

I.

FACTS AND PROCEDURAL BACKGROUND

1. This matter concerns 294 water right claims filed in the Snake River Basin Adjudication (“SRBA”) for the use of what will be referred to herein as “high flow” water from the Lemhi River and its tributaries in Basin 74. The claims were filed in the SRBA by various private parties and the Lemhi Irrigation District (“LID”) for irrigation purposes (collectively, “high flow claimants”).

2. The Director of the Idaho Department of Water Resources (“IDWR” or “Department”) filed his *Director’s Report for Irrigation & Other Uses, Reporting Area 23, IDWR Basin 74*, on January 23, 2006. The Director recommended approximately 288 high flow water rights to the high flow claimants to divert water from the Lemhi River and its tributaries for irrigation purposes.

3. The recommendations for the high flow water rights contained several common characteristics. Each right was recommended with a common priority date of March 15, 1966. Each right contained a subordination remark that provided: “This water right is subordinated to all water rights with a priority date earlier than October 3, 1974.” Additionally, each right was recommended with a remark under the “Other Provisions” element stating “[t]his water right is supplemental to surface water rights with priority dates earlier than March 15, 1966.”

4. *Objections* to the recommendations were filed by the United States, the Nez Perce Tribe, Gene Bray and Thomas R. Stuart III, asserting that the high flow water rights should not exist.¹ The following *Objection* filed by the United States and the Nez Perce Tribe in subcase no. 74-15014 is representative of the high flow *Objections*:

There has been no lawful appropriation of a water right under state law. The water use claim should have been made in the Lemhi Adjudication and is thus barred. There is no apparent basis for the claimed priority date. The place of use is not adequately identified. The quantity claimed exceeds the reasonable duty of water and the amount that has been beneficially used. Any use of water recognized under the claim is subject to existing and future water rights being first satisfied.

Standard Form 1 Objection, Subcase No. 74-15014 (June 29, 2006).

¹ Gene Bray and Thomas R. Stuart III did not participate in the proceedings on Challenge before this Court.

5. On June 17, 2008, the Special Master entered an *Order* designating the following nine subcases as test cases to determine the legal bases of high flow claims: 74-15104, 74-15112, 74-15153, 74-15197, 74-15214, 74-15311, 74-15316, 74-15344 and 74-15420.

6. On September 17, 2008, the Director filed a *Supplemental Director's Report* explaining the basis of the recommendations for the nine test cases. The rationale behind the recommendations was based in large part on the fact that a prior decree had previously memorialized and authorized the historic use of high flows from the Lemhi River and its tributaries by irrigators in Basin 74. This prior decree, known as the *Lemhi Decree*, was entered on December 30, 1982 in Lemhi County Civil Case No. 4948, *In the Matter of the General Determination of the Rights to the Use of the Surface Waters and Tributaries from Whatever Source of the Lemhi River Drainage Basin* ("Lemhi Adjudication"). Pertinent provisions of the *Lemhi Decree* will be examined below.²

7. Competing *Motions for Summary Judgment* were subsequently filed by James and Paula Whitaker and McFarland Livestock Co., Inc. (collectively, "Whitaker"), the State, LID, and the United States.

8. On December 23, 2010, the Special Master issued his *Order on Motions for Summary Judgment*. The *Order* denied the various *Motions for Summary Judgment* on the grounds, among other things, that the *Lemhi Decree* recognized a historical beneficial use of surface water to continue unchanged by establishing certain base irrigation water rights and then, by general provision, allowing an ancillary use of high flows on the same lands.

9. The *Special Master's Report and Recommendation* recommended that (1) the 294 high flow water right claims be disallowed, and (2) the use of high flow water in the Lemhi Basin be recognized and governed by the following general provision, which the Special Master determined to be consistent with the memorialization of the use of high flows by the Lemhi District Court in the *Lemhi Decree*:

The practice of diverting high flows in the Lemhi Basin during the pre-irrigation and post-irrigation seasons, in addition to diverting decreed and future rights that may be established pursuant to statutory procedures of the State of Idaho, is allowed provided:

(a) the waters so diverted are applied to beneficial use.

² A copy of the *Lemhi Decree* is attached as Attachment 1 to the *Supplemental Director's Report Regarding Subcase Nos. 74-15051 et al.*, filed in the above-captioned matter on September 18, 2008.

(b) existing decreed rights and future appropriations of water are first satisfied.

Special Master Report and Recommendation, p.3.

10. On July 11, 2011, the Special Master entered his *Order Granting, in Part, Denying in Part, Motions to Alter or Amend*, wherein the Special Master amended the recommended language of the proposed general provision to read as follows:

The practice of diverting high flows in the Lemhi Basin, in addition to diverting decreed and future water rights that may be established pursuant to statutory procedures of the State of Idaho, is allowed provided:

- (a) the waters so diverted are applied to beneficial use.
- (b) existing decreed rights and future appropriations of water are first satisfied.

Order Granting, in Part, Denying in Part, Motions to Alter or Amend, p.12. All other portions of the *Special Master Report and Recommendation* remained unchanged.

11. Timely *Notices of Challenge* were filed by LID, the State, and the United States, challenging the Special Master's *Report and Recommendation* as well as his *Order Granting in Part and Denying in Part Motions to Alter or Amend*.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument on Challenge was heard before this Court on November 29, 2011. The parties did not request additional briefing, nor does the Court require any. The matter is therefore deemed fully submitted the following business day, or November 30, 2011.

III.

STANDARD OF REVIEW

A. Challenge.

A district court is required to adopt a special master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2); *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 377, 816 P.2d 326, 333 (1991). In determining whether findings of fact are clearly erroneous, a reviewing court "inquires whether the findings of fact are supported by substantial and competent evidence." *Gill v. Viebrock*, 125 Idaho 948, 951, 877 P.2d 919, 922 (1994). The party challenging the findings of fact has the burden of showing error, and a reviewing court will

review the evidence in the light most favorable to the prevailing party. *SRBA Springs & Fountains Memorandum Decision & Order on Challenge*, Subcase No. 67-13701 (July 28, 2006), p. 18.

The special master's conclusions of law, however, are not binding upon a reviewing court, although they are expected to be persuasive. *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). This permits the district court to adopt the master's conclusions of law only to the extent they correctly state the law. *Id.* Accordingly, a reviewing court's standard of review of the special master's conclusions of law is one of free review. *Id.*

B. Summary judgment.

This matter comes before the Court on Challenge by way of summary judgment, and the Court is asked to review certain findings and conclusions of the Special Master made pursuant to an order on summary judgment. Summary judgment is properly granted when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c). Where the case will be tried without a jury, the district court, as the trier of fact, is entitled to draw the most probable inferences from the undisputed evidence properly before it and grant the summary judgment motion in spite of the potential of conflicting inferences. *P.O. Ventures, Inc. v. Loucks Family Irrev. Trust*, 144 Idaho 233, 237, 159 P.3d 870, 874 (2007). The burden of demonstrating the absence of a genuine issue of material fact, and that summary judgment is proper as a matter of law, is on the moving party. *McCorkle v. Northwestern Mut. Life Ins. Co.*, 141 Idaho 550, 554, 112 P.3d 838, 842 (Ct. App. 2005). The fact that the parties filed cross-motions for summary judgment does not change the applicable standard of review, and each motion must be evaluated on its own merits. *Borley v. Smith*, 149 Idaho 171, 176, 233 P.3d 102, 107 (2010).

IV.

ANALYSIS

A. The Lemhi Decree.

Prior to the commencement of the SRBA, the Lemhi River Basin was the subject of a general adjudication known as the Lemhi Adjudication. The Lemhi Adjudication determined the

“various rights to the use of water of the Lemhi River and its surface tributaries including ground water which may be either tributary to the Lemhi River or its surface tributaries within the Lemhi River Drainage Basin . . .” subject to certain stated exceptions.³ *Proposed Findings of Water Rights*, pp.1–2. The Adjudication was commenced on August 13, 1970, by order of Lemhi County District Court Judge Arnold T. Beebe in Lemhi County Civil Case No. 4948, entitled *In the Matter of the General Determination of the Rights to the Use of the Surface Waters and Tributaries from Whatever Source of the Lemhi River Drainage Basin*. Approximately 1,900 water rights were claimed in the Adjudication by various claimants throughout the Lemhi Basin.

In July 1974, after its investigation of the claims, the Department submitted its *Proposed Findings of Water Rights* to the court. In addition to containing its recommendations with respect to the water right claims, the *Proposed Findings* contained proposed findings of fact and conclusions of law for the court’s review and adoption. With respect to the use of high flows, the Department recommended the following definition, findings of fact and conclusion of law:

[Definition]

n. “High water” or “Flood water” as used in the Findings of Fact, and Conclusions of Law, is intended to describe a natural flow of “water over and above the amounts required to fulfill (1) existing quantified rights as shown in the recommended decree of water rights and (2) any future rights that may be established pursuant to statutory procedures of the State of Idaho.”

[Finding of Fact No. 7]

7. The Lemhi River Basin presently has almost non-existent storage facilities in which to preserve water for use later in the irrigation season when the flow in surface water sources diminishes. Water users in the basin have diverted flood flows occurring in May and June onto their lands in an effort to “hold or reservoir” the water in the soil of the basin.

[Finding of Fact No. 14]

14. Water has been diverted and applied to a beneficial use as described in the recommended following decree of water rights. In addition, the water users in the Lemhi River Basin have historically diverted the so call “high water or flood water” generally during the months of May and June.

[Conclusion of Law No. 6]

³ By its express terms, the *Lemhi Decree* did not “include any of the rights on Geertson Creek and its tributaries” because they were already the subject of a partial decree which was on appeal to the Idaho Supreme Court” or the rights of the United States Department of Agriculture, Forest Service “because they [had] yet to be resubmitted following the decision of U.S. v. New Mexico.” Lemhi County Civil Case No. 4948, *Partial Decree*, pp.1–2.

6. The normal Irrigation season is from April 1 to November 1 of each year. The practice of diverting water during the pre-irrigation and post irrigation season as well as diverting the so called “high water or flood waters” in addition to the quantified rights as described in the recommended decree of water rights (and future rights that may be established pursuant to statutory procedures) is allowed provided:

- (a) the waters so diverted are applied to a beneficial use.
- (b) the existing quantified rights (including future appropriations of water) are first satisfied.

Proposed Findings of Water Rights, pp.6–7 & 10.

Objections to the *Proposed Findings* were filed by various parties concerning, among other things, the Department’s limited recognition of the use of high flow water. The high flow objections were subsequently resolved via the filing of a *Stipulation* with the court on February 12, 1982, wherein the parties agreed to make certain changes to the Department’s proposed definition, findings of fact and conclusion of law. Ultimately, the parties agreed to recognize and authorize the use of high flows via the inclusion of the following provisions in the *Lemhi Decree*:

[Revised Definition]

n. “High water” or “Flood water” as used in the Findings of Fact, Conclusions of Law, and Decree describes a natural flow of “water over and above the amounts required to fulfill (1) existing quantified rights as shown in the decree of water rights and (2) any future rights that may be established pursuant to statutory procedures of the State of Idaho.”

[Revised Finding of Fact No. 7]

7. The Lemhi River Basin presently has almost non-existent storage facilities in which to preserve water for use later in the irrigation season when the flow in surface water sources diminishes. Diversions of high waters or flood waters for irrigation purposes within the basin have been practiced in an effort to hold or store water underground within the basin, which later contributes to the flow of the streams and river, and has the effect of augmenting or supplementing this flow during the latter portion of the irrigation season. While the amount of such high water available varies from year to year, an effort has been made to divert all of such water, whenever and in whatever amounts it is available, and to apply it on the irrigated lands. The practice has been to distribute and use this water in an informal manner. There is some potential for development of water storage projects within the basin; however, general interest in such development will probably only occur as the economic feasibility thereof increases.

[Revised Finding of Fact No. 14]

14. Water has been diverted and applied to a beneficial use as described in the following decree of water rights. In addition, the water users in the Lemhi River

Basin have historically diverted the so called “high water or flood water” generally during the months of May and June.

[Revised Conclusion of Law No. 6]

6. The normal irrigation season in the Lemhi Basin is from March 15 to November 15 of each year. The practice of diverting water during the pre-irrigation and post irrigation season as well as diverting the so called “high waters or flood waters” in addition to the quantified rights as described in the recommended decree of water rights (and future rights that may be established pursuant to statutory procedures) is allowed provided:

- (a) the waters so diverted are applied to beneficial use.
- (b) the existing quantified rights (including future appropriations of water) are first satisfied. (Note that Conclusion of Law #3 provides an exception to this condition of “high water” or “flood water” diversion.)

Stipulation Resolving General Objections, Ex. B.

On December 30, 1982, the Lemhi County District Court entered the *Partial Decree* constituting the *Lemhi Decree*, which incorporated by reference the revised definition, findings of facts, and conclusion of law stipulated to by the parties pertaining to the use and memorialization of high flows. No party appealed any aspect of the *Lemhi Decree*, including its memorialization of the use of high flow water.

B. The Special Master did not err in recommending that the 294 high flow water right claims be disallowed.

In his review of the *Lemhi Decree*, the Special Master resolved that the Decree did not recognize or create a water right for the use of high flow water. *Order on Motions for Summary Judgment*, pp.11–12. Rather, the Special Master determined that the *Decree* recognized a lesser use, stating that it “describe[d] high flows as an ‘ancillary use’ of water – not a water right – tied to use on irrigated lands quantified in the *Lemhi Decree* (base rights).” *Order on Motions to Alter or Amend*, p.9. It was on these grounds that the Special Master recommended that the high flow claims filed in the SRBA be denied. On Challenge, the State argues that the high flow claimants should be permitted to establish the required elements of a high flow water right in this matter, and that the Special Master erred in recommending that the claims be disallowed. This Court disagrees.

The fact that the Lemhi River Basin was the subject of a prior general adjudication directs the Court’s analysis of this issue. Principles of *res judicata*, as well as Idaho’s

adjudication statutes, generally prohibit a water user in a river basin that has been the subject of a general adjudication from subsequently establishing a water right not recognized in the adjudication decree with a priority date preceding the adjudication's commencement. This is because once a final decree is entered in a general adjudication all water users within the adjudicated water system are bound by its terms and cannot subsequently attack it. *See* I.C. § 42-1420(1) (stating, a decree entered in a general adjudication is, subject to certain exceptions, "conclusive as to the nature and extent of all water rights in the adjudicated water system"). The terms of the *Lemhi Decree* reflected these principles by providing that: (1) the Decree includes "all of the existing rights to the waters of the Lemhi River and its tributaries," and (2) that all water users who failed to claim water rights for use of water from the Lemhi River or its tributaries "forfeited such rights . . ." *Lemhi Decree*, pp.9–10, ¶5.

Given the above, determining whether the plain language of the *Lemhi Decree* created water rights in favor of high flow water users in that Basin is critical to the issue of whether high flow claims should be permitted to go forward in the SRBA. Under Idaho law, the interpretation of decrees or judgments is generally subject to the same rules applicable to construction of contracts. *McKoon v. Hathaway*, 146 Idaho 106, 109, 190 P.3d 925, 928 (Ct. App. 2008). The interpretation of a contract begins with the language of the contract itself. *Independence Lead Mines Co. v. Hecla Mining Co.*, 143 Idaho 22, 26, 137 P.3d 409, 413 (2006). When the language of a contract is clear and unambiguous, its interpretation and legal effect are questions of law. *Shawver v. Huckleberry Estates, LLC*, 140 Idaho 354, 361, 93 P.3d 685, 692 (2004). Where the language of a decree or judgment is ambiguous, the court may refer to the circumstances surrounding the making of the judgment in interpreting it and may refer to the pleadings and other parts of the record in the earlier case. *McKoon*, 146 Idaho, at 109, 190 P.3d, at 928. Determining whether a provision is ambiguous is a question of law. *Id.*

In this case, the plain and unambiguous language of the *Lemhi Decree* did not create water rights in favor of the high flow claimants. The *Decree* defined high flow as "a natural flow of 'water over and above the amounts required to fulfill (1) existing quantified rights as shown in the decree of water rights and (2) any future rights that may be established pursuant to statutory procedures of the State of Idaho.'" Likewise Conclusion of Law No. 6 of the *Decree*, which authorized the diversion of high flows, provided that the practice is allowed only where "the existing quantified rights (including future appropriations of water) are first satisfied." The

definition and conclusion of law evidence that neither the court nor the parties intended that the Decree's recognition of the use of high flow water would establish an enforceable water right, as the use is by definition subject to *all* water rights.

Had the Lemhi County District Court intended to establish water rights for the use of high flows, the court could have done so by simply decreeing the use of high flow water in the same fashion as all of the other water rights listed in the *Lemhi Decree*. It did not, deciding instead to recognize the use via the inclusion of the following general provision:

The normal irrigation season in the Lemhi Basin is from March 15 to November 15 of each year. The practice of diverting water during the pre-irrigation and post irrigation season as well as diverting the so called "high waters or flood waters" in addition to the quantified rights as described in the recommended decree of water rights (and future rights that may be established pursuant to statutory procedures) is allowed provided:

- (a) the waters so diverted are applied to beneficial use.
- (b) the existing quantified rights (including future appropriations of water) are first satisfied. (Note that Conclusion of Law #3 provides an exception to this condition of "high water" or "flood water" diversion.)

Stipulation Resolving General Objections, Ex. B. The general provision adopted by the Lemhi District Court fails to identify many of the essential elements of a water right, including the name of the claimant, the quantity, priority date, purpose of use, place of use, etc.

The general provision's lack of certain essential elements of a water right is significant under Idaho law. In *A&B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 416, 958 P.2d 568, 573 (1997) ("*A&B*") the Court instructed that excess water is not subject to a water right as it "is not subject to definition in terms of quantity of water per year, which is essential to the establishment and granting of a water right." In *State v. Idaho Conservation League*, 131 Idaho 329, 333, 955 P.2d 1108, 1112 (1998) ("*ICL*") the Court confirmed that "excess water cannot be decreed as a water right." The Court in that case reviewed a general provision that was contained in a prior general adjudication decree (i.e., the *Reynolds Creek Decree*) authorizing the use of high flows to determine whether it created a water right in favor of the benefitted water users. The Court held that it did not as it did "not set forth a priority date, quantity, legal description of the place of use, nor any of the other elements of a water right." *Id.*

Since the *Lemhi Decree* did not create a water right in favor of the high flow claimants, principles of *res judicata*, Idaho's adjudication statutes, as well as Idaho case law precludes the

high flow claimants from seeking to establish high flow water rights in the SRBA as a matter of law. Therefore, the Special Master did not err in recommending that the high flow claims be disallowed.⁴

1. The Special Master's recommendation is distinguishable from the resolution of the high flow claims in *ICL*.

Following remand from *ICL*⁵, the water users on Reynolds Creek abandoned pursuing the recommended general provision on high flow water in lieu of filing individual late claims for high flows. The water users claimed priority dates predating the entry of the *Reynolds Decree*. Eventually, all such claims were decreed in the SRBA. In this case, the State of Idaho argues the similarly situated high flow claims based on the *Lemhi Decree* should be accorded the same treatment. For the reasons explained below this Court disagrees.

The resolution of the individual high flow claims on Reynolds Creek is distinguishable from the present situation. Following remand, the motions to file late claims for high flow water on Reynolds Creek went unopposed. Thereafter, following reporting by the Department, all water users potentially affected by the individual claims were accorded the opportunity to pursue their objections, participate in settlement negotiations, or both. Most of the claims were either uncontested or any that were contested were resolved through settlement in the proceedings before the Special Master. *See Special Master's Report and Recommendation, Findings of Fact and Conclusions of Law, For General Provision in Basin 57 Designated as Basin-Wide Issue 5-57, Subcase 91-0005-57* (Sept. 11, 2002), p.3. Accordingly, the SRBA Court never had the opportunity to rule on the merits of any of the claims. In this case no objections were filed by water users in the Lemhi Basin. However, unlike the situation in Reynolds Creek, objections filed by out-of-basin water users holding water rights that share the same source remain unresolved. Since the high flow claims remain contested this Court is required to reach the

⁴ The effect of the prior decree would not preclude water users from pursuing individual licensed rights for the high flow water with a priority date junior to the entry of the *Lemhi Decree*.

⁵ Although the Idaho Supreme Court held that the general provision at issue in *ICL* recognizing the use of high flow or excess water did not create a water right, it went on to hold that the subject general provision was necessary for the efficient administration of existing water rights for reasons discussed later in this decision. The Court then proceeded to remand the matter back to the SRBA District Court for further proceedings in accordance with the opinion. *ICL* at 335, 955 P.2d at 1114.

merits of the claims. Accordingly, what occurred with respect to high flow claims on Reynolds Creek is distinguishable from the present situation.

C. The Special Master did not err in recommending a general provision authorizing the “use” of high flow water.

The United States argues the high flow general provision recommended by the Special Master is similar to the general provision rejected by the Idaho Supreme Court in *A & B* and should therefore also be rejected. The United States further argues the high flow general provision rejected in *A & B* is distinguishable from the high flow general provision upheld in *ICL* and therefore the holding in *A & B* is controlling. Finally, the United States also asserts the general provision recommended by the Special Master is identical to the general provision decreed in the *Payette Decree* and rejected by the SRBA Court in subcase no. 00-91065 (Basin 65 General Provisions). Each of these arguments is addressed in turn below. In order to address each of these arguments a certain amount of background surrounding the resolution of high flow general provisions in the SRBA is necessary for context.

1. Historical background regarding high flow general provisions in the SRBA.

a. The recommended high flow general provisions in the three test basins.

A general provision concerning the use of high flow water is not unique to the Lemhi River Basin. The Department has previously recommended general provisions authorizing the use of high flow water for irrigation in various basins throughout the SRBA and has failed to recognize the use in other basins. The recognition of the use of high flow water has stemmed from two different situations. The first situation occurred in the three test basins (34, 36 and 57) based on the Department’s finding of a long standing custom and practice of diverting additional water in conjunction with existing irrigation rights. *See Basin-Wide Issue 5 (Irrigation General Provisions), Report to the SRBA District Court, Sub-Case No. 91-0005 (March 11, 1996), pp. 7-9.* The second situation was based on prior decrees which expressly included general provisions

authorizing the use of high flow water.⁶ To date, for various reasons the SRBA Court has not previously decreed a general provision recognizing the use of high flow water.

In the three test basins the *Director's Reports* recommended various substantially uniform general provisions to be necessary for the definition or efficient administration of water rights in accordance with Idaho Code §§ 42-1411(3) and 42-1412(6). These general provisions included firefighting, early and late season of use, incidental stockwater, conjunctive management and the use of additional or "high flow" water. The recommended high flow general provision was identical for each of the three test basins and provided as follows:

Diversion of additional flows. A quantity of surface water in addition to the quantity of surface water described for irrigation use can be diverted for irrigation of the described place of use so long as:

- i. the waters so diverted is applied to beneficial use for irrigation,
- ii. all water rights diverting from the same or a common source, regardless of priority (now existing or developed subsequent to this decree), existing at the time of diversion that are within their period of use can be satisfied,
- iii. no element of the water right, other than quantity, is exceeded or violated by the diversion of additional flows,
- iv. the diversion and use of water does not conflict with the local public interest,
- v. the irrigation water user utilizing this general provision assumes all risk that the criteria of this general provision are satisfied.

A & B at 418-20, 958 P.2d at 575-577. In an explanatory *Director's Report* filed with the SRBA Court, the Department explained the basis for the high flow recommendations was derived from a long standing custom and practice of irrigators using surface flows in addition to the decreed quantities of their respective water rights. *Basin-Wide Issue 5 (Irrigation General Provisions), Report to the SRBA District Court, Sub-Case No. 91-00005* (March 11, 1996), p. 9. Due to the basin-wide nature of all of the various recommended general provisions, including the high flow general provisions, the entire matter was designated in the SRBA as Basin-Wide Issue 5. The

⁶ Prior to the commencement of the SRBA there were six different prior adjudications which decreed general provisions authorizing the use of authorizing the use of high flow water. These included: the *Burghardt Decree*, the *Bancroft-Lund Decree*, the *Basin Creek Decree*, the *Payette Decree*, the *Lemhi Decree* and the *Reynolds Decree*.

issue was framed as: “Whether these general provisions are necessary for the definition of the rights or for the efficient administration of water rights?” *Memorandum Decision and Order Re: Basin-Wide Issue 5*, Subcase No: 91-0005 (April 26, 1996), p. 2.

In addition to the above-referenced general provisions, the Department also recommended “General Provision 2” which only applied to the Reynolds Creek Drainage located within Basin 57. General Provision 2 authorized the use and storage of high flow water by existing water right holders subject to certain conditions and also provided for a system of rotation unrelated to the use of high flow water. The Department’s recommendation was based on a general provision previously included in the Reynolds Decree, which memorialized and authorized the use of high flows in the Reynolds Creek Basin. Due to the uniqueness and specific application of General Provision 2, the issue was designated as Basin-Wide Issue 5A and referred to a special master for resolution.⁷ Basin-Wide Issue 5A was framed as: “Whether general provision no. 2 . . . is necessary for the definition of the rights or for the efficient administration of water rights.” *Memorandum Decision Re: Basin-Wide Issue 5A*, Subcase No. 91-00005A (July 19, 1996), p. 1. The portions of General Provision 2 concerning the use of high flow water provided in relevant part as follows:

The following language is from the "Stipulation by Certain Defendants for Entry of Decree Adjudicating Water Rights", incorporated in the decree filed March 23, 1988, in the Reynolds Creek Adjudication, Owyhee County Civil No. 3456. The boundaries of the Reynolds Creek water system are shown in Figure 1. This language addresses the administration of water rights from the Reynolds Creek water system and is incorporated verbatim herein:

3. There shall be two different methods of administering the water rights in Reynolds Creek, dependent upon whether there is "excess" water in Reynolds Creek at a given time, with "excess" water being defined as the amount of water in excess of 37 CFS flowing in Reynolds Creek at the upper Basin Tollgate weir, hereinafter identified, at any time when the flow at the Outlet weir, hereinafter identified, is more than 57 CFS...

...
(b) Distribution During Periods of Excess Water. 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

⁷ General provisions specific to water administration on the Big Lost River in Basin 34 were also recommended and designated as Basin-Wide Issue 5B. These general provisions were also based on a prior decree but did not include a high flow provision.

Upper Users limit their diversions to the amounts specified for their respective water rights in the Findings. The intent of this provision is that the Upper Users shall have the first opportunity to use "excess" water, so long as the flow of water at the Outlet weir is more than 57 CFS.

5(a) The parties to this Stipulation do not intend to hereby 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.

ICL at 336-37, 955 P.2d 1115-16. General Provision 2 was recommended to apply solely to water rights in the Reynolds Creek Basin. It was recommended in addition to the high flow general provision recommended for the remainder of Basin 57 as well as for the other two test basins.

b. Proceedings before the SRBA District Court on Basin-Wide Issues 5 and 5A.

In Basin-Wide Issue 5, SRBA Presiding Judge Daniel C. Hurlbutt, Jr., held that the recommended high flow general provisions for the three test basins did not establish water rights because the provisions lacked the essential elements of a water right and therefore concluded the general provisions could not be decreed. Judge Hurlbutt reasoned the “[d]iversion of additional flows cannot be decreed as general provisions because they attempt to grant uses of water which neither constitute administrable water rights nor are they included as parts of the irrigation rights which will be decreed. These general provisions are not necessary to define or administer water rights.” *Memorandum Decision and Order Re: Basin-Wide Issue 5*, Subcase No: 91-0005 (April 26, 1996), p. 25.

In Basin-Wide 5A, Judge Hurlbutt adopted the *Special Master’s Report and Recommendation* and similarly concluded that General Provision No. 2 specific to Reynolds Creek was also not necessary for the definition or efficient administration of water rights and therefore also could not be decreed. *Memorandum Decision Re: Basin-Wide Issue 5A*, Subcase No. 91-00005A (July 19, 1996), p. 2. Judge Hurlbutt reasoned as follows:

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).

...

[T]he 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.

Id. at 5. In both cases, Judge Hurlbutt rejected the general provisions because they did not establish water rights and reasoned further that he could not approve a general provision that authorized a “use” of water not amounting to a water right.

c. Appeals from Basin-Wide Issues 5 (A & B) and 5A (ICL).

On appeal from Basin-Wide Issue 5, in *A & B* the Idaho Supreme Court agreed with Judge Hurlbutt’s ruling that the use of excess water as described in the general provision could not be decreed as a water right because it did not include the essential elements of a water right. The Idaho Supreme Court held “[e]xcess flow is not subject to definition in terms of quantity of water per year, which is essential to the establishment and granting of a water right.” *Id.* at 416, 958 P.2d at 573. The Supreme Court therefore concluded “a general provision concerning excess water would not define a water right or be necessary to administer a water right and therefore is not appropriate *The use of excess water cannot be decreed as a water right or a general provision.*” *Id.* (emphasis added).⁸

On appeal from Basin-Wide Issue 5A in *ICL*, the Idaho Supreme Court disagreed with Judge Hurlbutt’s ruling that the Court could not approve a general provision that authorized a “use” of water not amounting to a water right. The Idaho Supreme Court held that although General Provision 2 did not create a water right, a general provision authorizing the use of high flow could still be necessary for the administration of the existing water rights in the body of the decree. The Supreme Court relied on its holding in the “companion case” of *A & B* for the proposition that the authorized use of excess water in a general provision cannot be decreed as a water right because it lacks the requisite elements of a water right. *Id.* at 333, 955 P.2d at 1112 (citing *A & B* at 416, 958 P.2d at 573) (“[W]e have ruled in a companion case to this one that

⁸ The differing interpretations arising from this concluding statement are addressed elsewhere in this opinion.

‘excess’ water cannot be decreed as a water right”). The Idaho Supreme Court further acknowledged that General Provision 2 by its express terms did not intend to establish a water right to high flow water. *Id.* On the issue of whether General Provision 2 established a water right the Supreme Court again ruled:

[T]he elimination of all of the elements of a water right, particularly the essential elements of priority date and quantity, vitiates the existence of a legal water right in the ‘excess’ water. Thus General Provision 2 does not establish a water right to ‘excess’ water.

ICL at 333, 955 P.2d at 1112. The Supreme Court then decided the separate issue of whether a general provision authorizing the use of high flow water, despite not creating a water right, could nonetheless still be necessary for the efficient administration of existing rights. The Court reasoned as follows:

Despite our holding that General Provision 2 does not establish any rights to a water right to ‘excess’ water, the question remains whether General Provision 2 is ‘necessary . . . for the efficient administration of water rights.’ I.C. § 42-1412(6). The argument has been made that if ‘excess’ water is not subject to a water right, a general provision regarding ‘excess’ water cannot be necessary for the efficient administration of a water right, because there is no right to administer. We disagree. . . .

...
The issue of whether I.C. § 42-1412(6) means that ‘excess’ water may be administered along with existing rights, even though there is no water right in the ‘excess’ water itself, is a question of statutory interpretation.

...
The language used in I.C. § 42-1412(6) is disjunctive, not conjunctive. In order to be included in a final decree, a general provision need not be necessary to define *and* administer a water right. Instead, the provision need only be necessary to define *or* administer a water right. *Further, nothing in the statute requires that a general provision be on equal footing with a water right. In other words, the provision need not be a right or set forth a right in itself, but may be included in a decree if it is necessary to administer the rights set forth in the body of the decree.*

...
[W]hile General Provision 2 does not set forth a water right in ‘excess’ water, it does describe a procedure by which those who have water rights may use ‘excess’ water, and the provisions thus may be necessary for the efficient administration of water rights.

...
General Provision 2 lacks the statutorily required elements and therefore does not establish the right to use excess water. *However, it does describe a long-standing system of allowing those who otherwise have water rights in the Reynolds Creek Basin to use excess water when it is available.*

...

Thus the efficient administration of water within the Reynolds Creek Basin depends on the system mandated by General Provision 2, and General Provision 2 is necessary to govern the administrative role of the IDWR. We therefore hold that General Provision 2 should be included in the SRBA decree

ICL at 333-35, 955 P.2d at 1112-14 (emphasis added).

On remand from *ICL*, SRBA Presiding Judge R. Barry Wood determined: “Simply stated, General Provision 2 does not establish any rights to a water right to ‘excess’ water. But, because of historical practices, it is necessary for the efficient administration of water rights and must be included in the appropriate decrees. Therefore General Provision 2 in Basin 57 shall be included in the final SRBA decree.” ***Order of Consolidation/Separation of Issues (Realignment and Redesignation of Issues) of Basin-Wide Issues 5, 5A and 5B, AO1 § 11***, Subcases 91-00005, 91-00005A and 91-00005B (in the future 91-00005-34, 91-00005-36 and 91-00005-57), p.5. For the reasons previously explained, despite Judge Wood’s *Order*, the parties pursued individual claims to the high flow water thereby eliminating the need for the portion of the general provision authorizing the use and administration of high flow water. On remand from *A & B* further action was taken either by the SRBA Court or by the parties with respect to the high flow general provisions recommended for the three test basins.

As explained below, when *A & B* and *ICL* are read in conjunction with each other, the respective holdings provide that a general provision recognizing the use of high flow water does not establish a water right. However, based on historical practices a general provision authorizing the “use” of high flow water not amounting to a water right can still be necessary for the efficient administration of the water rights in the body of the decree.

2. The holding in *A & B* is not controlling to this case in all respects.

The United States argues the holdings in *A & B* and *ICL* are distinguishable based on the differences in the general provisions at issue in the two cases. The United States asserts the general provision at issue in *A & B* authorized the use of excess water, but unlike General Provision 2 at issue in *ICL*, did not provide a methodology for administering the excess water. The United States further argues that the general provision rejected by the Supreme Court in *A & B* is essentially the same as the general provision now before the Court and therefore the general provision should be rejected. This Court disagrees.

In *A & B*, the Idaho Supreme Court broadly concludes “[t]he use of excess water cannot be decreed as a water right or a *general provision*.” *A & B* at 416, 958 P.2d at 573 (emphasis added). Indeed if *A & B* is read in isolation, this conclusion suggests that the Court also decided the issue addressed in *ICL* of whether a general provision recognizing the use of high flow water, despite not creating a water right, could nonetheless be necessary for the efficient administration of other existing rights. However, several factors suggest that not to be the case.

Despite the broad concluding statement, the Supreme Court does not address the issue in the *A & B* opinion. In contrast, the *ICL* opinion is devoted entirely to the issue. Further, in *ICL* the Supreme Court provides that *ICL* and *A & B* are “companion” cases and defers to the ruling in *A & B* that a general provision authorizing the use of excess water does not create a water right and therefore cannot be decreed as a water right. However, the Supreme Court does not similarly rely on *A & B* to decide the issue of whether a general provision authorizing the use of excess water, despite not creating a water right, could still be included in a decree. That particular issue is addressed separately and for the first time in *ICL*. In fact, in *ICL* when quoting from the *A & B* opinion, the Supreme Court states “we have ruled in a companion case to this one that ‘excess’ water cannot be decreed as a water right.” *ICL* at 333, 955 P.2d at 1112 (quoting *A & B* at 416, 958 P.2d at 573). The remainder of the quote which provides “*or a general provision*” is omitted (emphasis added). Compare *A & B* at 416, 958 P.2d at 573. Furthermore, in *ICL* the Supreme Court concludes that nothing in the statute authorizing the use of a general provision requires that a “general provision be on equal footing with a water right” if it is necessary to administer the water rights set forth in the body of the decree. *ICL* at 334, 955 P.2d at 1113. Accordingly, in reading *A & B* and *ICL* in conjunction with one another it is clear that the Supreme Court did not address the same issue in *A & B*. The holding in *A & B* must therefore be read to be limited to the determination that a general provision authorizing the use of high flow water does not create a water right.

The United States argues the distinction between the holdings in *A & B* and *ICL* is the nature of the general provisions at issue. The United States asserts General Provision 2 provided a mechanism for the administration of water rights within the basin and the authorization of the high flow use was simply one component of that administrative scheme. In contrast, the United States asserts the purpose of the general provisions at issue in *A & B* was solely to authorize the use of high flow water.

The United States is correct that the general provisions in *A & B* and *ICL* were different. However, despite the differences, the primary purpose of the high flow general provisions was exactly the same. Namely, to authorize the diversion of high flow water by existing water right holders in excess of their decreed water rights. The propriety of authorizing such a use through a general provision not amounting to a water right was the heart of the issue in *ICL*. General Provision 2 on Reynolds Creek provided for two different methods of administration, one when high flow water was available and one when high flow water was not available. The methodology for administering high flow water, however, was limited to providing for administration of high flows only as between upper basin and lower basin water users, not as between individual water users. The administrative scheme came about as a result of a stipulation resolving a dispute between upper basin and lower basin water users. See *Special Master's Report and Recommendation, Findings of Fact and Conclusions of Law, For General Provision in Basin 57 Designated as Basin-Wide Issue 5-57*, Subcase No. 91-0005-57 (Sept. 11, 2002), p.2. In addition, General Provision 2 also provided for a rotation process in low water years which had nothing to do with excess flows. This provision was not addressed in *ICL*.

If as argued by the United States *A & B* stands for the proposition that diversion of water in excess of decreed quantities cannot be authorized through a general provision then the Supreme Court would have summarily rejected a significant portion of General Provision 2 in *ICL* simply by deferring to the holding in *A & B*. Moreover, if there is no lawful means for authorizing the use of high flow water short of a water right then most of the general provision would have been rendered meaningless. To illustrate, in referring to the necessity of General Provision 2 in *ICL*, the Supreme Court determined:

This provision assures the efficient administration of the water rights because it avoids controversy among the water rights holders by clearly notifying them of the mechanism for the administration of excess water in the Reynolds Creek Basin.

ICL at 335, 955 P.2d at 1114. However, if the use of high flow water cannot be authorized through a general provision then the mechanism for administering the use of the water becomes irrelevant and ultimately unnecessary. Put differently, if the use of high flow water cannot be authorized through a general provision then there is no high flow water to administer. As such, this Court finds the argument that the Supreme Court upheld General Provision 2 because in addition to authorizing the use of high flow water it also provided a more particularized

methodology for administering the excess water to be unpersuasive. The methodology only pertained to administration as between upper and lower basin users to settle a historical dispute over the use and storage of excess water unique to the Reynolds Creek Basin. A similar historical dispute does not exist in the Lemhi Basin.

Finally, the holding in *A & B* must be given proper context. The recommended high flow general provision in *A & B* served a test case for the SRBA. Indeed the legal significance of the high flow general provision questioned by Judge Hurlbutt and was an issue of first impression. In this regard, the high flow general provisions at issue in *A & B* and *ICL* are distinguishable in one important aspect. The language of the high flow general provision in *ICL* expressly provided that the general provision was not intended to establish a water right. *See supra* § IV. C.1.a. This was not the case with the high flow general provision at issue in *A & B*. Accordingly, the legal significance of a general provision authorizing the use of high flow water (i.e. whether or not such a general provision established a water right) was an issue of first impression and squarely at issue in *A & B*. Following *A & B*, water users were put on notice that if the expectation of the general provision was to establish a water right then the general provision would be rejected as it was not the proper mechanism for creating or memorializing a water right.⁹ However, following the companion holding in *ICL*, if the expectation of the general provision was to authorize use of high flow water ancillary to an existing right but not amounting to a water right then a general provision may be appropriate.

Finally, the facts underlying *A & B* and *ICL* are also distinguishable in one other important aspect, although not relied on by the Supreme Court. General Provision 2 at issue in *ICL* was based on a decree entered in a prior general adjudication. The high flow general provision at issue in *A & B* had no connection to a prior decree but was instead based on the Department's finding of a historical practice. Although the Idaho Supreme Court in *A & B* and *ICL* did not appear to weigh in on the significance of the prior decree, under the facts of this case, the distinction is relevant to this Court's ruling. Prior decrees are binding on the parties to the prior adjudication as well as their successors-in-interest as to pre-decree circumstances. *State v. Hagerman Water Right Owners*, 130 Idaho 736, 740-41, 947 P.2d 409, 413-14 (1997). The

⁹ Presumably, however, individual water users would not have been precluded from pursuing individual beneficial use claims for high flow water if the right was properly claimed with all the required elements and provided no impediment was created by a prior decree. (The claim preclusive effect of a prior decree is discussed elsewhere in this opinion).

general provision recommended by the Special Master in this case, like General Provision 2 in *ICL*, was also based on a prior decree. In *ICL* and in this case, the general provision was part of a settlement ultimately memorialized in the prior decree. The Lemhi Adjudication, like the Reynolds Adjudication was a general adjudication. The significance of a general adjudication is that all water users on the adjudicated source are bound by the decree. However, when the water rights in the Lemhi Basin and in Reynolds Creek Basin were joined into the SRBA, water users holding rights outside of the jurisdiction of respective decrees would not be bound by the prior decrees. Following the holding in *ICL* upholding the lawfulness of the high flow general provision, to the extent no objections were filed by out-of-basin water users not bound by the prior decree, this Court would not be at liberty to disregard the interests created by the prior decree as concerns pre-decree circumstances. The issue was fully and fairly litigated in a prior general adjudication.¹⁰

In this case, *Objections* were filed by water users holding out-of-basin rights not bound by the *Lemhi Decree*. However, unlike the 294 individual high flow claims rejected by this Court earlier in this opinion, the general provision recommended by the Special Master is both consistent with the *Lemhi Decree* and as discussed separately in this opinion, due to its subordination to out-of-basin rights, the provision only has application within the Lemhi Basin.

3. The circumstances surrounding the rejection of the same high flow general provision based on the *Payette Decree* and other prior decrees are distinguishable.

In further support of the argument that the holding in *A & B* is controlling of the facts of this case, the United States also raised the argument that the SRBA Court rejected the identical high flow general provision that was included in the *Payette Decree*. The United States also notes that the SRBA did not decree similar high flow general provisions that were included in other prior decrees, including the *Burghardt Decree*, the *Bancroft-Lund Decree* and the *Basin Creek Decree*.

¹⁰ In *ICL*, objections were initially filed to General Provision 2 but were eventually resolved by stipulation in the SRBA. *ICL* at 333-34, 955 P.2d at 1112-13. Although in that case, despite the prior decree and the absence of objections, the SRBA District Court still rejected General Provision 2 by questioning among other things the lawfulness of authorizing such a use of water not amounting to a water right. However, at the time the legality of such a general provision was an issue of first impression. Subsequently, in *ICL* the Idaho Supreme Court upheld the use of such a general provision. The same uncertainty is not present in this case.

The United States is correct in its assertion that the SRBA Court failed to decree the identical high flow general provision included in the *Payette Decree*. However, the circumstances surrounding the general provisions for Basin 65 are distinguishable from the instant case. In that case, the Department recommended general provisions for Basin 65. A high flow general provision was among the various recommended general provisions. The recommendation was based on the identical high flow general provision included in the *Payette Decree*. Due to numerous issues with the various general provisions, the matter was assigned a subcase number and referred to a Special Master. In an attempt to narrow the proceedings, the Special Master issued a notice of his intent to not recommend the high flow general provision and the early and late season general provision and set the matter for hearing to hear objections, if any. Following proceedings on all of the various general provisions, the Special Master issued an *Amended Special Master's Report and Recommendation*, recommending all the general provisions for Basin 65 including the high flow general provision not be decreed in the SRBA. No motions to alter to amend or challenges to the *Special Master's Recommendations* were filed. Thereafter, the SRBA District Court entered a ***Partial Decree Pursuant to I.R.C.P. 54(b) for General Provisions in Basin 65*** consistent with the *Special Master's Recommendation*.

The Court does not find the action taken with respect to the general provision in Basin 65 to be precedential to this case. The parties to the subcase had numerous opportunities to contest the *Special Master's Recommendation* and because no such contests were made, the issue was never put squarely before the SRBA District Court. In the absence of any such contests the Court had no way of determining whether water users opted to pursue valid water rights for the use and/or storage of high flow water through the licensure procedure in lieu of relying on a general provision not amounting to a water right. The general provision in the *Payette Decree*, like the general provision in the *Lemhi Decree*, subordinated high flow use to existing and future water rights, thereby leaving high flow water subject to future appropriation. Unlike the Lemhi Basin, storage opportunities are available in the Payette Basin. Following the *A & B* decision, water users in the Payette Basin seeking a licensed right to use or store high flow water, despite having a post-decree priority date, would have a better right than relying on a high flow general provision. Presumably, if water users wanted to continue to rely on the high flow general provision they would have filed a motion to alter or amend the recommendation of the Special

Master. Since this did not occur, a reasonable interpretation is that the water users no longer elected to pursue the route of a high flow general provision.

The high flow general provisions from the *Burghardt Decree*, the *Bancroft-Lund Decree* and the *Basin Creek Decree* were never recommended by the Department in the SRBA and their absence was never contested. Accordingly, the issue was never put squarely before the Court. Although the resolution of general provisions in the SRBA has varied, each circumstance must be evaluated on a case-by-case basis.

For all of the above-stated reasons, this Court disagrees with the United States' assertion that the holding in *A & B* is exclusively controlling to the facts of this case. The holding in *A & B* is controlling to the extent it establishes that the high flow general provision does not create an interest on equal footing with a water right and therefore cannot be decreed as a water right. *A & B* must be read in conjunction with the holding in *ICL*, which upheld the use of a high flow general provision despite not amounting to a water right.

This conclusion leads directly to the next issue of whether the Special Master erred in subordinating the use of high flow water to all future and existing rights including those rights outside of the Lemhi Basin.

D. The Special Master did not err in subordinating the high flow use to all existing and future rights including those water rights not bound by the *Lemhi Decree*.

The general provision recommended by the Special Master subordinated the use of high flow water to all water rights whether located inside or outside of the Lemhi Basin. The relevant portion of the general provision from the *Lemhi Decree* provides the use of high flows is allowed, provided “(b) the existing quantified rights (including future appropriations of water) are first satisfied.” The LID and State of Idaho do not oppose the general provision recommended by the Special Master in its entirety but do oppose subordinating the use of high flow water to existing and future rights located outside of the Lemhi Basin. The LID and State of Idaho argue the plain language of the general provision in the *Lemhi Decree* establishes that the intent of the general provision was to limit the subordination to future and existing rights only within the Lemhi Basin. The LID and the State of Idaho argue the phrase “existing quantified rights” is a reference to those rights quantified in the *Lemhi Decree* and did not include rights outside of the Lemhi Basin. The LID and State of Idaho argue the intent of the

general provision was to authorize the use until such time as storage projects were ultimately constructed thereby eliminating the need for the general provision. Finally, the LID and State of Idaho further argue that because the jurisdiction of the Lemhi Adjudication was limited to water rights within the Lemhi Basin, the *Lemhi Decree* could have only applied to rights within the Basin. As such, the LID and State of Idaho argue the *Lemhi Decree* lacked jurisdiction to address water rights outside of the Basin. This Court finds these arguments to be unavailing.

This Court has already determined that the high flow general provision in the *Lemhi Decree*, based on its express language, was not intended to create a water right. *See discussion supra*. In *A & B*, the Idaho Supreme Court held as a matter of law that such a general provision does not create a water right. In *ICL*, the Idaho Supreme Court upheld the use of such a general provision, for among other reasons, that the general provision did not create a water right. Therefore, both factually and as matter of law, the high flow general provision in this case did not create a water right. The direct consequence of limiting the application of the subordination provision to water rights within the Lemhi Basin *de facto* elevates the status of the high flow use to that of a water right as between in-basin and out-of-basin water users. Since the use of high flow water does not create a water right high flows are therefore unappropriated water. The effect of limiting the subordination provision to in-basin users would make the otherwise unappropriated high flow water unavailable for appropriation by out-of-basin users. Further, limiting the subordination provision would also result in the users of high flow water acquiring a better interest in the water as against those out-of-basin users holding valid existing water rights.

Finally, despite the reference to the potential for future storage in the *Lemhi Decree*, because as a matter of law the high flow general provision does not create a water right, there would be no lawful basis for transferring the high flow use to a storage water right at some point in the future. However, high flow water users would not be precluded from appropriating storage water in the future through the permit and licensing process if high flow water still remained unappropriated. As such, subordinating the use of high flow water to out-of-basin water rights is consistent with both the law and the express terms of the general provision in the *Lemhi Decree*.

Next, because the *Lemhi Decree* lacked jurisdiction over out-of-basin water rights, the subordination of high flow use must be extended to apply to out-of-basin rights for precisely this reason. Since the general provision does not establish a water right, what the LID and State of

Idaho are seeking is to have the use of high flow water in the Lemhi Basin administered separately from downstream basins. The only way an effective separate administration provision could be adjudicated as between hydraulically connected basins would be through joining the downstream basins in the adjudication. This did not occur in the Lemhi Adjudication. Indeed it would be convenient if separate administration could be ordered without joining in the action all parties potentially impacted by the separate administration. The reason separate administration as between basins can be adjudicated in the SRBA is because the adjudication is comprehensive of all basins potentially affected by the separate administration. This was not the case in the Lemhi. Accordingly, to the extent the *Lemhi Decree* intended to order administration of high flow water separate from out-of-basin rights such as was beyond the jurisdiction of the Lemhi Adjudication.

Contrary to the arguments of LID and the State of Idaho, the Court does not read the subordination provision as attempting to adjudicate aspects of out-of-basin rights beyond the jurisdiction of the *Lemhi Decree*. Rather the Court interprets the effect of the provision as placing a limitation on the high flow use over which the *Lemhi Decree* had jurisdiction. The fact that the end result protects out-of-basin rights would not exceed the jurisdiction of the *Lemhi Decree*. For these reasons this Court concludes the Special Master did not err in recommending that the use of the high flow water be subordinate to all future and existing water rights as a matter of law.

Therefore, based on the holding in *ICL*, which upheld the use of a high flow general provision authorizing the use of high flow water based on historical practices; the fact that the recommended general provision is consistent with a prior decree entered in a general adjudication; and the subordination of the high flow use protects water rights not subject to the prior decree, this Court holds the Special Master did not err in recommending a general provision authorizing the use of high flow water in conjunction with existing rights based on the *Lemhi Decree*.

E. An evidentiary hearing is not required to determine whether the high flow general provision is necessary for the efficient administration of water rights.

The United States argues there is no evidence in the record to support a finding that the general provision is necessary for the efficient administration of water rights. Therefore, the

United States asserts the Court cannot decree the general provision without conducting an evidentiary hearing for purposes of making such a finding. This Court disagrees.

Significant to the Idaho Supreme Court's decision in *ICL* was that "there was testimony during the proceedings before the Special Master and district judge [in the SRBA] regarding historical practices in the Reynolds Creek Basin regarding 'excess' water, and the necessity of having such a general provision." *ICL* at 334, 955 P.2d at 1113. Unlike the *Reynolds Decree*, the *Lemhi Decree* included specific findings of fact, specifically findings of fact 7 and 14, regarding the historical practice of diverting high flow water in conjunction with existing claims and the purpose and necessity of the high flow use. *See discussion supra* § III.A. Put another way, it has already been judicially determined in a previous court proceeding that the high flow general provision is necessary for the efficient administration of water rights.¹¹ Since the Lemhi Adjudication was a general adjudication those findings are binding on all water users within the basin at least as to pre-decree conditions. Further, no party to the SRBA with a water right bound by the prior decree has contested the general provision. Water rights that are not bound by the prior decree are unaffected by the general provision.

In addition, the *Affidavit of Rick Sager* ("*Sager Aff.*") was filed in conjunction with the summary judgment proceedings. The *Sager Aff.* also sets forth the historical practice and discusses the purpose of using high flow water in the Lemhi Basin. Accordingly, this Court finds there is sufficient evidence in the record from which to make findings of historical practice and necessity to support the inclusion of the general provision.

¹¹ The SRBA District Court adopted a similar approach on remand from *State v. Nelson*, 131 Idaho 12, 951 P.2d 943 (1998), regarding the general provisions for Basin 34. In *Nelson*, the Idaho Supreme Court remanded to the SRBA District Court for further factual findings to determine whether the general provisions at issue were necessary for the efficient administration of a water right or necessary to define a water right. *Id.* at 17, 951 P.2d at 948. Although the parties to the subcase ultimately resolved the matter through a stipulation, without conducting an evidentiary hearing the Court conducted an independent review of the record to ensure there was a factual and legal basis to support the general provisions. As part of the review, the Court relied on findings made in two prior decrees regarding the necessity of the general provisions as well as the historical reliance on the method of administration. *Order of Partial Decree for General Provisions in Administrative Basin 34*, Subcase No. 91-00005-34 (May 9, 2001).

F. The high flow general provision is consistent with the terms of the Wild & Scenic Rivers Agreement.

The LID and State of Idaho argue that subordinating the use of high flow water to water rights outside of the Lemhi Basin violates the terms of the Wild & Scenic Rivers Agreement. In *Potlatch Corp. v. United States*, 134 Idaho 912, 12 P.3d 1256 (2000), the Idaho Supreme Court held that pursuant to the Wild and Scenic Rivers Act (16 U.S.C. § 1271 *et seq.*) the United States held valid federal reserved water rights for undetermined flows downstream on the Main Salmon River. The Supreme Court further held that the “minimum amount necessary to fulfill the purposes of the Wild & Scenic Rivers Act must be determined in further proceedings before the district court.” *Id.* at 916, 12 P.3d at 1260. On September 1, 2003, following litigation and mediation, the United States settled the Wild & Scenic claims through the Wild & Scenic Agreement, to which the State of Idaho and LID were parties.

In the Wild & Scenic Agreement, the United States agreed that water rights 75-13316 and 77-11941 on the Main Salmon River would not affect the administration of any existing water rights, including those located in the tributary Lemhi Basin as follows:

While this paragraph does not affect the present administration of existing water rights from tributary sources that are administered separately, all new water rights that are hydraulically connected with the Wild and Scenic Rivers federal reserved water right will be administered as a single source.

Wild & Scenic Agreement, p.3, ¶ 2.a

The State of Idaho and LID argue that because administration of the existing “base” rights in the Lemhi Basin includes the diversion and use of high flows that subordinating the use of the high flows to the Wild & Scenic Claims violates the terms of the Agreement. This Court disagrees.

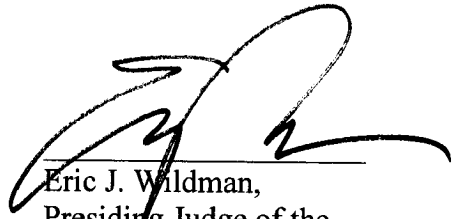
The authorized use of high flow water is part of the efficient administration of the “base” water rights in the Lemhi Basin. However, for the reasons previously explained, the “present administration” of high flow water both pursuant to the *Lemhi Decree* and as a matter of law necessarily includes the limitation that high flow use is subordinate to future and existing water rights. Further it would be inconsistent to interpret the Wild & Scenic Agreement as subjecting the use of unappropriated high flow water to separate administration but in the event the same water eventually became appropriated, then the new water right would be administered in

conjunction with the Wild & Scenic rights. Accordingly, the subordination provision does not violate the terms of the Wild & Scenic Agreement.

V.
CONCLUSION

For the above-stated reasons the ruling of the Special Master is *Affirmed*.

DATED: January 3, 2012




Eric J. Wildman,
Presiding Judge of the
Snake River Basin Adjudication

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED: January 3, 2012



Eric J. Wildman,
Presiding Judge of the
Snake River Basin Adjudication

EXHIBIT A - 294 "HIGH FLOW" CLAIMS

Subcase Nos:

74-15051	74-15132	74-15199	74-15278	74-15336	74-15398
74-15052	74-15133	74-15212	74-15279	74-15337	74-15399
74-15053	74-15134	74-15213	74-15280	74-15338	74-15400
74-15054	74-15135	74-15214	74-15281	74-15339	74-15401
74-15071	74-15136	74-15215	74-15282	74-15340	74-15402
74-15084	74-15137	74-15216	74-15283	74-15341	74-15403
74-15085	74-15138	74-15217	74-15284	74-15342	74-15404
74-15087	74-15139	74-15218	74-15285	74-15343	74-15405
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74-15106	74-15157	74-15252	74-15310	74-15367	74-15422
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74-15112	74-15163	74-15258	74-15316	74-15373	74-15428
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74-15118	74-15169	74-15264	74-15322	74-15384	74-15453
74-15119	74-15170	74-15265	74-15323	74-15385	74-15572
74-15120	74-15171	74-15266	74-15324	74-15386	74-15573
74-15121	74-15172	74-15267	74-15325	74-15387	74-15580
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74-15124	74-15183	74-15270	74-15328	74-15390	74-15583
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74-15126	74-15188	74-15272	74-15330	74-15392	
74-15127	74-15189	74-15273	74-15331	74-15393	
74-15128	74-15190	74-15274	74-15332	74-15394	
74-15129	74-15196	74-15275	74-15333	74-15395	
74-15130	74-15197	74-15276	74-15334	74-15396	
74-15131	74-15198	74-15277	74-15335	74-15397	

(Subcase list: HIGHCOMPLT)

1/03/12

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER ON CHALLENGE was mailed on January 03, 2012, with sufficient first-class postage to the following:

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NEZ PERCE TRIBAL EXEC COMM
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STATE OF IDAHO
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KARL TYLER CHEVROLET INC
LEADORE LAND PARTNERS LTD
LEADORE LAND PARTNERS LTD PART
Represented by:
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