in *In Re Snake River Basin Water,* 115 Idaho 1, 764 P.2d 78 (1988), implicitly recognized these principles by including the Boise and Weiser Rivers in the SRBA although those two rivers had undergone prior stream adjudications.

Even if the cause of action and parties were the same, the SRBA Court would not be bound by *res judicata* to include General Provision 2 for definitional or administrative purposes. *Res*

---

12 *Citing, Joyce v. Murphy Land & Irrigation Co.*, 35 Idaho 549, 553, 208 P. 241, 242-43 (1922) (citations omitted); quoted with approval in *Diamond*, 119 Idaho at 148, 804 P.2d at 321.

judicata applies to all matters "actually litigated" in a prior action. *Gubler v. Brydon.* As this court previously held, the Reynolds Creek Court did not define any right to "excess" water. Because no rights to "excess" water were decided, the SRBA Court is not bound by *res judicata* to include General Provision 2 for definitional purposes.[13] Since no rights to "excess" water are adequately defined, there is no reason to include General Provision 2 for the administration of nonexistent water rights. To the extent the prior court sanctioned and allowed water to be "used" without a water right, that provision would be void. Again, "[n]o person shall divert any water from a natural watercourse or apply water to land without having obtained a valid water right." I.C. § 42-201. "A void judgment is a nullity, and no rights can be based thereon; it can be set aside on motion or can be collaterally attacked at any time." *Prather v. Loyd*, 86 Idaho 45, 50, 383 P.2d 910, 912 (1963).

For the above-mentioned reasons, the court is not bound by *res judicata* to include General Provision 2.

D. THE COURT CANNOT ACCEPT THE STIPULATION PROPOSED BY ALL PARTIES TO BWI 5A

In lieu of General Provision 2 as proposed by the director, the parties agreed to a revised general provision. All parties agreed that both provisions are the same except that the term "high flow" was inserted in the place of "excess water" wherever that term was described in General Provision 2. The proposed stipulation reads as follows: "The parties to this Stipulation do not intend hereby to establish or set the priorities or quantities of any rights to 'high flow' water, or to establish that any presently perfected right does or does not include or authorize the use of 'high flow' water." Proposed Stipulation, at 3. Like General Provision 2, the proposed provision does not define any right to "high flow" water. For the above-mentioned reasons, this court cannot accept the proposed provision.

IV. RECOMMENDATION

The purpose of the SRBA is to resolve any uncertainty that exists regarding water rights in the State of Idaho. Rather than resolve that uncertainty, the proposed stipulation and General

---

13 If *res judicata* is not applicable, collateral estoppel should be considered. Collateral estoppel involves issue preclusion. Collateral estoppel is applicable if, among other elements, "the issue sought to be precluded was actually decided in the prior litigation." *Western Industrial and Environmental Services, Inc. v. Kaldveer Associates, Inc.*, 126 Idaho 541, 544, 887 P.2d 1048, 1051 (1994). While collateral estoppel was not raised by the parties, collateral estoppel would not be applicable because rights to "excess" were not decided or decreed by the Reynolds Creek court.

Provision 2 create uncertainty. In an effort to answer the question involving "excess" or "high" flow rights, the parties agreed to disagree by stating that they "do not intend to establish that any presently perfected right does or does not include or authorize the use of 'high flow' [excess] water." This is the vaguest of all possible provisions and adds nothing to the definition of a water right. Either rights to "excess" or "high" flow water exist or they do not exist. The parties may have a historical practice of using "excess" water. If they do, then the parties may have a constitutionally based right to use that water. If the right exits, then the right has to be defined as outlined under I.C. § 42-1409.

Given the history of water disputes in Reynolds Creek, the failure to define all elements of a water right in the prior action is unfortunate. Justice Bakes, in his concurring/dissenting opinion in *Nettleton v. Higginson*, criticizes prior decrees involving Reynolds Creek. Invariably, his dissatisfaction centered on the failure of trial courts to determine the required elements of a water right. Justice Bakes was critical of the 1899 Bernard Decree because:

> The decree did not set forth a priority date for the appropriation, nor did it list the amount of the appropriation or the location of the use of water. . . . Because it lacked many of these essential elements of a decree, the 1899 Bernard Decree could in no way form the basis for an 'adjudication' of Reynolds Creek within the meaning of I.C. § 42-604.

Id. at 96.

Justice Bakes was also critical of the 1973 Benson Decree because it did not address the duty of water. *Id.* at 97. The prior court and parties to the Reynolds Creek Decree should have been aware of the Supreme Court's concerns regarding the specificity necessary to establish a valid water right. The SRBA is an opportunity for all parties in Reynolds Creek to establish verifiable rights to "excess" water.

In summary, General Provision 2 cannot be included as a definitional provision to alleged "excess" water rights because it does not address the required statutory elements of a water right under I.C. §§ 42-1427(2) and 42-1409. Because of the failure to address the statutory elements of a water right, this court cannot decree alleged rights to "excess" water. At this point, this court must conclude that rights to "excess" water do not exist. Since no rights to "excess" water currently exist, General Provision 2 is not necessary for administrative purposes. There is no reason to include general provisions for the purpose of administering nonexistent water rights. To allow water to be

used without a right as a matter of administration would violate the prior appropriation doctrine. Therefore, it is recommended that **General Provision 2 not be included in a decree.**

IT IS SO RECOMMENDED.

DATE April 11, 1996.

FRITZ X. HAEMMERLE
Special Master, Reporting Area 2
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the SPECIAL MASTER'S RECOMMENDATION ON BASIN-WIDE ISSUE 5A was mailed on April 12, 1996, with sufficient first-class postage to the following:

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P. O. Box 44449
Boise, ID 83711-4449

The United States Department of Justice
Environment and Natural Resources Division
550 West Fort Street, MSC 033
Boise, ID 83724

Court Certificate of Mailing for Basin-Wide Issue 5A

Deputy Clerk

ATTACHMENT 2

Memorandum Decision Re: Basin-Wide Issue 5A In re SRBA, Case No. 39576, Subcase No. 91-00005A (Jul. 19, 1996)

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	)	**91-00005A**
	)	
	)	**MEMORANDUM DECISION RE: BASIN-WIDE ISSUE 5A**
Case No. 39576	)	
	)	
_____	)	

Cheri Copsey, Idaho Attorney General's Office, for the State of Idaho

John T. Schroeder, Schroeder & Lezamiz, for Jerry Hoagland/Reynolds Creek Decree Water Rights Owner

Laird Lucas, Land and Water Fund of the Rockies, for Conservation Groups

Scott L. Campbell, Elam & Burke, for Payette River Water Users Association

Don Olowinski, Hawley, Troxell, Ennis & Hawley, for Boise-Kuna Irrigation District, Wilder Irrigation District, New York Irrigation District and Big Bend Irrigation District

I. PROCEDURAL HISTORY

Basin-Wide Issue 5A was designated by the court as follows:

Whether general provision no. 2 in the *Amended Director's Report for Reporting Area 2 (Basin 57)* is necessary for the definition of the rights or for the efficient administration of the water rights.

This issue was referred to Special Master Fritz X. Haemmerle. On April 11, 1996, the Special Master issued a Report and Recommendation to the court which was challenged by the above parties and has been briefed and presented at oral argument.

II. DECISION

A.

This court adopts the Report and Recommendation filed by the Special Master on Basin-Wide Issue 5A and further adopts the Special Master's findings of fact and conclusion of law as its own and holds that **GENERAL PROVISION 2 WILL NOT BE DECREED.**

B.

In addition to the adoption of the Special Master's Report and Recommendation, this court enters the following findings and conclusions on Basin-Wide Issue 5A.

The issue presented may only be decided by placing it into the proper context of water law and the court's jurisdiction and duties in the Snake River Basin Adjudication (SRBA).

It is traditional in western water law that the value of a water right is the vesting in its owner of a priority date and the right to use a specific amount of water. Perhaps the best statement of the value of a water right was expressed by the Colorado Supreme Court in *Navajo Development Co., Inc. v. Sanderson*, 655 P.2d 1374 (Colo. 1982):

> A validly adjudicated water right gives its holder a special type of property right. **The value of the property right is that it allows a priority to the use of a certain amount of water** at a place somewhere in the hierarchy of users who also have rights to water from a common source . . . .

Id. at 1377 (emphasis added).

* * *

> Property rights in water consist not alone in the amount of the appropriation, but, also, in the **priority** of the appropriation. It often happens that the chief value of an appropriation consists in its **priority** over other appropriations from the same natural stream.

Id. at 1378 (quoting *Nichols v. McIntosh*, 34 P. 278, 280 (Colo. 1893)) (emphasis in original).

If only two elements of a water right had to be decreed, those elements must, as a matter of constitutional law, be priority and quantity. Those elements are the very essence of every water right. Absent a decree with priority and quantity, claimants in the SRBA would be deprived of their property right under the constitution and laws of this state. As a matter of law, this court

is required to decree priority and quantity in addition to other statutory elements. I. C. §§ 42-1412(6) and (7). In this case, the record explicitly states that General Provision 2 does not establish priority or quantity to what has been called "excess" water. "The parties to this stipulation **do not intend hereby to establish or set the priorities or quantities** of any rights to excess water, or to establish that any presently perfected right does or does not include or authorize the use of excess water." General Provision 2, ¶ 5(a) (emphasis added).

Despite the unambiguous statement that priority and quantity to "excess" rights are not established, the parties persist that quantity and priority to "excess" water are somehow defined by the provision. Although maintaining this argument, the parties cannot agree between themselves on either the priority date or quantity for these alleged "excess" water rights. For example, during the hearing before the Special Master, the State of Idaho argued that the priority date is the date the Reynolds Creek Decree was entered in 1988. (Tr., p. 110, Ll. 18-21.) During the argument before this court, the State asserted that the priority date goes back to the priority date listed for the specific underlying water right found in the Reynolds Creek Decree.

The Conservation Groups "candidly admit that the language of the proposed Stipulation and Settlement does not specify the individual amounts of water and priority dates which the Court has concluded are required of the SRBA decrees." *Conservation Group's Opening Brief* at 4. Nevertheless, before the Special Master, the Conservation Groups guessed the priority date to be the date the Reynolds Creek Adjudication began in 1978. (Tr., p. 123, Ll. 1-3.) Jerry Hoagland/Reynold Creek Decree Water Right Owners (RCDWRO), claimants, alleged before the Special Master that the priority date is 1863 or "thereabouts." (Tr., p. 83, Ll. 10-22.) Three parties interpreting the same document cannot agree to the exact priority date. Reading the four corners of the decree, it is clear that priority dates for alleged "excess" water rights are not defined.

Similarly, the plain and unambiguous language of General Provision 2 states that "quantity" to alleged "excess" water rights **is not established.** Despite the clear statement contained in both the Reynolds Creek Decree and General Provision 2, the State and RCDWRO postulate that quantity is defined by the capacity of the diversion works for each claimant. There is no evidence in the record as to the size or capacity of any given diversion. It must also be noted that in the

SRBA there are a multiplicity of subcases before the Special Masters in which the issue of what constitutes a "diversion works" and how its capacity is measured is very much contested. Additionally, the provision here fails to specify, by location or date, which diversion works will in the future serve as the basis for measurement. Therefore, not only does this interpretation fail to legally define quantity or priority, its ephemeral "definition" assures protracted future litigation in order to allow administration of those rights when a disagreement between claimants arises. This outcome would be irresponsible.

Further, all parties agree, in their proposal, that quantity is not stated in terms of cubic feet per second or annual volume of consumptive use. As a matter of law, this court is required to decree quantity in terms of cubic feet per second or annual volume of consumptive use for irrigation claims. I. C. §§ 42-1412(7) and 42-1411(2) and (3). Even if quantity had been defined, it is not defined as the legislature has required.

The State and RCDWRO argue that priority and quantity are defined because General Provision 2 incorporates and refers back to the specific finding for each underlying water right. The records fails to support this proposition. First, as the Special Master stated, General Provision 2 on its face reads that priority and quantity are not defined. Second, General Provision 2 reads that the parties to the original stipulation (General Provision 2) "do not intend . . . to establish that any presently perfected right does or does not include or authorize the use of excess water." General Provision 2, ¶ 5(a). Third, General Provision 2 describes "excess" water as that water which may be used "in excess of the amounts specified for their respective water rights in the Findings." General Provision 2, ¶ 3(b). The clear and unambiguous language of General Provision 2 indicates that the specific water rights do not incorporate alleged rights to "excess" water.

Finally, if a right to "excess" water exists, IDWR would be in a position to administer the right. To the contrary, IDWR's report requested by the Special Master reads as follows:

> If a dispute as to competing lawful uses of "excess" water could not be resolved among the water right holders, then a water right holder who desired to enforce their use by curtailing another's use would need to file an application for permit with IDWR and complete the statutory appropriation procedure.

Exhibit 29 at 3.

Throughout General Provision 2 and in IDWR's report, alleged "excess" water is referred to as a "use." This court cannot decree water "uses," as it has no such jurisdiction. The duty of this court is to determine water "rights." If a right to "excess" water exists, there would be no requirement to "complete the statutory appropriation procedure" prior to any administrative involvement of IDWR. Without a water "right," no claimant is entitled to use the waters of this state. "No person shall divert any water from a natural watercourse or apply water to land without having obtained a valid water right to do so. . . ." I. C. § 42-201(2).

The failure to define quantity and priority to alleged "excess" water rights is regrettable. The court notes that the Reynolds Creek Adjudication was instigated at the suggestion of the Idaho Supreme Court in *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977). In that case, the court stressed the importance of listing priority and quantity for any water right. "Only by having a specific list reciting the names of the water users, with their **dates of priority, amounts**, and points of diversion can such a system be administered." Id. at 91 (quoting *DeRousse v. Higginson*, 95 Idaho 173, 505 P.2d 321 (1973)). General Provision 2 and the stipulation of the parties ignores this clear directive of the Idaho Supreme Court.

As previously stated, the very essence of a water right is the priority date and the right to use a specific amount of water. Without a priority date or quantity, a claimant does not have a water right under the Idaho Constitution, legislative enactments and the well-settled traditional concepts of western water law. To the extent that claimants have a water right, the duty and purpose of the SRBA is to determine the elements of that respective water right. In this case, it is clear that the required elements to alleged "excess" water rights were not determined in the Reynolds Creek Decree. Priority and quantity are capable of being determined and included in each specific right for every claimant in the Reynolds Creek basin.

The challenges also contest the determination contained in the Special Master's Report and Recommendation on the *res judicata* effect of the Reynold's Creek Decree. As to the Special Master's determination that *res judicata* does not apply because identity of parties and claims are lacking, this court agrees. The doctrine of *res judicata* requires identity of parties and issues. *Kawai Farms, Inc. v. Longstreet,* 121 Idaho 610, 614, 826 P.2d 1322, 1326 (1992). However, when identity of parties and cause of action are lacking, this court shall accord prior decrees the

legal recognition due under the theory of collateral estoppel to the extent that particular issues were actually determined. As previously stated in this opinion and in the Special Master's recommendation, priority and quantity as to "excess" water were not determined under the Reynolds Creek Decree. Therefore, where quantity and priority were not determined, there is nothing which this court can recognize under the theories of *res judicata* or collateral estoppel. Either theory requires that an issue was actually decided. *Gubler v. Brydon*, 125 Idaho 107, 110, 867 P.2d 981, 984 (1994), *Western Industrial and Environmental Services, Inc. v. Kaldveer Associates, Inc,* 126 Idaho 541, 544, 887 P.2d 1048, 1051 (1994). Whenever parties advance claims under prior decrees, this court shall recognize elements of water rights that were actually decided. In this case, the record clearly establishes that the challengers' attempted reliance on *res judicata* is not cognizable.

Finally, the challengers urge the court to adopt General Provision 2 and/or the proposed stipulation because there has been no objection. To the contrary, it is the court's obligation to see that all legal requirements are satisfied even when proposed settlements are filed with no objection. This principle was set out by the Idaho Supreme Court in this very case (*In Re SRBA Case No. 39576*, ___ Idaho ___, 912 P.2d 614, 626 (1995)). In rejecting I. C. § 42-1411(4), which required the court to decree unobjected claims, the Supreme Court defined this court's function as to unobjected matters:

> [T]he provision in the 1994 statutes that the district court shall decree the unobjected to portions of the Director's report as those provisions are reported removes the authority of the courts to apply the facts to the law and render a conclusion. **The removal of this authority contradicts the rules established by this Court for entry of default judgment and divests the court of the power to correct even an egregious error that might eliminate or impair constitutionally recognized water rights.**

Id. at 626. (emphasis added).

In this case, despite there being no objection to General Provision 2, this court is performing its required function by rejecting General Provision 2 and the stipulation of the parties. The court is insuring that the RCDWRO, who may very well have constitutionally protected rights to "excess" water, obtain rights that are enforceable both administratively and judicially. These claimants deserve no less. Under General Provision 2 and the proposed revisions to General Provision 2, RCDWRO

have an agreement among themselves for "uses" to "excess" water. IDWR has declared this agreement to be entirely unenforceable until the users "complete the statutory appropriation procedure." Exhibit 29 at 3. What has been proposed, therefore, deprives the claimants of what may be valid rights to "excess" water. To place this provision in a decree would not render them enforceable absent a formidable act of legal prestidigitation. The purpose of the SRBA is not to defer determinations involving water rights. Rather, to the extent that water rights exist in the Snake River Basin, the function of this court is to ensure that right holders obtain a decree that is enforceable.

IT IS SO ORDERED.

DATED July 19, 1996.

DANIEL C. HURLBUTT, JR.
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the **MEMORANDUM DECISION RE: BASIN-WIDE ISSUE 5A** was mailed on July 19, 1996, with sufficient first-class postage to the following:

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P. O. Box 44449
Boise, ID 83711-4449

The United States Department of Justice
Environment and Natural Resources Division
550 West Fort Street, MSC 033
Boise, ID 83724

Court Certificate of Mailing for Basin-Wide Issue 5A

Deputy Clerk