6-28-2016

City of Blackfoot v. Spackman Clerk's Record Dckt. 44207

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

THE CITY OF BLACKFOOT,

Petitioner/Appellant,

v.

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

Respondents / Respondents,

A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY and TWIN FALLS CANAL COMPANY,

Intervenors / Respondents.

IN THE MATTER OF APPLICATION FOR PERMIT NO. 27-12261

In the name of the City of Blackfoot.

Supreme Court Docket No. 44207

Case No. CV-2015-1687

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bingham, reassigned to the

Honorable Eric J.Wildman
of the Fifth Judicial District[1].

APPEARANCES

Garrett H. Sandow, 220 N. Meridian, Blackfoot, Idaho, 83221, appearing for Petitioner-Appellant, City of Blackfoot

Robert L. Harris and **D. Andrew Rawlings**, Holden Kidwell Hahn & Crapo PLLC, 1000 Riverwalk Dr., Suite 200, PO Box 50130, Idaho Falls, Idaho, 83405, appearing for Petitioner-Appellant, City of Blackfoot.

Garrick L. Baxter, Deputy Attorney General, Idaho Department of Water Resources, PO Box 83720, Boise, Idaho,83720-0098, appearing for Respondents / Respondents, IDWR and Gary Spackman.

Paul L. Arrington, Travis L. Thompson, and **John K. Simpson,** Barker Rosholt & Simpson LLP, 163 2nd Ave W, PO Box 63, Twin Falls, Idaho, 83301-0063, appearing for Intervenors / Respondents, A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company and Twin Falls Canal Company.

W. Kent Fletcher, Fletcher Law Office, 1200 Overland Ave., PO Box 248, Burley, Idaho, 83318-0248, appearing for Intervenors / Respondents, Minidoka Irrigation District and American Falls Reservoir District #2.

[1] This matter was reassigned to this Court on October 26, 2015, by the Clerk of the Court for Bingham County, pursuant to *Idaho Supreme Court Administrative Order*, dated December 9, 2009.

ADMINISTRATIVE APPEAL SUMMARY REPORT
CV-2015-0001687

Return to Appeals Index

ADMINISTRATIVE APPEAL SUMMARY REPORT HTML19

06-24-2016

COURT CASE#: CV-2015-0001687
PETITIONER: CITY OF BLACKFOOT

IN THE MATTER OF APPLICATION FOR PERMIT NO. 27-12261 IN THE NAME OF THE CITY OF BLACKFOOT.

****** PARTIES INVOLVED ******

CITY OF BLACKFOOT	P	ATTY: SANDOW, GARRETT H
"		ATTY: ROBERT L HARRIS
"		ATTY: LUKE H MARCHANT
"		ATTY: RAWLINGS, D ANDREW
IDWR AND GARY SPACKMAN IN	R	ATTY: GARRICK L BAXTER
A&B IRRIGATION DISTRICT	I	ATTY: TRAVIS L THOMPSON
"		ATTY: PAUL L ARRINGTON
"		ATTY: JOHN K SIMPSON
BURLEY IRRIGATION DISTRICT	I	ATTY: TRAVIS L THOMPSON
"		ATTY: PAUL L ARRINGTON
"		ATTY: JOHN K SIMPSON
MILNER IRRIGATION DISTRICT	I	ATTY: TRAVIS L THOMPSON
"		ATTY: PAUL L ARRINGTON
"		ATTY: JOHN K SIMPSON
NORTH SIDE CANAL COMPANY	I	ATTY: TRAVIS L THOMPSON
"		ATTY: PAUL L ARRINGTON
"		ATTY: JOHN K SIMPSON
TWIN FALLS CANAL COMPANY	I	ATTY: TRAVIS L THOMPSON
"		ATTY: PAUL L ARRINGTON
"		ATTY: JOHN K SIMPSON
AMERICAN FALLS RESERVOIR	I	ATTY: W KENT FLETCHER
MINIDOKA IRRIGATION DISTRI	I	ATTY: W KENT FLETCHER

****** ROA ENTRIES ******

10-16-2015	NOTICE OF APPEAL AND PETITION FOR JUDICIAL REVIEW OF FINAL AGENCY RECORD		
10-21-2015	CERTIFICATE OF SERVICE		
10-26-2015	NOTICE OF REASSIGNMENT		
10-27-2015	PROCEDURAL ORDER GOVERNING JUDICIAL REVIEW OF FINAL ORDER OF DIRECTOR OF IDWR SETTLED RECORD AND TRANSCRIPT TO BE LODGED W/COURT BY: 12/08/15	ZB	12-08-2015 0500
10-27-2015	ORAL ARGUMENT: 03/10/16	HH	03-10-2016 0130
11-04-2015	SURFACE WATER COALITION'S NOTICE OF APPEARANCE		

11-10-2015	(FAX) NOTICE OF LODGING AGENCY RECORD AND TRANSCRIPT WITH THE AGENCY		
11-16-2015	ORDER TREATING APPEARANCE AS MOTION TO INTERVENE AND GRANTING SAME		
12-08-2015	ORDER SETTLING THE AGENCY RECORD AND TRANSCRIPT		
12-08-2015	NOTICE OF LODGING THE SETTLED AGENCY RECORD AND TRANSCRIPT WITH THE DISTRICT COURT		
12-08-2015	AGENCY'S CERTIFICATE OF RECORD		
01-12-2016	LODGED: PETITIONER'S OPENING BRIEF		
02-08-2016	(FAX) UNOPPOSED MOTION FOR EXTENSION OF TIME TO FILE RESPONDENTS' BRIEF	MG	02-08-2016
02-08-2016	(FAX) AFFIDAVIT OF MEGHAN CARTER IN SUPPORT OF UNOPPOSED MOTION FOR EXTENSION OF TIME TO FILE RESPONDENTS' BRIEF		
02-08-2016	ORDER GRANTING MOTION FOR EXTENSION OF TIME		
02-11-2016	RESPONDENTS' BRIEF		
02-11-2016	SURFACE WATER COALITION'S RESPONSE BRIEF		
03-03-2016	LODGED: PETITIONER'S REPLY BRIEF		
03-10-2016	HEARING HELD	HH	03-10-2016 0130
03-10-2016	MINUTES		
04-06-2016	MEMORANDUM DECISION AND ORDER		
04-06-2016	JUDGMENT	5B	05-18-2016
05-16-2016	NOTICE OF APPEAL		05-16-2016
06-23-2016	NOTICE OF LODGING (OF TRANSCRIPT)		

Return to Appeals Index

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Attorneys for the City of Blackfoot

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

THE CITY OF BLACKFOOT,

Petitioner,

v.

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

Respondents.

IN THE MATTER OF APPLICATION FOR PERMIT NO. 27-12261

In the name of the City of Blackfoot.

Case No. CV-2015-1687

Fee Category L.3.a – $221.00

NOTICE OF APPEAL AND PETITION FOR JUDICIAL REVIEW OF FINAL AGENCY ACTION

Petitioner, the City of Blackfoot, by and through its above-listed counsel of record files this *Notice of Appeal and Petition for Judicial Review of Final Agency Action* challenging a decision by the Idaho Department of Water Resources issued by its director, pursuant to Idaho Code §§ 42-1701A(4), 67-5270, and 67-5279.

STATEMENT OF THE CASE

1. This is a civil action pursuant to Idaho Code §§ 42-1701A(4), 67-5270, and 67-5279 seeking judicial review of the *Order Addressing Exceptions and Denying Application for Permit*, issued by the Director of the Idaho Department of Water Resources, Gary Spackman, ("Director") on September 22, 2015.

2. To aid in the construction of Interstate 15, the City of Blackfoot (the "City") allowed the Federal Highway Administration to relocate a portion of the Snake River to avoid construction of certain bridges. This created a gravel pit, known as Jensen's Grove, in the former location of a portion of the Snake River channel.

3. Decades later, with federal assistance, the City was able to purchase a water right, Water Right No. 01-181C (hereinafter, simply "01-181C"), in order to turn Jensen's Grove into a recreation area with a 73-acre lake that is filled with water beginning in the spring of each year.

4. In 2005, the City filed a transfer application, administratively numbered as Transfer No. 72385 (hereinafter, simply "72385"), to amend 01-181C. A group of canal companies and irrigation districts known as the Surface Water Coalition (the "Coalition") protested. In June 2006, the City and the Coalition agreed to resolve the Coalition's protest pursuant to a *Settlement Agreement, IDWR Transfer of Water Right, Transfer No. 72385, June*

2006 (the "Agreement"). In February 2007, the Department of Water Resources approved 72385, incorporating the Agreement into the approval.

5. In relevant part, 01-181C allows the City to divert a total of 2,266.8 AF for recreation storage. Of that total amount, 1,100 AF is stored in Jensen's Grove during its season of use (which must be refilled before each season of use), 980.8 AF accounts for seepage losses during the season of use, and 186 AF makes up for losses from evaporation during the season of use.

6. Thus, the City contends that a total of 2,080.8 AF enters the aquifer as ground water recharge annually—comprised of the 980.8 AF of seepage during the season of use and 1,100 AF that fills Jensen's Grove but seeps into the aquifer in the months after each season of use.

7. On September 12, 2013, the City submitted an application for permit to the Idaho Department of Water Resources (the "Department") which was administratively numbered as 27-12261 (hereinafter, simply ("27-12661"). The application was amended on September 2, 2014, and January 27, 2015. By submitting 27-12261, the City is seeking a water right permit to develop 9.71 cfs of ground water for the irrigation of 524.2 acres by relying on the mitigation provided by the 2,080.8 AF of ground water recharge described above.

8. The Coalition protested 27-12261.

9. The Department's Hearing Officer conducted a hearing on April 21, 2015. Thereafter, the Hearing Officer allowed post-hearing briefs on the question of whether there was a legal impediment to using water right 01-181C in a mitigation plan for the proposed permit.

10. On June 30, 2015, the Hearing Officer issued a *Preliminary Order Issuing Permit*, which issued the permit, 27-12261, with certain restrictions (the "*Preliminary Order*"). In reaching that conclusion, the Hearing Officer considered 01-181C, as amended, and the Agreement. The Hearing Officer approved the issuance of a permit for 01-181C, but also required that the City file a transfer application to amend 01-181C to allow for it to be used for ground water recharge.

11. The City filed exceptions to the *Preliminary Order* on July 14, 2015 with the Director. The City challenged two of the *Preliminary Order*'s Findings of Fact, several points of Evaluation Criteria/Analysis, and the Conclusions of Law. The Coaltion responded on July 28, 2015.

12. On September 22, 2015, the Director issued the *Order Addressing Exceptions and Denying Application for Permit* (the "*Final Order*"). The *Final Order* reversed the *Preliminary Order* by denying issuance of a permit for 27-12261, and surprisingly, did not consider or interpret the Agreement at all.

13. The Final Order is the subject of this *Notice of Appeal and Petition for Judicial Review of Final Agency Action.*

JURISDICTION AND VENUE

14. This petition is authorized by Idaho Code §§ 42-1701A(4), 67-5270, and 67-5279.

15. This Court has jurisdiction over this action pursuant to Idaho Code §§ 42-1701A(4) and 67-5272.

16. Venue lies in this Court pursuant to Idaho Code § 67-5272 because the City of Blackfoot is located in and does business in Bingham County, Idaho.

17. Pursuant to the Idaho Supreme Court's Administrative Order issued on December 9, 2009, "all petitions for judicial review of any decision regarding administration of water rights from the Department of Water Resources shall be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District." The Snake River Basin Adjudication District Court's procedures instruct the clerk of the district court in which the petition is filed to issue a *Notice of Reassignment*. Blackfoot has attached a copy of the Snake River Basin Adjudication District Court's *Notice of Reassignment* form for the convenience of the clerk.

18. The Director's *Order Addressing Exceptions and Denying Application for Permit*, dated September 22, 2015, is a final agency action subject to judicial review pursuant to Idaho Code § 67-5270(3).

PARTIES

19. Petitioner, City of Blackfoot, is an incorporated city, located in Bingham County, Idaho, provides water to its residents, and is the applicant for Permit No. 27-12261.

20. Respondent, Gary Spackman, is the Director of the Idaho Department of Water Resources, and a resident of Ada County, Idaho.

21. Respondent, Idaho Department of Water Resources, is an executive department existing under the laws of the state of Idaho pursuant to Idaho Code § 42-1701, *et seq.*, with its state office located at 322 E. Front Street, Boise, Ada County, Idaho.

STATEMENT OF INITIAL ISSUES

22. Petitioner intends to assert the following initial issues on judicial review:

a. Whether the Director erred in a manner described in Idaho Code § 67-5279(3) by failing to consider the *Settlement Agreement, IDWR Transfer of Water Right, Transfer No. 72385, June 2006,* as an element of Water Right No. 01-181C.

b. Whether the Director erred in a manner described in Idaho Code § 67-5279(3) by not engaging in contractual interpretation of the *Settlement Agreement, IDWR Transfer of Water Right, Transfer No. 72385, June 2006.*

c. Whether the Director erred in a manner described in Idaho Code § 67-5279(3) by concluding that "[n]othing in Transfer No. 72[3]85 [sic] or the Partial Decree issued by the Snake River Basin Adjudication indicate Right 01-181C can be used for ground water recharge." *Final Order* at 2. Stated another way, whether the City gave away its ability to use 01-181C to mitigate for 27-12261 when it entered into the *Settlement Agreement, IDWR Transfer of Water Right, Transfer No. 72385, June 2006.*

d. Whether the Director erred in a manner described in Idaho Code § 67-5279(3) by concluding that the City must file a transfer if it wants to use 01-181C for mitigation purposes. *Final Order* at 2.

e. Whether the Director erred in a manner described in Idaho Code § 67-5279(3) by determining that "any recharge to the aquifer achieved by diversion and use under Right 01-181C, is merely incidental recharge [under Idaho Code § 42-234(5)] and cannot be 'used as a basis for claim of a separate or expanded water right.'"

f. Whether questions of injury to the Coalition's water rights were already addressed in the contested case, and therefore, under principles of res judicata, the City should not be required to file a transfer application to permit the Coalition to have a second opportunity to raise injury arguments.

g. Whether the Director's actions prejudiced a substantial right of the City.

AGENCY RECORD

23. Judicial Review is sought of the Director's *Order Addressing Exceptions and Denying Application for Permit*, dated September 22, 2015.

24. The Department held a hearing in this matter on April 21, 2015, which was recorded, and the recording should be made a part of the agency record in this matter. The person who has a digital copy of the hearing is Sharla Cox, Idaho Department of Water Resources, 900 North Skyline Drive, Suite A, Idaho Falls, ID 83402-1718, Telephone: (208) 525-7161, Facsimile: (208) 525-7177, Email: sharla.cox@idwr.idaho.gov. Counsel for the City hereby certifies that the City contacted Ms. Cox to verify that she has the recording. In accordance with I.R.C.P. 84(g), the City has contacted M&M Court Reporting at the direction of the agency clerk to obtain an estimate of the cost to prepare the transcript. The estimated cost is Two Hundred Dollars ($200.00), and the City certifies that a check has been sent to M&M Court Reporting, 101 S. Capitol Blvd., Suite 503, Boise, ID 83702 on October 16, 2015, as the estimated cost for preparing the transcript in this matter, and will pay the actual cost of the transcript if it is determined to be more than the estimated cost.

25. Petitioner anticipates it can reach a stipulation regarding the agency record with the Respondents and any intervenors, and will pay its necessary share of the fee for preparation of the record at such time.

26. Service of this Petition for Judicial Review has been made on the Respondents as they exist at the time of the filing of this Petition.

Dated this 16 day of October 2015.

Garrett Sandow
Attorney for City of Blackfoot

FOR

Robert L. Harris
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys and/or individuals listed below, by the method indicated, a true and correct copy thereof on this 16 day of October 2015.

Document Served: NOTICE OF APPEAL AND PETITION FOR JUDICIAL REVIEW OF FINAL AGENCY ACTION

Attorneys and/or Individuals Served:

Paul L. Arrington
BARKER, ROSHOLT & SIMPSON, LLP
195 River Vista Place, Suite 204
Twin Falls, Idaho 83301-3027
pla@idahowaters.com

(X) Mail
( ) Hand Delivery
( ) Facsimile, (208) 735-2444
( ) Courthouse Box

W. Kent Fletcher
FLETCHER LAW OFFICE
P.O. Box 248
Burley, Idaho 83318-0248
wkf@pmt.org

(X) Mail
( ) Hand Delivery
( ) Facsimile, (208) 878-2548
( ) Courthouse Box

Courtesy Copy:

Snake River Basin Adjudication District Court
of the Fifth Judicial District
P.O. Box 2707
Twin Falls, Idaho 83303-2707

(X) Mail
( ) Hand Delivery
( ) Facsimile
( ) Courthouse Box

Garrett Sandow
Attorney for City of Blackfoot

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

THE CITY OF BLACKFOOT, Petitioner, -vs- GARY SPACKMAN, in his capacity as Director of the Idaho Department of Water Resources, and THE IDAHO DEPARTMENT OF WATER RESOURCES, Respondent. IN THE MATTER OF APPLICATION FOR PERMIT NO. 27-12261 In the name of the City of Blackfoot.	**Case No. CV-2015-1687** **CERTIFICATE OF SERVICE**

I, PAMELA W. ECKHARDT, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bingham, do hereby certify I served a true copy of the this Court's file in the above-entitled case on the person(s) listed below in the manner indicated:

Snake River Basin Adjudication District Court
Fifth Judicial District
PO Box 2707
Twin Falls, ID 83303-2707

☒ U.S. Mail

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Blackfoot, Idaho, this 21st day of October 2015.

PAMELA W. ECKHARDT,
Clerk of the District Court

Brandee Cammack
Deputy Clerk

DISTRICT COURT SEVENTH JUDICIAL DISTRICT STATE OF IDAHO BINGHAM COUNTY

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of October, 2015, I served a true copy of the foregoing document to the person(s) listed below in the manner indicated:

PAUL L. ARRINGTON, ESQ.
BARKER, ROSHOLT & SIMPSON, LLP
195 RIVER VISTA PLACE, SUITE 204
TWIN FALLS, ID 83301-3027

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ROBERT L. HARRIS, ESQ.
LUKE H. MARCHANT, ESQ.
D. ANDREW RAWLINGS, ESQ.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
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lmarchant@holdenlegal.com;
arawlings@holdenlegal.com

GARRETT H. SANDOW, ESQ.
220 N. MERIDIAN
BLACKFOOT, IDAHO 83221

☐ U.S. Mail
☒ Designated Courthouse Box

PAMELA W. ECKHARDT,
Clerk of the Court

Brandee Cammack
Deputy Clerk

DISTRICT COURT SEVENTH JUDICIAL DISTRICT STATE OF IDAHO BINGHAM COUNTY

IN THE DISTRICT COURT OF THE SEVENTH DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

THE CITY OF BLACKFOOT, Petitioner, v. GARY SPACKMAN, in his capacity as Director of the Idaho Department of Water Resources, and THE IDAHO DEPARTMENT OF WATER RESOURCES, Respondent.	Case No. CV 2015-1687 **NOTICE OF REASSIGNMENT**
IN THE MATTER OF APPLICATION FOR PERMIT NO. 27-12261 In the name of the City of Blackfoot.	

WHEREAS Idaho Supreme Court Administrative Order dated December 9, 2009, declares that all petitions for judicial review made pursuant to I.C. § 42-1701A of any decision from the Department of Water Resources be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District, and

WHEREAS Idaho Supreme Court Administrative Order dated December 9, 2009, vests in the Snake River Basin Adjudication District Court the authority to adopt procedural rules necessary to implement said Order, and

WHEREAS on July 1, 2010, the Snake River Basin Adjudication District Court issued an Administrative Order regarding the Rule of Procedure Governing Petitions for Judicial Review or Actions for Declaratory Relief of Decisions from the Idaho Department of Water Resources.

THEREFORE THE FOLLOWING ARE HEREBY ORDERED:

1. The above-matter is hereby assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District for disposition and further proceedings.

2. All further documents filed or otherwise submitted in this matter, and all further filing fees filed or otherwise submitted in this matter, shall be filed with the Snake River Basin Adjudication District Court of the Fifth Judicial District at P.O. Box 2707, Twin Falls, Idaho 83303-2707, provided that checks representing further filing fees shall be made payable to the county where the original petition for judicial review or action for declaratory judgment was filed.

DATED this 21st day of October 2015.

CLERK OF THE COURT

By: Brandee Cammack
Deputy Clerk

DISTRICT COURT SEVENTH JUDICIAL DISTRICT STATE OF IDAHO BINGHAM COUNTY

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the NOTICE OF REASSIGNMENT on the attorneys and/or individuals listed below, by the method indicated, on this 21st day of October 2015.

Paul L. Arrington BARKER, ROSHOLT & SIMPSON, LLP 195 River Vista Place, Suite 204 Twin Falls, Idaho 83301-3027 pla@idahowaters.com	( ) Mail ( ) Hand Delivery ( ) Facsimile, (208) 735-2444 (X) Email
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, Idaho 83318-0248 wkf@pmt.org	( ) Mail ( ) Hand Delivery ( ) Facsimile, (208) 878-2548 (X) Email
Robert L. Harris Luke H. Marchant D. Andrew Rawlings HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C. P.O. Box 248 Burley, Idaho 83318-0248 rharris@holdenlegal.com lmarchant@holdenlegal.com arawlings@holdenlegal.com	( ) Mail ( ) Hand Delivery ( ) Facsimile, (208) 523-9518 (X) Email
Garrett H. Sandow, ISB # 5215 220 N. Meridian Blackfoot, Idaho 83221 Telephone: (208) 785-9300 Facsimile: (208) 785-0595	( ) Mail ( ) Hand Delivery (X) Facsimile, (208) 785-0595 ( ) Email
Snake River Basin Adjudication District Court of the Fifth Judicial District P.O. Box 2707 Twin Falls, Idaho 83303-2707	(X) Mail ( ) Hand Delivery ( ) Facsimile ( ) Courthouse Box

CLERK OF THE COURT

By: Brandee Cammack
Deputy Clerk

DISTRICT COURT SEVENTH JUDICIAL DISTRICT STATE OF IDAHO BINGHAM COUNTY

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

THE CITY OF BLACKFOOT, Petitioner, vs. GARY SPACKMAN, in his official capacity as Director of the Idaho Department of Water Resources, and THE IDAHO DEPARTMENT OF WATER RESOURCES Respondents. IN THE MATTER OF APPLICATION FOR PERMIT NO. 27-12261 In the name of the City of Blackfoot.	Case No. CV-2015-1687 **PROCEDURAL ORDER GOVERNING JUDICIAL REVIEW OF FINAL ORDER OF DIRECTOR OF IDAHO DEPARTMENT OF WATER RESOURCES**

A *Petition for Judicial Review* was filed in the above-entitled district court seeking judicial review of a final order issued by the Director of the Idaho Department of Water Resources ("Department" or "agency"). This *Order*, together with Rule 84, Idaho Rules of Civil Procedure, (I.R.C.P.), applicable statutes and the *Administrative Order Adopting Procedures for the Implementation of the Idaho Supreme Court Administrative Order Dated December 9, 2009*[1] issued by this Court on July 1, 2010, govern all proceedings before the Court.

[1] A copy is attached to this *Order*.

THEREFORE, THE FOLLOWING ARE HEREBY ORDERED:

1. **Petition for Judicial Review and Reassignment of Case**: The *Petition for Judicial Review* was filed on October 16, 2015. The case was reassigned by the clerk of the court to this Court on October 21, 2015.

2. **Cross Petitions, Filing Fees, and all Subsequent Filings**: All further documents, including cross petitions, filed, lodged or otherwise submitted, and all further filing fees filed or otherwise submitted, shall be filed with the Snake River Basin Adjudication District Court of the Fifth Judicial District at P.O. Box 2707, Twin Falls, Idaho 83303-2707, **provided** that checks representing further filing fees shall be made payable to the county where the original petition for judicial review or action for declaratory judgment was filed.

3. **Appearances by persons or entities who were a party to the underlying administrative proceeding but who were not made a named party in the *Petition for Judicial Review***: Where a person or entity who was a party to the underlying administrative proceeding is not made a named party in the *Petition for Judicial Review*, and is not otherwise a Petitioner, such person or entity may file a *Notice of Appearance* in this matter within fourteen (14) days from the issuance of this *Procedural Order*. This Court will treat the *Notice of Appearance* as a *Motion to Intervene* and will treat the party filing the *Notice of Appearance* as an Intervenor.[2] Under such circumstances, the Court will automatically issue an order granting the *Motion to Intervene* unless one or more parties to the action files an opposition to the *Motion* within 10 days of the filing of the *Notice of Appearance*. A person or entity not a party to the underlying administrative proceeding who desires to participate in this action, and is not otherwise a Petitioner, must proceed in accordance with Idaho Appellate Rule 7.1.

4. **Assigned Case Number and Document Footers**: All documents filed, lodged or submitted shall be under the above-captioned case number and county of origin appearing in caption. All documents filed, lodged or otherwise submitted, including attachments shall include a footer at the bottom of the document describing said document.

5. **Stays**: Unless provided for by statute, the filing of a petition or cross petition does not automatically stay the proceedings and enforcement of the action before the Department. I.C. § 67-5274. Any application or motion for stay must be made in accordance with I.R.C.P. 84(m).

6. **Form of Review**: Pursuant to I.R.C.P. 84(e)(1), when judicial review is authorized by statute, judicial review shall be based upon the record created before the Department rather than as a trial de novo, unless the statute or the law provides for the procedure or standard. If the statute provides that the district court may take additional evidence upon judicial review, it may order the same on its own motion or the motion of any party. If the

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[2] The parties should note that in such instances the Court will treat the *Notice of Appearance* as a *Motion to Intervene* for housekeeping purposes. In doing so, it is the Court's intent to have the record in this matter clearly reflect which persons and/or entities are participants in this action. It is also the Court's intent to have the caption of this matter properly reflect all those parties who are participating in this action and to identify in what capacity those parties are participating (i.e., Petitioner, Respondent, or Intervenor).

statute provides that review is de novo, the appeal shall be tried in the district court on any and all issues, on a new record. Pursuant to I.R.C.P. 84(e)(2), the scope of review on petition from the Department to the district court shall be as provided by statute.

7. **Preparation of Agency Record; Payment of Fees**: Pursuant to I.R.C.P. 84(f), when the statute provides what shall be contained in the official record of the agency upon judicial review, the Department shall prepare the record as provided by statute. Otherwise, the documents listed in paragraph (3) of I.R.C.P. 84(f) shall constitute the agency record for review. Petitioner (and cross-petitioner) shall pay all fees as required for preparation of the agency record in accordance with I.R.C.P. 84(f)(4). **The clerk of the Department shall lodge the record with the Department within 14 days of the entry of this *Order*, or no later than November 10, 2015.** Any extension in time for preparation of the agency record shall be applied for by the agency to the district court.

8. **Preparation of Transcript; Payment of Fee**: The Court requires the provision of a written transcript prepared from the recorded or reported proceedings. It is the responsibility of the petitioner (or cross-petitioner as the case may be) to timely arrange and pay for preparation of all portions of the transcript reasonably necessary for review. Pursuant to I.R.C.P. 84(g), the responsible party shall contact the agency clerk to determine the estimated cost of the transcript, and pay the estimated cost in accordance with I.R.C.P. 84(g)(1)(A) or (2)(A) as the case may be. **The transcript shall be lodged with the Department within 14 days of the entry of this *Order*, or no later than November 10, 2015.** The transcriber may apply to the district court for an extension of time, for good cause shown.

9. **Settlement of Transcript and Record**: Pursuant to I.R.C.P. 84(j), and unless otherwise provided by statute, upon receipt of the transcript and upon completion of the record, the Department shall mail or deliver notice of lodging of transcript and record to all attorneys of record or parties appearing in person and to the district court. The parties shall have 14 days from the date of mailing of the notice to pick up a copy of the transcript and agency record and to object to the transcript or record. All fees for the preparation of the transcript and record shall be paid by the responsible party at or before the pick-up of the agency record and transcript. Any objection to the record shall be determined by the Department within 14 days of the receipt of the objection and the decision on the objection shall be included in the record on petition for review. Upon the failure of the party to object within 14 days, the transcript and record shall be deemed settled. The settled record and transcript shall be lodged with the district court no later than **December 8, 2015.**

10. **Lodging of Transcript and Record in Electronic Format**: In addition to lodging the settled transcript and agency record in paper format, the Department shall also lodge the transcript and agency record in electronic format (pdf version ocr 8) on CD-ROM. (In the event of an appeal from the district court it is the intent that the electronic version of the transcript and clerk's record be provided to the Idaho Supreme Court in lieu of paper format).

11. **Augmentation of the Record – Additional Evidence Presented to District Court – Remand to Agency to Take Additional Evidence**: Pursuant to I.R.C.P. 84(l) the agency record and/or transcript on review may be augmented upon motion to this court by a

party within 21 days of the filing of the settled transcript and record in the manner prescribed by Idaho Appellate Rule (I.A.R.) 30. The taking of additional evidence by the district court and/or agency on remand shall be governed by statute or I.R.C.P. 84(l).

12. **Briefs and Memoranda**: The petitioner's brief shall be filed with the clerk of the court within 35 days after lodging of the transcript and record. The respondent's (and cross-petitioner's brief) shall be filed within 28 days after service of petitioner's brief. Any reply brief shall be filed within 21 days after service of respondent's brief. The organization and content of briefs shall be governed by I.A.R. 35 and 36. Pursuant to I.R.C.P. 84(p) only one (1) original signed brief may be filed with the court and copies shall be served on all parties.

13. **Extension of Time**: Motions to extend the time for filing a brief or modify order of briefing shall be submitted in conformity with I.A.R. 34(e). All other requests for extension of time shall be submitted in conformity with I.A.R. 46.

14. **Motions**: All motions shall be submitted in conformity with I.R.C.P. 84(o) and shall be heard without oral argument unless ordered by the Court.

15. **Oral Argument, Telephonic and Video Teleconferencing**: Oral argument will be heard **March 10, 2016, at 1:30 p.m. (Mountain Time)** at the Snake River Basin adjudication District Court, 253 3rd Avenue North, Twin Falls, Idaho. Telephone participation will be available by dialing 1-720-279-0026 and entering 786692# when prompted. **However, no cell phones or speaker phones will be permitted as they interfere with our sound system making the proceeding difficult to accurately record.** Video teleconferencing ("VTC") will also be available by appearing at either (1) the Idaho Department of Water Resources, Idaho Water Center, 322 E. Front St., Conference Rm. B, Boise, Idaho, or (2) the Idaho Department of Water Resources, Eastern Regional Office, 900 N. Skyline Drive, Ste. A, Idaho Falls, Idaho. Parties should refer to the *Administrative Order Adopting Procedures for the Implementation of the Idaho Supreme Court Administrative Order Dated December 9, 2009* regarding protocol for telephone and VTC participation. The form and order of argument shall be governed by I.A.R. 37.

16. **Judgment or Decision**: The Court's decision will be by written memorandum as required by I.R.C.P. 84(t)(1). In compliance with I.R.C.P. 54(a), as amended effective July 1, 2010, a separate judgment will also issue contemporaneously therewith. Pursuant to I.R.C.P. 84(t)(2), if no petition for rehearing is filed the time for appeal to the Idaho Supreme Court shall begin to run after the date of the filing stamp of the clerk of the court appearing on the judgment. If a petition for rehearing is filed, the time for appeal shall begin to run after the date of the filing stamp of the clerk of the court appearing on either an order denying rehearing or on any modified judgment.

17. **Petitions for Rehearing:** Petitions for rehearing shall be governed by the time standards and procedures of I.A.R. 42. If rehearing is granted, the Court will issue an order granting same and setting forth a briefing schedule for responsive briefing, a reply, and oral argument. Unless otherwise ordered, the brief filed in support of rehearing will be treated as the opening brief. Scenario

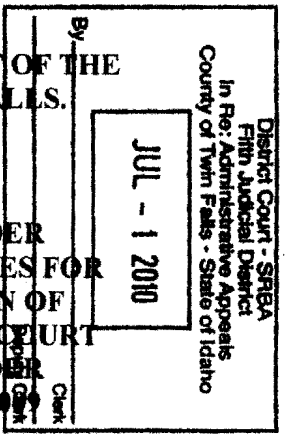
18. **Remittitur**: If no notice of appeal to the Idaho Supreme Court is filed within forty-two (42) days after filing of the Court's written decision, the clerk shall issue a *remittitur* remanding the matter to the agency as provided in I.R.C.P. 84(t)(4). The Court will then notify the clerk of the district court where the petition was originally filed regarding completion of the case.

19. **Failure to Comply**: Failure by either party to timely comply with the requirement of this ***Order*** or applicable provisions of the Idaho Rules of Civil Procedure or Idaho Appellate Rules, if applicable, shall be grounds for imposition of sanctions, including, but not limited to the allowance of attorney's fees, striking of briefs, or dismissal of the appeal pursuant to I.R.C.P. 11 and 84(n) and I.A.R. 11.1 and 21.

Dated October 27, 2015

ERIC J. WILDMAN
District Judge

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



RE: RULES OF PROCEDURE GOVERNING PETITIONS FOR JUDICIAL REVIEW OR ACTIONS FOR DELCARATORY JUDGMENT OF DECISIONS FROM THE IDAHO DEPARTMENT OF WATER RESOURCES	)	**ADMINISTRATIVE ORDER ADOPTING PROCEDURES FOR THE IMPLEMENTATION OF THE IDAHO SUPREME COURT ADMINISTRATIVE ORDER DATED DECEMBER 9, 2009**

WHEREAS Idaho Supreme Court Administrative Order dated December 9, 2009, declares that all petitions for judicial review made pursuant to Idaho Code § 42-1701A of any decision from the Department of Water Resources be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District, and

WHEREAS Idaho Supreme Court Administrative Order dated December 9, 2009, vests in the Snake River Basin Adjudication District Court of the Fifth Judicial District the authority to adopt procedural rules necessary to implement said Order.

THEREFORE THE FOLLOWING ARE HEREBY ORDERED:

1. Filing of Petition for Judicial Review or Declaratory Judgment Action. Pursuant to Idaho Code § 67-5272(1), any party filing a petition for judicial review pursuant to Idaho Code § 42-1701A, or an action for declaratory judgment, of any decision from the Department of Water Resources shall file the same, together with applicable filing fees, in the district court of the county in which:

(a) the hearing was held; or

(b) the final agency action was taken; or

(c) the aggrieved party resides or operates its principal place of business in Idaho; or

(d) the real property or personal property that was the subject of the agency decision is located.

The filing party shall also serve a courtesy copy of the petition for judicial review or action for declaratory judgment with the Snake River Basin Adjudication District Court of the Fifth Judicial District at P.O. Box 2707, Twin Falls, Idaho 83303-2707. Upon receipt by the Department of Water Resources of a petition for judicial review or action for declaratory

judgment, the Department shall review the certificate of mailing and in the event it does not show that a courtesy copy of the same was filed with the Snake River Basin Adjudication District Court, then the Department shall forthwith forward a copy of the petition or action for declaratory judgment to the Snake River Basin Adjudication District Court of the Fifth Judicial District at P.O. Box 2707, Twin Falls, Idaho 83303-2707.

2. **Reassignment.** Upon the filing of a petition for judicial review pursuant to Idaho Code § 42-1701A, or an action for declaratory judgment, of any decision from the Department of Water Resources, the clerk of the district court where the action is filed shall forthwith issue, file, and concurrently serve upon the Department of Water Resources and all other parties to the proceeding before the Department of Water Resources, an *Notice of Reassignment* (copy attached hereto), assigning the matter to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District for disposition and further proceedings.

Also upon issuance of the *Notice of Reassignment*, the clerk of the district court where the action is filed shall forward a copy of the file to the clerk of the Snake River Basin Adjudication District Court of the Fifth Judicial District at P.O. Box 2707, Twin Falls, Idaho 83303-2707.

3. **Case Number.** All cases assigned to the Snake River Basin Adjudication District Court of the Fifth Judicial District as described herein shall retain the case number and caption assigned to them by the district court where the petition for judicial review or action for declaratory judgment is originally filed.

4. **Subsequent Filings.** Following the issuance of the *Notice of Reassignment*, all further documents filed or otherwise submitted, and all further filing fees filed or otherwise submitted, shall be filed with the Snake River Basin Adjudication District Court of the Fifth Judicial District at P.O. Box 2707, Twin Falls, Idaho 83303-2707, provided that checks representing further filing fees shall be made payable to the county where the original petition for judicial review or action for declaratory judgment was filed.

5. **Lodging of Transcript and Record.** Following the preparation and settlement of the agency transcript and record, the Department of Water Resources shall transmit the settled transcript and record, in both paper and electronic form on CD ROM, to the clerk of the Snake River Basin Adjudication District Court of the Fifth Judicial District at P.O. Box 2707, Twin

Falls, Idaho 83303-2707 within forty-two (42) days of the service of the petition for judicial review or action for declaratory judgment.

6. Participation in Hearings by Telephone and Video Teleconferencing (VTC). Unless otherwise ordered by the Snake River Basin Adjudication District Court of the Fifth Judicial District, telephone participation and/or VTC will be allowed in all hearings, except as follows:

(a) The court may require in person or VTC attendance as circumstances may require.

(b) The court's notice setting hearing will specify participation restrictions, telephone conferencing numbers and participant codes and/or location of regional VTC facilities.

(c) Speakerphones and cell phones often pick up background noise and/or cause interference with sensitive courtroom equipment. Therefore, the use of speakerphones and cell phones are discouraged.

(d) Place your call to the court a few minutes prior to the scheduled start of your hearing so that the clerk of the court may identify who is participating by telephone.

7. Resolution. This court will notify the clerk of the district court where the petition for judicial review or action for declaratory judgment was originally filed of the completion of the case upon the happening of either:

(a) the expiration of the time to appeal any decision of this court if no appeal to the Idaho Supreme Court is filed; or

(b) the filing of the remittitur from the Idaho Supreme Court or Idaho Court of Appeals with this court in the event that an appeal to the Idaho Supreme Court is timely filed following a decision of this court.

8. Other Procedural Rules. Any procedure for judicial review not specified or covered by this Order shall be in accordance with Idaho Rule of Civil Procedure 84 to the extent the same is not contrary to this Order.

DATED this 1 day of July, 2010.

ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF _____.

RE: PETITIONS FOR JUDICIAL REVIEW OR ACTIONS FOR DECLARATORY RELIEF OF DECISIONS FROM THE IDAHO DEPARTMENT OF WATER RESOURCES	)	**CASE NO. _____**
	)	**NOTICE OF REASSIGNMENT**

WHEREAS Idaho Supreme Court Administrative Order dated December 9, 2009, declares that all petitions for judicial review made pursuant to I.C. § 42-1701A of any decision from the Department of Water Resources be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District, and

WHEREAS Idaho Supreme Court Administrative Order dated December 9, 2009, vests in the Snake River Basin Adjudication District Court the authority to adopt procedural rules necessary to implement said Order, and

WHEREAS on July 1, 2010, the Snake River Basin Adjudication District Court issued an Administrative Order regarding the Rule of Procedure Governing Petitions for Judicial Review or Actions for Declaratory Relief of Decisions from the Idaho Department of Water Resources.

THEREFORE THE FOLLOWING ARE HEREBY ORDERED:

1. The above-matter is hereby assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District for disposition and further proceedings.

2. All further documents filed or otherwise submitted in this matter, and all further filing fees filed or otherwise submitted in this matter, shall be filed with the Snake River Basin Adjudication District Court of the Fifth Judicial District at P.O. Box 2707, Twin Falls, Idaho

83303-2707, provided that checks representing further filing fees shall be made payable to the county where the original petition for judicial review or action for declaratory judgment was filed.

DATED this ___ day of _____, 2010.

CLERK OF THE DISTRICT COURT

By:_____
Deputy Clerk

In the Supreme Court of the State of Idaho

IN THE MATTER OF THE APPOINTMENT OF THE SRBA DISTRICT COURT TO HEAR ALL PETITIONS FOR JUDICIAL REVIEW FROM THE DEPARTMENT OF WATER RESOURCES INVOLVING ADMINISTRATION OF WATER RIGHTS	ADMINISTRATIVE ORDER

WHEREAS pursuant to I.C. § 42-1701A any person who is aggrieved by a final decision or order of the Director of the Department of Water Resources is entitled to judicial review, and

WHEREAS there is a need for consistency and uniformity in judicial decisions regarding the administration of water rights, and

WHEREAS the Idaho Supreme Court has a constitutional responsibility to administer and supervise the work of the district courts pursuant to Art. V, § 2 of the Idaho Constitution, and

WHEREAS the Snake River Basin Adjudication District Court of the Fifth Judicial District has particular expertise in the area of water right adjudication,

IT IS HEREBY ORDERED that all petitions for judicial review of any decision regarding the administration of water rights from the Department of Water Resources shall be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District. Review shall be held in accord with Title 67, Chapter 52 of the Idaho Code, except that, once filed, all petitions for judicial review shall be forwarded to the clerk of the Snake River Basin Adjudication District Court of the Fifth Judicial District.

IT IS FURTHER ORDERD that the Snake River Basin Adjudication District Court is authorized to develop the procedural rules necessary to implement this order.

IT IS FURTHER ORDERED that this order shall be effective the 1st day of July, 2010.

DATED this 9 day of December 2009.

By Order of the Supreme Court

Daniel T. Eismann, Chief Justice

ATTEST:

Stephen W. Kenyon, Clerk

I, Stephen W. Kenyon, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the Order entered in the above entitled cause and now on record in my office.
WITNESS my hand and the Seal of this Court 12/10/09

STEPHEN W. KENYON Clerk

By: Deputy

CERTIFICATE OF MAILING

I certify that a true and correct copy of the PROCEDURAL ORDER GOVERNING JUDICIAL REVIEW OF FINAL ORDER OF DIRECTOR OF IDWR was mailed on October 27, 2015, with sufficient first-class postage to the following:

IDWR AND GARY SPACKMAN IN HIS
Represented by:
GARRICK L BAXTER
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO - IDWR
PO BOX 83720
BOISE, ID 83720-0098
Phone: 208-287-4800

THE CITY OF BLACKFOOT
Represented by:
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HOLDEN KIDWELL HAHN & CRAPO
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PO BOX 50130
IDAHO FALLS, ID 83405
Phone: 208-523-0620

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Represented by:
RAWLINGS, D ANDREW
HOLDEN KIDWELL HAHN & CRAPO
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IDAHO FALLS, ID 83405
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IDAHO FALLS, ID 83405-0130
Phone: 208-523-0620

THE CITY OF BLACKFOOT
Represented by:
SANDOW, GARRETT H
220 N MERIDIAN
BLACKFOOT, ID 83221
Phone: 208-785-9300

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

Julie Murphy
Deputy Clerk

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
195 River Vista Place, Suite 204
Twin Falls, Idaho 83301-3029
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

Attorneys for A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company

W. Kent Fletcher, ISB #2248
FLETCHER LAW OFFICE
P.O. Box 248
Burley, Idaho 83318
Telephone: (208) 678-3250
Facsimile: (208) 878-2548

Attorneys for American Falls Reservoir District #2 and Minidoka Irrigation District

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

THE CITY OF BLACKFOOT,

Petitioner,

vs.

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

Respondents.

IN THE MATTER OF APPLICATION FOR PERMIT NO. 27-12261

In the name of the City of Blackfoot.

Case No. CV-2015-1687

SURFACE WATER COALITION'S NOTICE OF APPEARANCE

Fee Category I.1: $136.00

TO: CLERK OF THE ABOVE-ENTITLED COURT AND TO ALL COUNSEL OF RECORD

YOU ARE HEREBY NOTIFIED THAT the Barker Rosholt & Simpson LLP enters an appearance as attorneys of record for and on behalf of A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company and Twin Falls Canal Company, and Fletcher Law Office enters an appearance as attorneys of record for and on behalf of American Falls Reservoir District #2 and Minidoka Irrigation District, these entities are collectively referred to as the Surface Water Coalition or Coalition. All papers in this action shall be served upon the respective counsel at the addresses listed above.

The above-named entities were parties to the underlying administration action. Pursuant to paragraph 3 of the *Procedural Order Governing Judicial Review of Final Order of Director of Idaho Department of Water Resources* entered in this matter, the parties understand that the Court will treat this *Notice of Appearance* as a motion to intervene and will treat them as Intervenors.

Respectfully submitted this 30th day of October, 2015.

BARKER ROSHOLT & SIMPSON LLP

John K. Simpson
Travis L. Thompson
Paul L. Arrington

Attorneys for A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company

FLETCHER LAW OFFICE

W. Kent Fletcher

Attorneys for American Falls Reservoir District #2 and Minidoka Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of October, 2015, I served true and correct copies of the foregoing upon the following by the method indicated:

SRBA District Court 253 3rd Ave. North P.O. Box 2707 Twin Falls, Idaho 83303-2707	✓ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
Garrick Baxter Deputy Attorneys General Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098	✓ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
The City of Blackfoot Represented by: Luke H. Marchant Andrew Rawlings Holden Kidwell Hahn & Crapo P.O. Box 50130 Idaho Falls, Idaho 83405	✓ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
The City of Blackfoot Represented by: Garrett H. Sandow 220 N. Meridian Blackfoot, Idaho 83221	✓ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email

Paul L. Arrington

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

GARRICK L. BAXTER, ISB #6301
MEGHAN CARTER, ISB #8863
Deputy Attorneys General
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
Telephone: (208) 287-4800
Facsimile: (208) 287-6700
garrick.baxter@idwr.idaho.gov
meghan.carter@idwr.idaho.gov

Attorneys for Respondents

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

THE CITY OF BLACKFOOT,

Petitioner,

vs.

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

Respondents.

IN THE MATTER OF APPLICATION FOR PERMIT NO. 27-12261 IN THE NAME OF THE CITY OF BLACKFOOT.

Case No. CV-2015-1687

NOTICE OF LODGING AGENCY RECORD AND TRANSCRIPT WITH THE AGENCY

TO: CLERK OF THE ABOVE COURT AND ALL COUNSEL OF RECORD

IRRIGATION DISTRICT,

Intervenors.

IN THE MATTER OF APPLICATION FOR PERMIT NO. 27-12261 IN THE NAME OF THE CITY OF BLACKFOOT.

TO: CLERK OF THE ABOVE COURT AND ALL COUNSEL OF RECORD

In accordance with I.R.C.P. 84(j), YOU ARE HEREBY NOTIFIED that the agency record and transcript, having been prepared pursuant to I.R.C.P. 84(f) and (g), are lodged with the agency for the purpose of settlement.

A copy of the record and transcript, which are contained on one (1) DVD, have been served by mail with a copy of this notice to the parties' attorneys of record. In accordance with Rules 84(f) and (g) the Petitioner City of Blackfoot has paid $17.00 per the estimated fee for preparation of the record and transcript. The actual preparation cost of the record and transcript is $17.00. The agency does not anticipate any further charges affiliated with continued preparation of the record and transcript. However, the agency will inform the parties immediately should additional charges be incurred.

The parties have fourteen (14) days from the date of the mailing of this notice to file any objections to the record and transcript. If no objections are filed within that time, the record and transcript shall be deemed settled. The agency's decision on any objection timely filed along with all evidence, exhibits, and written presentation of the objection shall be included in the record. Thereafter, the agency shall lodge the settled transcript and record with the district court pursuant to I.R.C.P. 84(k).

//

DATED this 10th day of November 2015.

LAWRENCE G. WASDEN
Attorney General

CLIVE R. J. STRONG
Chief, Natural Resources Division

GARRICK L. BAXTER
MEGHAN CARTER
Deputy Attorneys General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of November 2015, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the following parties by the indicated methods:

Original to:
SRBA DISTRICT COURT
253 3RD AVENUE NORTH
PO BOX 2707
TWIN FALLS ID 83303-2707
Facsimile: (208) 736-2121

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Overnight Mail
- ☒ Facsimile
- ☐ Email

ROBERT L HARRIS
LUKE H MARCHANT
HOLDEN KIDWELL HAHN & CRAPO
PO BOX 50130
IDAHO FALLS ID 83405
rharris@holdenlegal.com
lmarchant@holdenlegal.com

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Overnight Mail
- ☐ Facsimile
- ☒ Email

GARRETT H SANDOW
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gsandowlaw@aol.com

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Overnight Mail
- ☐ Facsimile
- ☒ Email

JOHN K SIMPSON
TRAVIS L THOMPSON
PAUL L ARRINGTON
BARKER ROSHOLT & SIMPSON LLP
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- ☐ Hand Delivery
- ☐ Overnight Mail
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FLETCHER LAW OFFICE
PO BOX 248
BURLEY ID 83318
wkf@pmt.org

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Overnight Mail
- ☐ Facsimile
- ☒ Email

Meghan Carter
Deputy Attorney General

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

THE CITY OF BLACKFOOT, Petitioner, vs. GARY SPACKMAN, in his official capacity as Director of the Idaho Department of Water Resources, and THE IDAHO DEPARTMENT OF WATER RESOURCES Respondents, A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY and TWIN FALLS CANAL COMPANY, Intervenors. IN THE MATTER OF APPLICATION FOR PERMIT NO. 27-12261 In the name of the City of Blackfoot.	Case No. CV-2015-1687 **ORDER TREATING APPEARANCE AS MOTION TO INTERVENE AND GRANTING SAME**

On November 4, 2015, the A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, American Falls Reservoir District #2, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company filed a *Notice of Appearance* in the above-captioned matter. Although the above-mentioned entities were parties to the underlying

administrative proceeding, they were not made named parties in the *Petition for Judicial Review* filed by the Petitioner. Pursuant to the *Procedural Order* issued by the Court in the above-captioned matter, the *Notice of Appearance* will be treated as a *Motion to Intervene*. This Court finds, following a review of the file, that the above-mentioned entities are real parties in interest to this proceeding, that they were parties to the underlying administrative proceeding from which judicial review is being requested, and that they have interests that could be affected by the outcome of this proceeding. This Court further finds that no party has objected to the above-mentioned entities participating in this proceeding. Therefore, in exercising its discretion, this Court finds that the A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, American Falls Reservoir District #2, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company are entitled to leave to intervene as parties to this proceeding.

THEREFORE THE FOLLOWING ARE HEREBY ORDERED:

1. The *Motion to Intervene* **is hereby granted**.

2. All further captions used in this proceeding shall include the A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, American Falls Reservoir District #2, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company as Intervenors as shown above.

Dated: November 16, 2015

ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER TREATING APPEARANCE AS MOTION TO INTERVENE AND GRANTING SAME was mailed on November 16, 2015, with sufficient first-class postage to the following:

IDWR AND GARY SPACKMAN IN HIS
Represented by:
GARRICK L BAXTER
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO - IDWR
PO BOX 83720
BOISE, ID 83720-0098
Phone: 208-287-4800

A&B IRRIGATION DISTRICT
BURLEY IRRIGATION DISTRICT
MILNER IRRIGATION DISTRICT
NORTH SIDE CANAL COMPANY
TWIN FALLS CANAL COMPANY
Represented by:
JOHN K SIMPSON
1010 W JEFFERSON ST STE 102
PO BOX 2139
BOISE, ID 83701-2139
Phone: 208-336-0700

CITY OF BLACKFOOT
Represented by:
LUKE H MARCHANT
HOLDEN KIDWELL HAHN & CRAPO
1000 RIVERWALK DR STE 200
PO BOX 50130
IDAHO FALLS, ID 83405
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A&B IRRIGATION DISTRICT
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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

THE CITY OF BLACKFOOT,

Petitioner,

vs.

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

Respondents,

and

A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, AMERICAN FALLS RESERVOIR DISTRICT #2, and MINIDOKA

Case No. CV-2015-1687

AGENCY'S CERTIFICATE OF RECORD

IRRIGATION DISTRICT,

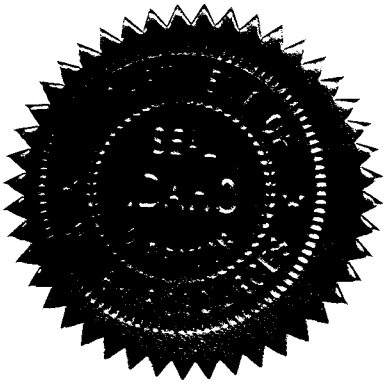
Intervenors.

IN THE MATTER OF APPLICATION FOR PERMIT NO. 27-12261 IN THE NAME OF THE CITY OF BLACKFOOT.

TO: CLERK OF THE ABOVE COURT AND ALL COUNSEL OF RECORD

I, Gary Spackman, Director of the Idaho Department of Water Resources, do hereby certify that the record in the above entitled matter was compiled under my direction, and is a true and correct record of the pleadings, papers and proceedings therein as shown in the index to this record.

IN WITNESS WHEREOF, I have hereunto set by hand and affixed the seal of the Idaho Department of Water Resources at Boise, Idaho this 8th day of December 2015.



GARY SPACKMAN
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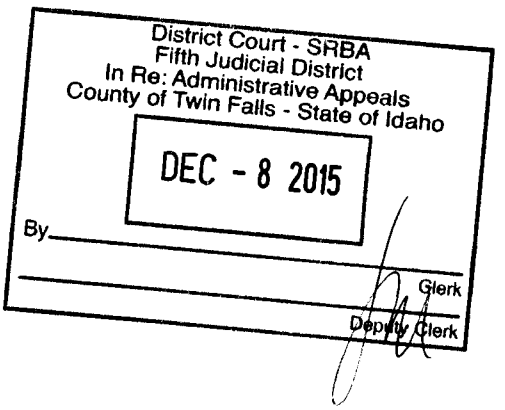

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Case No. CV-2015-1687

NOTICE OF LODGING THE SETTLED AGENCY RECORD AND TRANSCRIPT WITH THE DISTRICT COURT

IRRIGATION DISTRICT,

Intervenors.

IN THE MATTER OF APPLICATION FOR PERMIT NO. 27-12261 IN THE NAME OF THE CITY OF BLACKFOOT.

TO: THE DISTRICT COURT AND THE PARTIES OF RECORD

On November 10, 2015, the Idaho Department of Water Resources ("Department") served its *Notice of Lodging Agency Record and Transcript with the Agency* ("Notice") in this matter pursuant to I.R.C.P. 84(j). The Notice gave the parties fourteen (14) days from the date of the Notice to file any objection to the agency record and transcript. No objections to the agency record or transcript were filed with the Department.

The Department filed an *Order Settling the Agency Record and Transcript* with the Court on December 8, 2015. The agency record and transcript are deemed settled pursuant to I.R.C.P. 84(j).

YOU ARE HEREBY NOTIFIED that the settled record and transcript are being filed with the District Court pursuant to I.R.C.P. 84(k), by providing one (1) DVD dated December 8, 2015, in OCR format. A copy of the DVD is also being mailed with this notice to the parties.

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DATED this 8th day of December 2015.

LAWRENCE G. WASDEN
Attorney General

CLIVE R. J. STRONG
Chief, Natural Resources Division

GARRICK L. BAXTER
MEGHAN CARTER
Deputy Attorneys General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of December 2015, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the following parties by the indicated methods:

Original to:
SRBA DISTRICT COURT
253 3RD AVENUE NORTH
PO BOX 2707
TWIN FALLS ID 83303-2707
Facsimile: (208) 736-2121

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THE CITY OF BLACKFOOT,

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Respondents,

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A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, AMERICAN FALLS RESERVOIR DISTRICT #2, and MINIDOKA

Case No. CV-2015-1687

ORDER SETTLING THE AGENCY RECORD AND TRANSCRIPT

IRRIGATION DISTRICT,

Intervenors.

IN THE MATTER OF APPLICATION FOR PERMIT NO. 27-12261 IN THE NAME OF THE CITY OF BLACKFOOT.

Pursuant to I.R.C.P. 84(j), on November 10, 2015, the Idaho Department of Water Resources ("Department") served upon the parties its *Notice of Lodging Agency Record and Transcript with the Agency* ("Notice"). The Notice gave the parties fourteen (14) days from the date of the Notice to file any objections to the agency transcript or record. No objections were filed.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that, with no objections to the agency record and transcript having been filed, the agency record and transcript are now deemed settled.

IT IS FURTHER ORDERED that, pursuant to I.R.C.P. 84(j), this order shall be included in the record on the petition for judicial review. The Department shall provide the parties with a copy of the agency record on one (1) DVD consistent with this order.

DATED this 8th day of December 2015.

GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of December 2015, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the following parties by the indicated methods:

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THE CITY OF BLACKFOOT,

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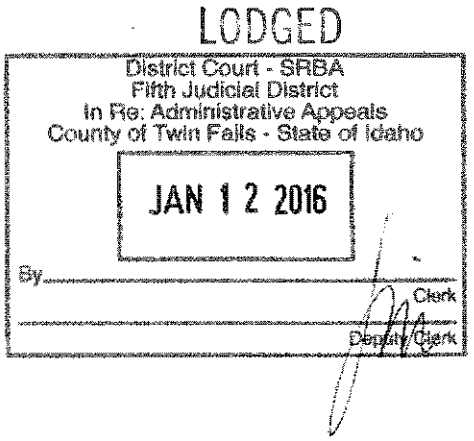
GARY SPACKMAN, in his capacity as Director of the Idaho Department of Water Resources, and THE IDAHO DEPARTMENT OF WATER RESOURCES,

Respondents.

IN THE MATTER OF APPLICATION FOR PERMIT NO. 27-12261

In the name of the City of Blackfoot.

Case No. CV-2015-1687



PETITIONER'S OPENING BRIEF

Judicial Review from the Idaho Department of Water Resources
Honorable Eric J. Wildman, District Judge, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

CONSTITUTIONAL & STATUTORY AUTHORITY

REGULATORY AUTHORITY AND PROCEDURAL

Petitioner, the City of Blackfoot (the "City" or "Blackfoot"), hereby submits *Petitioner's Opening Brief.* This brief is filed pursuant to this Court's *Procedural Order* of October 27, 2015; I.R.C.P. 84(p); I.A.R. 35; and I.A.R. 36.

I. STATEMENT OF THE CASE.

A. Nature of the Case.

This is a civil action pursuant to Idaho Code §§ 42-1701A(4), 67-5270, and 67-5279, seeking judicial review of the *Order Addressing Exceptions and Denying Application for Permit* (the "*Final Order*") issued by the Director of the Idaho Department of Water Resources, Gary Spackman (the "Director"), on September 22, 2015.

B. Course of Proceedings.

The City submitted the application for permit for 27-12261 (hereinafter simply "27-12261") on September 12, 2013. R. at 1-27. The original application was signed by then-Mayor Mike Virtue. R. at 3. On September 2, 2014, the Idaho Department of Water Resources (the "Department") assisted the City with preparation of an amended application for permit, which was signed by Mayor Paul Loomis.[1] R. at 28-58. On January 27, 2015, the City submitted a second amended application with the assistance of Rocky Mountain Environmental Associates, Inc., complete with an amended mitigation plan. R. at 92-105. The second amended application was also signed by Mayor Paul Loomis. R. at 93.

[1] Evidence of the Department's assistance is contained in the style and layout of a map submitted with the amended application.

After these amendments, 27-12261 sought a water right permit to develop 9.71 cfs of ground water for the irrigation of 524.2, acres with Water Right No. 01-181C (hereinafter, simply "01-181C") being offered as mitigation for the depletive effects to the Eastern Snake Plain Aquifer (the "ESPA") resulting from diversion of water under 27-12261. R. at 200-01.

27-12261 was protested by the Surface Water Coalition (the "Coalition"). At the hearing, the Coalition stipulated that items (b) through (e) of Idaho Code § 42-203A(5) were not at issue, and specifically stipulated that they did not disagree with or object to the modeling analysis performed quantifying the recharge benefits of water lost from Jensen's Grove or the proposal to leave small portions of certain water rights in the Blackfoot River to mitigate for modeled impacts to downstream reaches of the Snake River. R. at 203-04, 207. More specifically, the Coalition's concern was not **factual** in nature, but based only on **legal** issues surrounding interpretation of the *Settlement Agreement, IDWR Transfer of Water Right, Transfer No. 72385*, dated June 2006 (the "*Settlement Agreement*"). Ex. at 18-23.

In fact, the Coalition presented no witnesses at the hearing. Tr., p. 49, ll. 21-23. Stated another way, the Coalition did not submit evidence of any factual concerns or rebuttal testimony or analysis regarding the modeling analysis and other analyses submitted by the City, or to rebut the reality that ground water recharge occurs at Jensen's Grove under 01-181C. The only assertion of injury was that use of 01-181C for mitigation would injure the Coalition because 01-181C would be used differently than the Coalition believed the *Settlement Agreement* allowed. R. at 155-56. The Coalition has taken the position that 01-181C was not authorized to be used for mitigation purposes. R. at 163-69. This is why briefing was submitted specifically

addressing the legal question of: "Is there a legal impediment to using water right 01-181C in a mitigation plan for the proposed permit?" R. at 200. Therefore, the only item under Idaho Code § 42-203A(5) at issue was subpart (a), which is whether 27-12261 "will reduce the quantity of water under existing water rights" based on the Coalition's interpretation of the *Settlement Agreement* and its perceived limitations of using 01-181C for mitigation purposes.

On June 30, 2015, the hearing officer entered the *Preliminary Order Issuing Permit* (the "*Preliminary Order*"), which issued 27-12261 with the condition that the City file a transfer to allow it to use the recharge provided by 01-181C as mitigation for 27-12261. R. at 200-16. On July 14, 2015, the City filed its *Exceptions* to the *Preliminary Order* and asked the Director to correct errors made by the hearing officer in reaching his conclusion. R. at 220-44. The Coalition responded on July 30, 2015. R. at 249-69.

On September 22, 2015, the Director issued the *Final Order* within which the Director refused to consider the *Settlement Agreement*, found that 01-181C could not be used for ground water recharge without a transfer application, and denied the City's application for 27-12261. R. at 271-74. The City filed this present petition for judicial review on October 16, 2015. R. at 278-85.

C. Statement of Facts.

1. The City of Blackfoot is located in Bingham County, Idaho, and with a population of nearly 12,000 people, is one of eastern Idaho's major cities. *See, e.g.,* http://quickfacts.census.gov/qfd/states/16/1607840.html; http://en.wikipedia.org/wiki/Blackfoot,_Idaho.

2. Many years ago, during the planning and construction of Interstate 15 ("I-15"), the Blackfoot City fathers were approached by Federal Highway Administration officials to discuss relocation of a portion of the Snake River channel because doing so would eliminate construction of four bridges, thereby saving the federal government the expense of constructing the bridges. Tr., p. 35, l. 22–p. 36, l. 10.

3. As responsible citizens, these City fathers recognized the benefit to taxpayers, and agreed to the channel relocation even though doing so would mean sacrificing significant riverfront property. Tr., p. 36, ll. 19-23. In addition, the old river channel was used to mine gravel for the road construction, and has continued to be used for mining gravel. Tr., p. 29, l. 16–p. 30, l. 17. The City therefore effectively replaced Snake River riverfront property with a gravel pit.

4. This gravel pit that exists at the former location of a portion of the Snake River channel on the east side of I-15 is known as Jensen's Grove. R. at 203-04.

5. Decades after the City allowed the federal government to relocate the Snake River channel, the City was awarded a federal grant of approximately two hundred and fifty thousand dollars ($250,000.00), through the help of Congressman Mike Simpson, to secure a water right to fill and maintain water levels in Jensen's Grove. Tr., p. 36, l. 24–p. 37, l. 11.

6. The City used these funds to purchase 01-181C from the New Sweden Irrigation District. Tr., p. 37, ll. 12-15; *see also* Ex. at 12. These federal funds represent payment for only a small part of the losses the City incurred by giving up its riverfront property, and the

benefit of the City's purchase of a water right for Jensen's Grove is that it salvaged some of that loss by significantly improving a recreational area and facility for local residents.

7. The City filed a transfer application to amend 01-181C on October 27, 2005, which was numbered as Transfer No. 72385 (hereinafter, simply "72385"). Ex. at 28, 49. 01-181C was an irrigation-only water right. Tr., p. 37, ll. 16-19. The transfer requested a change in the place of use and changes to the nature of use of most of 01-181C to diversion to storage, storage, diversion to recharge, as well as retaining a small portion for irrigation purposes. Ex. at 28, 49.

8. The Coalition protested 72385. *See* Ex. at 15, 65. Eventually, the parties agreed to resolve the Coalition's protest pursuant to the terms and conditions of the *Settlement Agreement*. Ex. at 18-23, 46-47, 74-87.

9. Approval of 72385 was issued on February 14, 2007. Ex. at 88-90. 01-181C now allows the City to divert (1) 46.00 cfs as diversion to storage; (2) 1.00 cfs and 200.0 AF for irrigation; (3) 200.00 AF for irrigation storage; (4) 200.00 AF for irrigation from storage; and (5) 2,266.8 AF for recreation storage, of which 1,100 AF of this amount is stored in Jensen's Grove during its season of use and 980.8 AF is allocated for seepage losses during its season of use. As stated by condition no. 5 of the transfer approval:

> The reservoir established by the storage of water under this right shall not exceed a total capacity of **1100 acre feet** or a total surface area of 73 acres. **This right authorizes additional storage in the amount of 186 afa to make up losses from evaporation and 980.8 afa for seepage losses**.

Ex. at 90 ("Condition No. 5") (emphasis added). Thus, in addition to 980.8 AF of seepage, 1,100 AF of water left in Jensen's Grove at the end of the irrigation season enters into the ESPA as ground water recharge in the amount 2,080.8 AF.

10. It is this annual seepage loss—ground water recharge—of 2,080.8 AF that the City seeks to use as mitigation for 27-12261. *See* Ex. at 2.

11. Additionally, condition no. 9 of the transfer approval incorporates the provisions of the *Settlement Agreement*:

> **The diversion and use of water under this transfer is subject to additional conditions and limitations contained in a Settlement Agreement-IDWR Transfer of Water Right, Transfer No. 72385, dated June 2006, including any properly executed amendments thereto**, entered into by and between the New Sweden Irrigation District, the City of Blackfoot, A& B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, Twin Falls Canal Company, and North Side Canal Company. The Settlement Agreement has been recorded in Bingham County (Instrument No. 575897) and Bonneville County (Instrument No. 1249899) and is enforceable by the parties thereto.

Ex. at 90 ("Condition No. 9") (emphasis added).

12. Condition No. 5 and Condition No. 9 were incorporated into the SRBA partial decree for 01-181C as part of the quantity element and as an "other provision necessary for definition or administration of this water right," respectively. Ex. at 91-94.

13. Thus, both the Department's approval of 72385 and the SRBA partial decree for 01-181C incorporate the *Settlement Agreement*. *See* Ex. at 90 and 93.

14. For that reason, the interpretation of the elements and conditions of 01-181C, including the provisions of the *Settlement Agreement*—particularly paragraph 1—was at issue in the contested case of 27-12661. *See* R. at 137, 155-156.

15. The City applied for 27-12661 in order to replace an expensive and dated pump station on the Blackfoot River that the City currently operates.

16. The City delivers several surface water rights through the pump station. Tr., p. 9, l. 22–p. 10, l. 1. The water right entitlements diverted at the pump station include water rights that were previously delivered through a facility known as the "Miner's Ditch,"[2] as well as water allocated to shares owned by certain shareholders of the Corbett Slough Irrigation Company and shareholders of the Blackfoot Irrigation Company. Ex. at 1; R. at 201.

17. Prior to the 1960s, Miner's Ditch ran through the City and crossed I-15. Tr., p. 9, ll. 13-17. Miner's Ditch ran near a proposed school, and in an effort to increase safety and eliminate the dangers of an open ditch, the City, the State of Idaho, and the school district decided to eliminate Miner's Ditch in exchange for installation of a pump station on the Blackfoot River to provide water to the water users who took delivery of their water through Miner's Ditch. Tr., p. 9, l. 18–p. 10, l. 1.

18. The pump station arrangement was accepted by the City, not by agreement, but by actions of the Blackfoot City Council. Tr., p. 10, ll. 2-9. Since its construction, the City has maintained the pump station almost entirely on its own. Tr., p. 10, ll. 10-14. The

[2] Water Right Nos. 27-17, 27-20A, 27-20B, 27-23E, 27-10790, 27-10999, and 27-11117.

City only receives a small stipend yearly from the irrigators who benefit from the pump station, but receives no contribution from the school district, the State of Idaho, or anyone else for maintenance and operation of the pump station. Tr., p. 10, ll. 10-14.

19. The pump station has proven to be a major burden for the City, both operationally and financially, particularly with no help from the school district or the State of Idaho.

20. The pump station requires significant maintenance because of the high sediment load in Blackfoot River water. Tr., p. 10, ll. 21-22. The pump station has to be refurbished every two to three years, and due to these maintenance issues, operates at an annual cost of between $40,000 and $50,000 per year. Tr., p. 10, l. 22–p. 11, l. 9. The pump station has two pumps, one of which operates, while the other is being serviced or repaired. Tr., p. 35, ll. 1-10.

21. Currently, the concrete culvert and other attendant equipment associated with the pump station have aged and may need to be replaced soon. Tr., p. 11, ll. 1-5. As a result, the City, with the aid of consultants, examined a number of options to address the situation. Tr., p. 11, l. 10–p. 13, l. 13.

22. The City analyzed refurbishment of the pump station, installation of settling ponds, and replacing the delivery of water to the Miner's Ditch users with a well. Tr., p. 11, l. 10–p. 13, l. 13. Results from the City's experts estimated that refurbishment of the Blackfoot River pump station would cost just under $400,000.00, and that settling ponds would be very expensive as well. Tr., p. 12, ll. 5-14. The most cost effective option was drilling a new well, at an estimated cost of $80,000.00. Tr., p. 12, ll. 10-11.

23. The City first analyzed drilling a well very near to the pump station on the Blackfoot River with the hope that it would qualify under the Department's current policy for changing a water right's source. Tr., p. 11, ll. 13-24; *See also Administrator's Memorandum*, Transfer Processing No. 24, December 21, 2009, at 26 ("The ground water and surface water sources must have a direct and immediate hydraulic connection (at least 50 percent depletion in original source from depletion at proposed point of diversion in one day)"). Unfortunately, based upon analysis of the local geology, the City's consultants determined that there is a basalt layer approximately 50 feet below land surface which would require the City to hit a "sweet spot" of 48.5 feet for the well to function and operate appropriately. Tr., p. 12, l. 25–p. 13, l. 6. With so little margin of error, the City elected to look at other options instead. Tr., p. 13, ll. 7-13.

24. The alternative eventually pursued by the City was to drill a new well and use ground water recharge from Jensen's Grove to mitigate for the ground water withdrawals. Tr., p. 13, ll. 7-24. The operational costs of the new well are anticipated to be between $12,000.00 and $14,000.00 per year, compared to $40,000.00 to $50,000.00 per year to maintain the Blackfoot River pump station. Tr., p. 15, ll. 1-12. The result is an estimated savings of between $28,000.00 and $36,000.00 per year to the City. The new well would provide water to the lands serviced by the pump station, most of which is within City limits or within the City's impact area. Tr., p. 15, ll. 13-21.

25. Accordingly, the City filed 27-12261 to authorize development of a water right to provide water to the Miner's Ditch users. *See* R. at 1, 28, and 92.

26. 27-12261was protested by the Coalition. R. at 66-67.

27. The only matter at issue at the hearing on this matter was the legal question of whether, under Idaho Code 42-203A(5)(a), 27-12261 "will reduce the quantity of water under existing water rights" based on the *Settlement Agreement* and the use of 01-181C for mitigation purposes.

II. ISSUES PRESENTED ON APPEAL.

A. Whether the Director erred in a manner described in Idaho Code § 67-5279(3) by failing to consider the *Settlement Agreement* as an element of 01-181C.

B. Whether the Director erred in a manner described in Idaho Code § 67-5279(3) by not engaging in contractual interpretation of the *Settlement Agreement*.

C. Whether the Director erred in a manner described in Idaho Code § 67-5279(3) by concluding that nothing in 72385 or the SRBA partial decree that allows 01-181C to be used for ground water recharge.

D. Whether the Director erred in a manner described in Idaho Code § 67-5279(3) by concluding that the City must file a transfer if it wants to use 01-181C for mitigation purposes.

E. Whether the Director erred in a manner described in Idaho Code § 67-5279(3) by determining that the recharge to the aquifer accomplished under 01-181C is merely incidental recharge and therefore cannot be used as a basis for claim of a separate or expanded water right.

F. Whether questions of injury to the Coalition's water rights were already addressed in the *Settlement Agreement* and 01-181C, and therefore, under principles of *res judicata*, the City is not required to file a transfer application to permit the Coalition to have a second opportunity to raise the same injury arguments addressed previously.

G. Whether the Director's actions prejudiced a substantial right of the City.

III. ARGUMENT.

Judicial review of a final decision of the Director is governed by the Idaho Administrative Procedures Act (I.C. § 67-5201, *et seq.*, hereinafter "IDAPA"). I.C. § 42-1701A. Under IDAPA, the Court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The Court cannot substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1); *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). Where, as here, the agency "was required . . . to issue an order," the Court must affirm the agency decision unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;
(b) in excess of statutory authority of the agency;
(c) made upon unlawful procedure;
(d) not supported by substantial evidence on the record as a whole; or
(e) arbitrary, capricious, or an abuse of discretion.

I.C. § 67-5279(3); *Castaneda*, 130 Idaho at 926, 950 P.2d at 1265. Further, the party challenging the agency decision must also show that at least one of its substantial rights have been prejudiced. I.C. § 67-5279(4).

As set forth below, the City requests that this court engage in contractual interpretation of the *Settlement Agreement* because the Director did not. If this Court finds that the Director's failure to engage in contractual interpretation violated the provisions of Idaho law as described herein, then the court should thereafter itself engage in contractual interpretation and rule on this issue because "[w]hen the language of a contract is clear and unambiguous, its interpretation and legal effect are questions of law," *Lamprecht v. Jordan, LLC*, 139 Idaho 182, 185, 75 P.3d 743, 746 (2003), and "[o]n appeal, this Court exercises free review over matters of law." *Id.*

A. The *Settlement Agreement* is an element of Water Right No. 01-181C, and should therefore have been considered by the Director.

The Director improperly refused to "consider[] or discuss[]" the *Settlement Agreement*. R. at 272. The Director held that "the *Settlement Agreement* does not in any way affect the Director's decision in this matter. The decision can be made using principles of Idaho water law without referring to the *Settlement Agreement*." R. at 272 (italics added). In effect, the Director was, in three sentences, refusing to consider a component of 01-181C and its significant implications on how 27-12261 could be mitigated. The Director narrowly focused only on the listed beneficial uses on the face of 01-181C, and because he did not see ground water recharge expressly listed, he concluded that 01-181C could not be used for mitigation. But this approach ignored the conditions in 01-181C which refer to the *Settlement Agreement* and necessarily make the analysis of 01-181C more nuanced.

Conditions contained in a water right are recognized as elements of the water right and are no more or less important than other elements of a water right. For permits, Idaho Code § 42-203A(5) allows the Director to "grant a permit upon conditions." The perfected permit is

then licensed pursuant to Idaho Code § 42-219 wherein the license issued must bear "the number of[] the permit under which the works from which such water is taken were constructed." Such license must therefore incorporate any permit conditions which are part and parcel to the description of how the water right can be used, and in some instances, additional conditions can also be included in the license. *See Idaho Power Co. v. Idaho Dep't of Water Res.* (In Re Licensed Water Right No. 03-7018), 151 Idaho 266, 255 P.3d 1152 (2011) (Department had authority to include a term condition in Idaho Power's license, even though such a condition was not included in the original permit). As a result of including these conditions in a license, "[s]uch license **shall be binding upon the state** as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right[.]" Idaho Code § 42-220 (emphasis added).

The binding effect of conditions in a water right license remains unchanged in the formal adjudication of a water right license. With claims submitted in an adjudication (such as the SRBA), the claim form requires inclusion of "conditions of the exercise of any water right included in any decree, license, approved transfer application or other document," Idaho Code § 42-1409(j), the report of the Director requires inclusion of the same conditions, Idaho Code § 42-1411(2)(j), and the final step of the adjudication process—issuance of the partial decree—is required to "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." Idaho Code § 42-1412(6). Therefore, conditions in a water right license or partial decree are elements of the water right and are no less important than the diversion rate or any other water right element.

The *Settlement Agreement* is an incorporated element of 01-181C. The Department's approval of 72385, the City's transfer that changed the beneficial use of 01-181C, specifically states that it is "subject to additional conditions and limitations contained in [the *Settlement Agreement*], including any properly executed amendments thereto." R. at 90. Further, the corresponding SRBA partial decree relating to 72385 contains **the exact same language**, incorporating the *Settlement Agreement* by reference. R. at 93.

Based on the above, the Director did not give appropriate consideration to the *Settlement Agreement*, and instead, focused on the other elements of the water right to excuse him from considering the provisions of the *Settlement Agreement* or engaging in contractual interpretation. In effect, the Director elevated other elements of the water right over the provisions of the *Settlement Agreement* despite the statutory edict that such conditions are binding on him, as an agent of the State of Idaho: "[s]uch license **shall be binding upon the state** as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right[.]" Idaho Code § 42-220 (emphasis added). Ignoring the conditions of 01-181C was not a lawful exercise of the Director's discretion and would not be a lawful exercise of this Court's discretion as well.

In terms of how the *Settlement Agreement* should be considered in an incorporated agreement, the principle of incorporating an agreement is perhaps best illustrated in divorce jurisprudence, because in divorce cases, the parties will frequently arrive at a property settlement agreement, which may or may not thereafter be incorporated, or merged, into the court's divorce decree. *See, e.g., Phillips v. Phillips*, 93 Idaho 384, 386-87, 462 P.2d 49, 51-52 (1969). Courts

first look within the four corners of the divorce decree to determine whether the agreement was incorporated. *Borley v. Smith*, 149 Idaho 171, 177, 233 P.3d 102, 108 (2010). Only if the divorce decree is ambiguous regarding incorporation may a court look to extrinsic evidence. *Id.* If the agreement is incorporated, it has become a part of the divorce decree. *Davidson v. Soelberg*, 154 Idaho 227, 230, 296 P.3d 433, 436 (Ct. App. 2013). In that circumstance, the only way to enforce or otherwise adjudicate the incorporated agreement is to pursue that action in the original divorce case, because it is no longer just an agreement between the parties, but is the court's judgment. *Id.* Further, subsequent courts are not at liberty to ignore or disregard the agreement, which has become part of the divorce decree. *See id.*

Here, by conducting the same analysis, this Court must conclude that the *Settlement Agreement* was incorporated into the Department's approval of 01-181C and the SRBA's partial decree that affected 01-181C. Ex. at 90 and 93 (the approval and the partial decree, respectively, both stating that the diversion and use was "subject to additional conditions and limitations contained in [the *Settlement Agreement*], including any properly executed amendments thereto"). The first step of the appropriate analysis, "to look first *only* to the four corners" of the judgment, *Borley*, 149 Idaho at 177, 233 P.3d at 108 (emphasis in original), is dispositive since both the administrative determination and the judicial decree clearly and unambiguously incorporate the *Settlement Agreement*. Because the license and partial decree are unambiguous, this Court need not consider any evidence extrinsic to those documents to determine whether the *Settlement Agreement* was incorporated into 01-181C or to interpret the *Settlement Agreement*. The Director erred by failing to consider the *Settlement Agreement* at all. Neither the Department nor

this Court may consider 01-181C without the *Settlement Agreement*, because to do so is to consider only part of the City's water right.

Assume, for illustrative purposes only, that the City and the Coalition properly amended the *Settlement Agreement* to allow 01-181C to be applied to mitigate a third party's water right. By the terms of the approval of 72385 and the SRBA's partial decree, that would settle the issue (at the very least between the City and the Coalition). But, under the Director's approach of refusing to consider the *Settlement Agreement*, the amendment would not be recognized and the third party's water right would not be mitigated. By refusing to consider the *Settlement Agreement*, the Director erroneously discarded part of 01-181C, R. at 272, and this Court should not do the same.

The only way to understand 01-181C is to consider and construe (by contractual interpretation) the *Settlement Agreement*. The Director's error in not doing so is in violation of the statutory provisions described above (Idaho Code §§ 42-203A(5), 42-219, 42-1409, 42-1411, 42-1412(6)) because the Director may not arbitrarily ignore part of an appropriator's water right. The error was made unsupported by substantial evidence, since there is nothing to show that the *Settlement Agreement* is not relevant to this dispute. Finally, the error was arbitrary, capricious, and an abuse of discretion, since the three sentences in the *Final Order* detailing the Director's decision to ignore the *Settlement Agreement* provide no rational reason for ignoring what was incorporated by the Department's approval of 72385 and the SRBA's partial decree regarding 01-181C.

B. 01-181C, as modified by 72385, can be used by the City as mitigation for 27-12261.

Because the *Settlement Agreement* is incorporated into 01-181C, it must be construed (along with the rest of 01-181C) in order to determine how 01-181C relates to 27-12261 and answer the following questions: (1) whether the City gave away its ability to use 01-181C to mitigate for 27-12261 when it entered into the *Settlement Agreement*; (2) whether the City must file a transfer in order to have the Department consider any portion of 01-181C as mitigation; and (3) whether the recharge provided to the aquifer provided by 01-181C can be used as mitigation or whether it is merely incidental.

1. The plain language of the *Settlement Agreement*, when considered in conjunction with the rest of 01-181C, shows that the City should be allowed to utilize the annual seepage loss of 01-181C as mitigation for 27-12261.

Any time interpretation of a contract is in dispute, it can certainly be argued that the contract should have been more clearly drafted. If it had, then perhaps this matter would not even be before this Court. But the parties to this proceeding are bound by the words that the parties agreed to in the *Settlement Agreement*, and rather than thinking of ways that the contract could have been better drafted, this court should focus on what it has before it and engage in the appropriate analysis outlined by the Idaho Supreme Court.

The testimony from the mayor and former mayor of the City stated clearly that the City never intended to give away the recharge benefits from 01-181C's diversion and use in Jensen's Grove, a well-known gravel pit. The City needs this Court to tell it whether it did or did not give away those benefits through interpretation of the plain language of the *Settlement Agreement*. If

the City did give those rights away in this Court's estimation, then the City will have to move on now knowing it executed a poorly-worded agreement that did not reflect its intent, and will be more careful when working with the Coalition the future. However, as set forth below, the City is confident that the plain language of the *Settlement Agreement* supports its position that it never gave away its rights use the recharge occurring in Jensen's Grove from 01-181C.

The interpretation of three paragraphs—paragraphs 1.a., 1.b., and 1.e—of the *Settlement Agreement* are critical in determining the rights of the City in this matter. These provisions provide:

> a. After approval of the pending Transfer, the CITY shall not, temporarily or permanently, thereafter transfer the Water Right, or any portion thereof, without receiving the written consent of the COALITION.
>
> b. Without the written consent of the COALITION, the CITY agrees to hold the Water Right in perpetuity for diversion of the water from the Snake River into storage at the Pond, for irrigation and recreation purposes, and to not transfer the Water Right or change the nature of use or place of use of the Water Right.
>
> . . .
>
> e. The CITY shall not lease, sell, transfer, grant, or assign to any other person or entity any right to recover groundwater or mitigation for the diversion of groundwater as a result of diversions under the Water Right including any incidental groundwater recharge that may occur as a result of such diversions. Furthermore, the CITY shall not request or receive any such mitigation credit on behalf of any other person or entity. If the CITY proposes to utilize the Water Right for groundwater recharge or mitigation purposes associated with existing or future groundwater rights, the CITY must file the appropriate application for permit and/or transfer.

Ex. at 19-20 (capitalization in original).

Contractual interpretation is a two-step process wherein the administrative agency or court first reviews the plain language of the contract to determine if there is an ambiguity. *City of Meridian v. Petra Inc.*, 154 Idaho 425, 435, 299 P.3d 232, 242 (2013) (citations omitted). If there is no ambiguity, then the contract is interpreted consistent with its plain language. *Id.* (citations omitted); *see also Kepler–Fleenor v. Fremont Cnty.*, 152 Idaho 207, 211, 268 P.3d 1159, 1163 (2012). This is especially true where, as here,[3] the contract is fully integrated; meaning that the language of the contract reflects the entirety of the parties' intent. *City of Meridian*, 154 Idaho at 435, 299 P.3d at 242 (citations omitted); *Hap Taylor & Sons, Inc. v. Summerwind Partners, LLC*, 157 Idaho 600, 610, 338 P.3d 1204, 1214 (2014). Only if there is ambiguity in the term or terms in dispute may the court or hearing officer resort to extrinsic evidence, also known as parol evidence, to interpret the ambiguous provisions. *Buku Properties, LLC v. Clark*, 153 Idaho 828, 834, 291 P.3d 1027, 1033 (2012). In the face of ambiguity, the goal remains to give effect to the parties' intent at the time of contracting. *Hap Taylor & Sons*, 157 Idaho at 610, 338 P.3d at 1214; *Bondy v. Levy*, 121 Idaho 993, 998, 829 P.2d 1342, 1347 (1992).

As already explained above, the Director did not consider or interpret the *Settlement Agreement*, but found that 01-181C as currently described could not be used for mitigation, "using principles of Idaho water law without referring to the *Settlement Agreement*." R. at 272 (italics added). The Director made this decision on his own, not based on a position taken by the

[3] The *Settlement Agreement* is an integrated agreement. *See* Ex. at 21, ¶ 7.

Coalition. In its *Post-Hearing Brief*, the Coalition focused on interpretation of the *Settlement Agreement*, and specifically, the requirement to obtain written consent from the Coalition:

> It is undisputed that the City failed to comply with requirements 1(a) and 1(b). Each requires that the City obtain "written consent" from the Coalition before seeking to transfer any portion of water right 01-181C. *Id.* This includes any attempt to change the nature of use of the water right. *Id.* In order to effectuate the proposed mitigation, the City would be required to file a transfer of water right 01-181C to include "recharge" as a purpose of use. Since the City has not complied with this obligation, it has no authority to seek the changes proposed by the mitigation plan.

R. at 167.

This Court must engage in the contractual interpretation process. The proposition that the City must obtain written consent from Coalition is not supported by the plain language of either Paragraph 1.a. or 1.b. Both paragraphs refer to a "transfer" or to "change the nature of use or place of use" of 01-181C as administrative actions that require the Coalition's consent, but these provisions do not mention a water right permit application. A "transfer" or "change" are terms of art under Idaho water law and are specific to the provisions of Idaho Code § 42-222, not the provisions of Idaho Code § 42-203A(5) for new permit applications. Furthermore, these provisions were included and approved by the Coalition as a party to the *Settlement Agreement*, and it perhaps goes without saying that the Coalition is very familiar with Idaho water law. Use of these specific terms has specific meaning. Because 27-12261 is an application for permit, and not a transfer application, the provisions of Paragraphs 1.a and 1.b do not require written consent from the Coalition. Consequently, there is no legal limitation under these provisions that would prohibit the City from pursuing 27-12261 without obtaining written consent from the Coalition.

Similarly, there is no part of the plain language of Paragraph 1.e which would require the City to file a transfer to realize the benefits associated with seepage under 01-181C already approved through the prior transfer that changed its nature of use. Through that transfer, 01-181C expressly included seepage as one of its elements and incorporated the provisions of the *Settlement Agreement* wherein the City—under certain circumstances—retained the right to claim the benefits of the recharge at a future date.

The circumstances under which the City could claim the benefits of ground water recharge are described in the *Settlement Agreement*. In what appears to be a clear attempt to prevent others from benefitting from Jensen's Grove recharge under 01-181C, the first sentence of Paragraph 1.e provides:

> **The CITY shall not lease, sell, transfer, grant, or assign to any other person or entity any right to recover groundwater or mitigation for the diversion of groundwater as a result of diversions under the Water Right** including any incidental groundwater recharge that may occur as a result of such diversions.

R. at 20 (bold emphasis added, capitalization in original). Nothing in the plain language of this provision states that **the City** cannot claim any credit from the ground water recharge occurring under 01-181C. In fact, the plain language of this sentence contemplates that the City **would actually accrue benefits from ground water recharge**, but that it could not convey those benefits to "any other person or entity." R. at 20.

The second sentence of Paragraph 1.e is similar to the first, and it provides that the City "shall not request or receive any such mitigation credit **on behalf of any other person or entity**." R. at 20 (emphasis added). Again, this sentence recognizes the recharge benefits the

City generates, and it does not say that the City cannot claim any credit from the ground water recharge occurring through the annual seepage. While the first sentence prevents the City from assigning ground water recharge benefits, this second sentence prevents the City from requesting or receiving such benefits on behalf of someone else.

Finally, the third sentence of Paragraph 1.e most directly addresses the City's ability to use the benefits or credits of ground water recharge occurring under 01-181C:

> If the CITY proposes to utilize the Water Right for groundwater recharge or mitigation purposes associated with existing or future groundwater rights, **the CITY must file the appropriate application for permit and/or transfer**.

R. at 20 (underlining and bold emphasis added, capitalization in original). This sentence does not prohibit the City from using ground water recharge under 01-181C for mitigation. In fact, it specifically states that the City can use the mitigation credits as long as it submits the appropriate **application for permit** and/or transfer. Under the plain language of Paragraph 1.e, the City is permitted to use 01-181C "for groundwater recharge or mitigation purposes associated with future groundwater rights," R. at 20, and 27-12261 is a future ground water right sought by the appropriate application for permit because a transfer is unnecessary (*see* Section III.B.2, *infra*).

Based on the plain language of the *Settlement Agreement*, the City has the option of filing a permit application (or transfer) to realize the benefits of the seepage under 01-181C. The City has done that by submitting 27-12261. There is nothing ambiguous about these provisions. If the *Settlement Agreement* was intended to bar the City from using 01-181C for mitigation or recharge purposes, it should have simply said so—and it does not say so. In fact, the *Settlement*

Agreement is completely preoccupied with preventing the City from conveying the mitigation benefits of 01-181C to any third party. In other words, the *Settlement Agreement* specifically recognizes the mitigation, in the form of ground water recharge, resulting from 01-181C and only limits how the City can later utilize the benefits from such recharge. If the parties intended the *Settlement Agreement* to require the Coalition's consent in all cases where 01-181C is proposed as mitigation, the contract would have simply stated that the City must obtain the Coalition's consent before submitting a permit application that requires mitigation under 01-181C. Or it could have said that there is no recharge benefit from 01-181C, without the necessity of specifying that such a recharge benefit cannot be conveyed to or applied on behalf of another. The *Settlement Agreement* does not say any of this, and that omission does not create an ambiguity.

Because the *Settlement Agreement* is not ambiguous, and because it is integrated into the four corners of the partial decree, this Court should not look to parol evidence to interpret it as the Director did. The Director relied on parol evidence (correspondence between the parties' attorneys) to find an ambiguity sufficient to consider parol evidence in construing 01-181C. R. at 272 (citing exhibits 8 and 103 from the hearing, presently Ex. at 46 and 70, respectively). This approach gets the analysis of contractual interpretation out of order. Parol evidence cannot be the source of ambiguity that causes this Court to consider parol evidence to interpret 01-181C, including the *Settlement Agreement*. *See Steel Farms, Inc. v. Croft & Reed, Inc.*, 154 Idaho 259, 266, 297 P.3d 222, 229 (2012) ("Parol evidence may be considered to aid a trial court in determining the intent of the drafter of a document if ambiguity exists," citation omitted).

Furthermore, if this Court were to consider parol evidence, the only testimony presented at the hearing of the contemporaneous negotiations or conversations concerning the *Settlement Agreement* were from Mayor Reese, the mayor of the City at the time the *Settlement Agreement* was executed. Tr., pp. 34-49. Mayor Reese was asked what his recollection of the *Settlement Agreement* was relative to ground water recharge, and he testified that the City neither gave up nor intended to give up its right to use recharge from Jensen's Grove under 01-181C in the settlement negotiations. Tr., p. 38, l. 5–p. 40, l. 19. The mayor also discussed the provisions of Paragraph 1.e, and the language therein stating that the City preserved the right to submit an application for permit to utilize the benefits accruing from the ground water recharge in Jensen's Grove under 01-181C. Tr., p. 38, l. 5–p. 40, l. 19. This is consistent with the plain language of the *Settlement Agreement*.

No member of the Coalition was present to submit any testimony supporting the Coalition's interpretation of the *Settlement Agreement*. Even if this Court reviews and considers the correspondence of Travis Thompson and Daniel Acevado, Ex. at 46-48, nothing there states that the City cannot claim the annual seepage from 01-181C for mitigation under a permit application. The correspondence provides a legal argument based on the language of the *Settlement Agreement*, rather than a factual argument that illuminates the parties' intent; therefore the correspondence has only minor probative value of the parties' intent in drafting the *Settlement Agreement*. *See* Ex. at 46-48. In fact, the correspondence only addresses a request to not expressly include ground water recharge as a beneficial uses at the time of the transfer approval (*see* Section III.B.3., *infra*). This makes sense under the terms of the *Settlement*

Agreement because the benefits of the recharge could not be realized yet until the City filed an application for permit (such as 27-12261) or a transfer application.

The Director erred in failing to consider that the *Settlement Agreement*, as part of 01-181C, expressly forbids the City from conveying any mitigation credit associated with 01-181C to any third party without the Coalition's approval and, while tacitly acknowledging that 01-181C provides mitigation, the *Settlement Agreement* does not bar the City from using that mitigation itself. Properly interpreted by this Court, it should find that the *Settlement Agreement* allows the City to use the recharge from 01-181C to mitigate for 27-12261.

2. The mitigation provided by 01-181C can be used to mitigate for 27-12261 without the necessity of filing a transfer to list ground water recharge as an express beneficial use of 01-181C.

The City's position is that the *Settlement Agreement*, incorporated into 01-181C, already acknowledges the recharge occurring under 01-181C and the parties' limitation of the circumstances upon which the City could use that recharge. The Director ignored the *Settlement Agreement*, and focused instead on the listed beneficial uses of the water right which do not list ground water recharge as one of those uses. But there is rational explanation for not expressly including it and that is because at the time of the transfer approval for 01-181C, the City was not immediately claiming credit for the ground water recharge. If the City wanted to claim credit for the ground water recharge, it had to file an application for permit or a transfer, so why list ground water recharge on the face of the water right? By only reading the listed elements of the water right, and ignoring the *Settlement Agreement*, the Director's reading of the elements of 01-181C

is much too narrow. The *Settlement Agreement* condition is just as much part of the water right as any other element of the water right.

Unfortunately, with that incorrect first step, the *Final Order* proceeds down an analytical track that it should not have gone, and we see no need to respond to the details that the Director discussed (such as the difference between how non-use of a water right does not require a transfer but a change in how a water right is used for mitigation does require one). The bottom line is that the City and the Coalition entered into the *Settlement Agreement* which described the process for claiming credit for the recharge from 01-181C, and it was accepted by the Department and the SRBA Court when it issued the partial decree for 01-181C. From the City's perspective, it is only trying to finally get credit for recharge that everyone factually acknowledges it is responsible for:

> Q. Was the City going to forfeit it for a time, a period of time, meaning that they weren't getting any credit at the time the application was settled?
> A. Yes.
> Q. Okay. But did the City agree, to your understanding, to forfeit that forever?
> A. No.

Tr., p. 39, l. 22–p. 40, l. 14 (Testimony of Mayor Scott Reese).

No additional conditions on 01-181C are needed because the *Settlement Agreement* already recognizes the recharge that occurs. The *Final Order* ignores 72385—the prior approved transfer wherein the ability for the City to realize the benefits associated with seepage under 01-181C—which was already approved and expressly included seepage as one of its elements and incorporated the provisions of the *Settlement Agreement* wherein the City retained the right to

claim the benefits of the recharge (while bargaining away its ability to convey that right to any third party without the Coalition's approval). The Court should fix these errors and properly construe 01-181C.

There is also no need to file a second transfer for 01-181C and then file an application identical to 27-12261 (as required by the *Final Order*) and provide the Coalition, and other persons, two additional chances to protest this action and make it more costly for the State, the Department, and especially the City to beneficially use the water that annually seeps into the ESPA from Jensen's Grove.

Instead, consistent with 72385 and *Settlement Agreement*, approval of 01-181C's seepage as mitigation for 27-12261 should be addressed through the conditions of approval for 27-12261. Providing conditions for approval is something that the Department does routinely and the mitigation provided by 01-181C should be addressed in the same way. It is important to note on this point that the Department did not state or advise the City at the time it submitted its application and revised applications— with which the Department assisted—that the City had to file another transfer of 01-181C before it could be used for mitigation purposes. The City believed that any question of injury caused by using 01-181C for mitigation purposes was to be—and actually was—addressed in this contested case. As further described below, a transfer would be a duplicative proceeding not permitted under principles of *res judicata*. Therefore, this Court should determine that seepage from 01-181C can be designated in the approval order for 27-12261 as mitigation without the need for the City to file a transfer for this water right.

Finally, if a transfer for 01-181C was required, the Department should have informed the City before proceeding to a hearing on 27-12261. The transfer could have been filed and consolidated with the 27-12261 proceedings to address the entire matter at once. The Department's determination that a transfer now has to be filed will subject the City to a duplicitous hearing. And it is unlikely that a transfer hearing will even occur. It is unrealistic to think that that the Coalition will consent to the transfer only to later protest it. The consent will not be given, which will effectively hold the City hostage indefinitely.

In sum, a transfer application is not necessary because the City's ability to realize the benefits associated with 01-181C's annual seepage was already approved through 72385 that changed 01-181C's nature of use which expressly included seepage as one of 01-181C's elements and incorporated the provisions of the *Settlement Agreement* wherein the City retained the right to claim the benefits of the recharge occurring under this right. It is only if the City wanted to file a transfer to add beneficial uses which would allow the City to possibly assign those benefits to others that the Coalition was concerned about. Accordingly, the City requests this Court to determine that a transfer application is not necessary to amend 01-181C and that the consent of the Coalition is therefore not necessary to utilize the ground water seepage occurring under 01-181C for mitigation purposes.[4]

[4] To be clear, the City recognizes that if the City were change the nature of use of other portions of 01-181C (such as converting the right back to solely an irrigation water right), such a transfer application would require consent from the Coalition based on the plain language of the *Settlement Agreement*. However, as to utilization of the ground water recharge benefits, no such consent is required.

3. The ground water recharge provided by 01-181C is not merely incidental, and therefore can serve as mitigation for 27-12261.

The annual seepage of 2,080.8 AF into the ESPA from Jensen's Grove was, and is, intentional and not incidental, and may therefore be considered as mitigation. The Director held that "[w]ithout expressly listing recharge as a beneficial use, any recharge to the aquifer achieved by diversion and use under Right 01-181C, is merely incidental recharge and cannot be 'used as the basis for claim of a separate or expanded water right.'" R. at 272 (quoting I.C. § 42-234(5)). However, this analysis does not go far enough.

The City agrees that, pursuant to Idaho Code § 42-234(5), incidental recharge cannot be used as the basis for an additional water right, but this is for situations where ground water recharge or seepage is not included anywhere on the water right. Stated another way, incidental recharge is for recharge not included as an element of a water right. This is not the case with 01-181C. The *Settlement Agreement* is a condition of 01-181C and it allowed the City to claim the ground water recharge benefits occurring under 01-181C. Both the *Settlement Agreement* and the reference to seepage losses on the face of 01-181C expressly acknowledge the ground water recharge that occurs under 01-181C. That which is express in not implied or incidental. The annual seepage accounted for in 01-181C is allowed with the express purpose of providing recharge to the aquifer so that the City (and not some third party, as apparently concerned the Coalition) could use that as mitigation. This is allowed by 01-181C and the *Settlement Agreement* (*see* Sections III.B.1 and 2, *supra*), and therefore, is not incidental recharge under Idaho Code § 42-234(5). All of the evidence indicates that the City intended (and still intends)

for the 2,080.8 AF of annual seepage to recharge the aquifer and be used to offset an application for permit, which, in this matter, is 27-12261.

C. The questions of injury to the Coalition's water rights were already addressed in the *Settlement Agreement* and 01-181C, and therefore, under principles of *res judicata*, the City should not be required to file a transfer application to permit the Coalition to have a second opportunity to raise the same injury arguments regarding 01-181C's use for ground water recharge.

As described above, the Coalition's concerns in this matter were only based on **legal** issues surrounding interpretation of the *Settlement Agreement*, not **factual** issues of injury to its water supply. The Coalition did not submit any factual concerns or rebuttal testimony or analysis regarding the modeling analysis and other analyses submitted by the City. The Coalition did so knowing full well that the hearing was the time to submit evidence of injury, if any, and it did not submit any such evidence. It was clear to the Hearing Officer and the parties that the City proposed 01-181C to be used for mitigation purposes.

Because the question of injury has already been addressed, addressing it again in a transfer proceeding is barred by *res judicata*, specifically, the claim preclusion portion of *res judicata*:

> *Res judicata* is comprised of claim preclusion (true *res judicata*) and issue preclusion (collateral estoppel). Under principles of claim preclusion, a valid final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties upon the same claim. The three fundamental purposes served by *res judicata* are:
>
> > First, it "[preserves] the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results." Second, it serves the public interest in protecting the courts against the

> burdens of repetitious litigation; and third, it advances the private interest in repose from the harassment of repetitive claims.
>
> . . .
>
> **The doctrine of claim preclusion bars not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of any claims relating to the same cause of action which were actually made or which might have been made.**

Hindmarsh v. Mock, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002) (citations omitted, brackets in original, emphasis added).

The *Final Order* was likely just as much of a surprise to the Coalition as it was to the City because both parties believed that the major issue to be decided was interpretation of the *Settlement Agreement*, and not a decision that now requires the City to file a second transfer to again amend 01-181C. The Coalition had the opportunity to offer evidence of injury, and the only evidence offered was injury based on a legal interpretation of the *Settlement Agreement*. Tr., p. 49, ll. 21-24. It would be improper to now give the Coalition a second bite at the apple to assert other bases of injury in a transfer proceeding. It is important to remember that the doctrine of claim preclusion bars not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of any claims relating to the same cause of action which were actually made **or which might have been made**. Accordingly, the Coalition should now be barred from presenting the same claims of injury that were addressed in 01-181C, 72385, and the *Settlement Agreement*. The City should not be required to file a second transfer for 01-181C to have its recharge benefits tied to a water right permit and then submit an application identical to 27-

12261 (as required by the *Final Order*) and provide the Coalition two more chances to protest this action with the same arguments it has already made.

The Coalition has already raised its issues with using 01-181C for mitigation (where the Coalition's primary concern appears to be that the City would transfer that mitigation credit to a third party) and in this contested case (where the Coalition presented no factual evidence, but merely a legal argument that the City was not allowed to file 27-12261 by the terms of the *Settlement Agreement*). The Director's error was made in excess of the Department's authority, since the Department may not arbitrarily ignore *res judicata* and require the City to give the Coalition multiple chances to protest 27-12261. The error was made unsupported by substantial evidence, since the evidence shows that the Coalition had opportunity to protest and put forward its evidence of injury (which it chose not to do) and there is no factual reason to give the Coalition multiple chances to protest 27-12261. Finally, the error was arbitrary, capricious, and an abuse of discretion, since *res judicata* should estop the Coalition from asserting the same injuries over and over, yet the *Final Order* appears to require just that.

D. The Director's actions prejudiced a substantial right of the City.

Generally, "directly interested parties . . . have, as a procedural matter, substantial rights in a reasonably fair decision-making process and, of course, in proper adjudication of the proceeding by application of correct legal standards." *State Transp. Dep't v. Kalani-Keegan*, 155 Idaho 297, 302, 311 P.3d 309, 314 (Ct. App. 2013).

Here, the City is a directly interested party, since it made the application for 27-12261. The Department's procedure was "a reasonably fair decision-making process." *Id.* However,

the Department's adjudication was not made by the "application of correct legal standards." *Id.* As discussed above, the *Final Order* erroneously failed to consider the *Settlement Agreement*, which is an incorporated part of 01-181C and the application of Idaho water law to this case in the absence of the entirety of 01-181C was incorrect. Additionally, the law was applied by the Director incorrectly, since he wholly failed to consider mitigatory conditions for 27-12261 since his analysis hung solely on the fact that ground water recharge is not expressly listed as a beneficial use of 01-181C. Thus, the City's substantial right "in proper adjudication of the proceeding by application of correct legal standards" was violated. *Id.*

IV. CONCLUSION.

The City never intended to give away the recharge benefits from 01-181C's diversion and use in Jensen's Grove, a well-known gravel pit. The City needs this Court to tell it whether it did or did not give away those benefits through interpretation of the plain language of the *Settlement Agreement*. If the City did give those rights away in this Court's estimation, then the City will have to move on now knowing it executed a poorly-worded agreement that did not reflect its intent, and will be more careful when working with the Coalition the future. However, as set forth above, the City is confident that the plain language of the *Settlement Agreement* supports its position that it never gave away its rights use the recharge occurring in Jensen's Grove from 01-181C. If it did, why didn't the *Settlement Agreement* just say that the City could not ever claim those benefits?

For the reasons set forth above, there is no legal impediment to using 01-181C's annual seepage in a mitigation plan for 27-12261. Under the plain language of Paragraph 1.e of the

Settlement Agreement, the City is permitted to use 01-181C "for groundwater recharge or mitigation purposes associated with future groundwater rights," and 27-12261 is a future ground water right. 27-12261 provides substantial benefits to the City in the form of reduced costs of maintaining the Blackfoot River pump station. Furthermore, because 27-12261 is an application for permit, and not a transfer application, the provisions of Paragraphs 1.a and 1.b do not require written consent from the Coalition.

The errors described above have been made in violation of statutory provisions; in excess of the statutory authority of the Department; without support of substantial evidence; and arbitrarily, capriciously, and as an abuse of discretion. The errors have violated the City's substantial right in the proper adjudication of this matter by the application of correct legal standards. Where, as here, "there is no indication in the record that further findings of fact could be made from the paucity of evidence that would affect the outcome of this case," remand to the Department is unnecessary. *Bonner Gen. Hosp. v. Bonner Cnty.*, 133 Idaho 7, 11, 981 P.2d 242, 246 (1999); *see also* I.C. § 67-5279(3). The Coalition has only ever made a legal argument in this case, which can be answered by this Court upon the record already established because contract interpretation is a matter of law.

This Court should issue an order approving the issuance of a permit for 27-12261 because there are no legal impediments to using ground water recharge under 01-181C to mitigate for 27-12261. Indeed, such mitigation for a water right permit like 27-12261 was specifically contemplated under the *Settlement Agreement*. A determination that the City must file a transfer and obtain consent from the Coalition is contrary to the plain language of the *Settlement*

Agreement, and as a practical matter, the Coalition will not consent to any transfer. The inequitable result will be that the City will never be able to utilize the recharge benefits everyone acknowledges occurs at Jensen's Grove under 01-181C to aid the growing City of Blackfoot.

Dated this 11th day of January, 2016.

Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the following described pleading or document on the parties listed below by hand delivery, email, mail, or by facsimile, with the correct postage thereon, on this 11th day of January, 2016.

DOCUMENT SERVED: PETITIONER'S OPENING BRIEF

ORIGINAL TO: Eric J. Wildman
District Judge
253 3rd Avenue North
P.O. Box 2707
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Attorneys for Respondents

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

THE CITY OF BLACKFOOT,

Petitioner,

vs.

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

Respondents,

and

A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, AMERICAN FALLS RESERVOIR DISTRICT #2, and MINIDOKA

Case No. CV-2015-1687

AFFIDAVIT OF MEGHAN CARTER IN SUPPORT OF UNOPPOSED MOTION FOR EXTENSION OF TIME TO FILE RESPONDENTS' BRIEF

IRRIGATION DISTRICT,

Intervenors.

IN THE MATTER OF APPLICATION FOR PERMIT NO. 27-12261 IN THE NAME OF THE CITY OF BLACKFOOT.

STATE OF IDAHO)
) ss.
County of Ada)

I, MEGHAN CARTER, being first duly sworn upon oath, depose and say:

1. That I am a deputy attorney general and represent the Idaho Department of Water Resources ("Department"), in the above matter.

2. That the Respondents' brief is due February 8, 2016.

3. That the Department has not previously requested an extension of time in this matter.

4. That due to other urgent intervening matters related to water rights administration and orders of the Department requiring counsel's attention, counsel will not be able to complete the Respondents' brief by the due date.

5. That I believe an extension of three (3) days, to and including February 11, 2016, is a reasonable and necessary extension.

6. That the undersigned counsel contacted counsel for the other parties to request an extension of time for filing its Respondents' brief. Counsel stipulated to the request upon the condition that the Department broaden its request to apply to all Respondents' briefs so that there will be uniformity in the briefing schedule. Accordingly, the Department requests an extension of

time for the filing of all Respondents briefs in this appeal to February 11, 2016, thereby extending the deadline for filing reply briefs to March 3, 2016.

7. I am reasonably assured that the Respondents' brief will be timely filed on or before June 8, 2015, should this request be granted.

DATED this 8th day of February 2016.

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
Chief, Natural Resources Division
Deputy Attorney General

MEGHAN CARTER
Deputy Attorney General
Department of Water Resources

SUBSCRIBED AND SWORN To before me this 8th day of February 2016.

KIMI A. WHITE NOTARY PUBLIC STATE OF IDAHO

NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho
Commission Expires: 04/01/16

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of February 2016, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the following parties by the indicated methods:

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Attorneys for Respondents

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

THE CITY OF BLACKFOOT,

Petitioner,

vs.

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

Respondents,

and

A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, AMERICAN FALLS RESERVOIR DISTRICT #2, and MINIDOKA

Case No. CV-2015-1687

UNOPPOSED MOTION FOR EXTENSION OF TIME TO FILE RESPONDENTS' BRIEF

IRRIGATION DISTRICT,

Intervenors.

IN THE MATTER OF APPLICATION FOR PERMIT NO. 27-12261 IN THE NAME OF THE CITY OF BLACKFOOT.

COMES NOW the Respondents, the Idaho Department of Water Resources ("Department") and Gary Spackman, in his capacity as Director of the Department, by and through their counsel of record, pursuant to Rules 34(e) and 46 of the Idaho Appellate Rules, and move this Court for an extension of time for filing all Respondents briefs in this appeal to February 11, 2016, and thereby extending the deadline for filing reply briefs to March 3, 2016.

The undersigned counsel has contacted the counsel for the other parties to request an extension of time for filing its Respondents' brief. Counsel did not oppose but also asked that the Department broaden its request to apply to all Respondents' briefs so that there will be uniformity in the briefing schedule. Accordingly, the Department requests an extension of time for the filing of all Respondents briefs in this appeal to February 11, 2016, thereby extending the deadline for filing reply briefs to March 3, 2016.

This motion is based upon the affidavit of counsel filed herewith.

//

//

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//

//

DATED this 8th day of February 2016.

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
Chief, Natural Resources Division
Deputy Attorney General

MEGHAN CARTER
Deputy Attorney General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of February 2016, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the following parties by the indicated methods:

Original to:
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Meghan Carter
Deputy Attorney General

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

THE CITY OF BLACKFOOT, Petitioner, vs. GARY SPACKMAN, in his official capacity as Director of the Idaho Department of Water Resources, and THE IDAHO DEPARTMENT OF WATER RESOURCES Respondents, A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY and TWIN FALLS CANAL COMPANY, Intervenors. IN THE MATTER OF APPLICATION FOR PERMIT NO. 27-12261 In the name of the City of Blackfoot.	Case No. CV-2015-1687 **ORDER GRANTING MOTION FOR EXTENSION OF TIME**

On October 27, 2015, this Court entered an *Order* setting the deadline for the filing of Respondents' Brief(s) as February 8, 2016, and the deadline for the filing of Reply Brief(s) as February 29, 2016. On February 8, 2016, the Respondents filed a *Motion* requesting an extension of time in which to file their Respondents' Brief to February 11, 2016. In their *Motion*, the Respondents represent that they have contacted counsel for the other parties, and that

they do not oppose the *Motion*. The *Motion* is supported by the *Affidavit of Meghan Carter*. For good cause appearing, and in an exercise of discretion, the Court will grant the *Motion*.

THEREFORE, BASED ON THE FOREGOING, THE FOLLOWING ARE HEREBY ORDERED:

1. The Respondents' *Motion for Extension* **is hereby granted**.

2. The deadline for the filing of Respondents' Brief(s) **is hereby extended until February 11, 2016.**

3. The deadline for the filing of Reply Brief(s), if any, **is hereby extended until March 3, 2016**.

IT IS SO ORDERED.

Dated February 8, 2016

ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING MOTION FOR EXTENSION OF TIME was mailed on February 08, 2016, with sufficient first-class postage to the following:

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Julie Murphy
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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

THE CITY OF BLACKFOOT,

Petitioner,

vs.

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

Respondents,

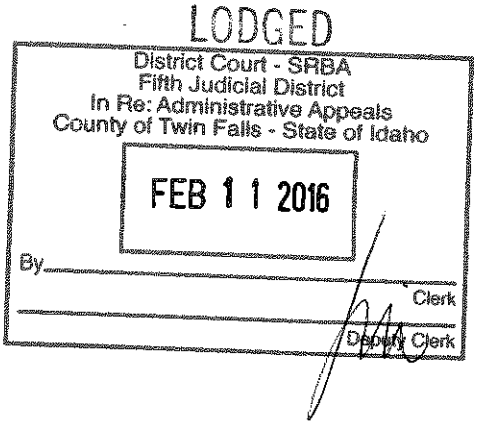
and

A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, AMERICAN FALLS RESERVOIR DISTRICT #2, and MINIDOKA IRRIGATION DISTRICT,

Intervenors.

IN THE MATTER OF APPLICATION FOR PERMIT NO. 27-12261 IN THE NAME OF THE CITY OF BLACKFOOT.

Case No. CV-2015-1687



RESPONDENTS' BRIEF

Judicial Review from the Idaho Department of Water Resources
Honorable Eric J. Wildman, District Judge, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is a judicial review proceeding in which the City of Blackfoot ("City"), appeals a final order issued by the Director ("Director") of the Idaho Department of Water Resources ("Department") denying an application for permit filed by the City. The order appealed is the September 22, 2015, *Order Addressing Exceptions and Denying Application for Permit* ("Final Order").

B. STATEMENT OF FACTS & PROCEDURAL BACKGROUND

On September 12, 2013, the City filed Application for Permit No. 27-12261 ("Application") with the Department. R. at 1. The application was amended on September 2, 2014, (R. at 28), and again on January 27, 2015 (R. at 92). A joint protest was filed by A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company, American Falls Reservoir District #2, and Minidoka Irrigation District (collectively referred to as the "Coalition"). R. at 66.

The City seeks a permit to divert 9.71 cfs of groundwater to irrigate 524.2 acres near the City. R. at 92. The City seeks the permit to replace surface water the City currently delivers through a pump station on the Blackfoot River and to supplement other existing ground water rights. R. at 95.

The proposed permit "constitutes a consumptive use of water and, without mitigation, would reduce the amount of water available to satisfy water rights from sources connected to the Eastern Snake Plain Aquifer" R. at 207. Because of this, the City submitted a mitigation plan with the Application. R. at 95. The City proposes to mitigate for the new ground water use by leaving in the Blackfoot River 0.16 cfs of the water the City currently delivers through the river pump. R.

at 97. In addition, the City proposes using Water Right 01-181C ("01-181C") to recharge 1,066 afa of water into Jensen Grove, a gravel pit near the City. R. at 96.

Water Right 01-181 was originally described in the 1910 Rexburg Decree, and New Sweden Irrigation District ("NSID") claimed a portion of the water right in the Snake River Basin Adjudication ("SRBA"). R. at 204. The City purchased the water right from NSID and applied for a transfer in 2005 ("Transfer"). Ex. at 49. The Transfer requested a change in place of use from NSID to Jensen Grove and a change in the purpose of use. *Id.* The Transfer sought to add diversion to storage, storage, irrigation from storage and diversion to recharge as new purposes of use. *Id.* The Coalition protested the Transfer. Ex. at 75. The City and the Coalition executed a private settlement agreement in June of 2006 ("Private Agreement"). Ex. at 18. The City, NSID, and the Coalition are the only parties to the Private Agreement. *Id.* In the Private Agreement, the City voluntarily agreed to limit its ability to transfer or change the nature of use of 01-181C without first receiving consent from the Coalition. Ex. at 19. The City also agreed that if it "proposes to utilize [01-181C] for groundwater recharge or mitigation purposes associated with existing or future groundwater rights, the CITY must file the appropriate application for permit and/or transfer." Ex. at 20.

The Department circulated a draft transfer approval for comment on December 1, 2006. Ex. at 70. The draft included "ground water recharge" and "ground water recharge storage" as purposes of use. Ex. at 72. The Coalition disagreed with some aspects of the draft, specifically inclusion of "ground water recharge" and "ground water recharge storage" as purposes of use. Ex. at 46. The City disagreed with the Coalition and requested the Department approve the transfer as drafted, keeping "ground water recharge" and "ground water recharge storage" as purposes of use. Ex. at 48. The Department approved the Transfer in February of 2007 without

"ground water recharge" and "ground water recharge storage" as purposes of use. Ex. at 88. The Transfer authorized five beneficial uses: diversion to storage, irrigation, irrigation storage, irrigation from storage, and recreation storage. Ex. at 89. A partial decree was issued by the SRBA District Court for 01-181C on May 29, 2009. Ex. at 91. The five authorized purposes of use in the partial decree are the same as the Transfer. Ex. at 92. The partial decree for 01-181C contains, among other things, two conditions which were included in the transfer. The first condition under the quantity element states:

> The reservoir established by the storage of water under this right shall not exceed a total capacity of 1100 acre feet or a total surface area of 73 acres. This right authorizes additional storage in the amount of 186 afa to make up losses from evaporation and 980.8 afa for seepage losses.

Ex. at 92. The second condition is located in the Other Provisions Necessary for Definition or Administration section and provides:

> The diversion and use of water under transfer 72385 is subject to additional conditions and limitations contained in a Settlement Agreement – IDWR Transfer of Water Right, Transfer No. 72385, date June 2006, including any properly executed amendments thereto, entered into by and between the New Sweden Irrigation District, the City of Blackfoot, A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, Twin Falls Canal Company and North Side Canal Company. The Settlement Agreement has been recorded in Bingham County (Instrument No. 575897) and Bonneville County (Instrument No. 1249899) and is enforceable by the parties thereto.

Ex. at 93.

A hearing on the Application was held on April 21, 2015. Whether 01-181C could be used to mitigate for the Application was a question raised at hearing. R. at 207-208. The City argued it does not need to file an application for transfer to add recharge or mitigation as a purpose of use to 01-181C because the City's ability to realize the benefits associated with seepage under 01-181C was approved through the Transfer. R. at 207. The Coalition argued

paragraphs 1(a), 1(b) and 1(e) of the Private Agreement "prohibit using water right 01-181C to offset the diversion of water proposed in the pending application for permit." R. at 209. The hearing officer rejected the City's argument stating "[t]he beneficial uses of 'recharge' and 'mitigation' are not explicitly authorized under water right 01-181C." *Id.* The hearing officer also cited the Private Agreement and the fact ground water recharge and ground water recharge storage were removed as beneficial uses in the Transfer approval as evidence those uses "were not intended to be included as beneficial uses on water right 01-181C through [the Transfer]." R. at 208. The hearing officer issued his *Preliminary Order Issuing Permit* ("Preliminary Order") on June 30, 2015. R. at 200. In the Preliminary Order, the hearing officer conditionally granted the Application, directing the City to file a transfer for 01-181C to change the purpose of use to include either recharge or mitigation. R. at 211, 215. The hearing officer could not determine if 01-181C would provide sufficient mitigation for the Application without a transfer proceeding and included the following condition to account for all possible outcomes of the transfer proceeding:

> Prior to diversion of water under this right, the right holder shall file an application for transfer to describe "ground water recharge" and/or "mitigation" as an authorized beneficial use under water right 01-181C. If the transfer application is denied, then this permit is void and no longer of any effect. If the transfer application is approved and the beneficial use of "ground water recharge" or "mitigation" is for an annual diversion volume less than 1,066 acre-feet, then the diversion rate and annual diversion volume for this permit shall be reduced in proportion to the shortfall.

R. at 211, 215.

The City filed exceptions to the Preliminary Order on July 14, 2015. R. at 221. In its exceptions, the City argued the hearing officer "did not correctly apply principles of contractual interpretation," that the hearing officer "failed to follow Department policy by requiring a transfer for 01-181C to be filed to include 'mitigation' or 'ground water recharge' as beneficial

uses," and that being required to file a transfer implicates the doctrine of *res judicata*. R. at 230. The City asked the Director to interpret the Private Agreement between it and the Coalition and requested the Director not require the City file a transfer to use 01-181C as mitigation. R. at 230.

On September 22, 2015, the Director issued the Final Order. R. at 271. In the Final Order the Director determined a decision on the City's exceptions could "be made using principles of Idaho water law without referring to the Settlement Agreement," and declined to consider principles of contract interpretation. R. at 272. The Director determined "Right 01-181C does not provide for mitigation or ground water recharge as a beneficial use. If the City would like to use Right 01-181C for mitigation through ground water recharge it must file a transfer." R. at 273. The Final Order denied the Application without prejudice and suggested the City refile the Application in conjunction with a transfer adding mitigation or recharge as authorized uses to 01-181C to "allow the Department to fully consider the City's mitigation plan as part of the application for permit process." R. at 274. The City timely filed its petition for judicial review on October 16, 2015. R. at 278-85.

II. ISSUES ON APPEAL

The Department reformulates the issues presented as follows:

A. Whether the Director correctly determined the Private Agreement did not need to be considered to decide whether 01-181C currently authorizes the use of water for mitigation or recharge purposes.

B. Whether the Director correctly determined the plain language of the Private Agreement does not authorize the use of 01-18C for recharge or mitigation.

C. Whether the reference to seepage in the quantity element of 01-181C authorizes the City to use the water right for mitigation or recharge.

D. Whether the Court may consider the documents from the earlier transfer proceeding when interpreting the partial decree for 01-181C.

E. Whether the doctrine of *res judicata* precludes the Director from concluding that the City must file a transfer to add mitigation or recharge as an authorized use to 01-181C.

F. Whether the City's substantial rights have been prejudiced.

III. STANDARD OF REVIEW

Judicial review of a final decision of the Department is governed by the Idaho Administrative Procedure Act, chapter 52, title 67, Idaho Code. Idaho Code § 42-1701A(4). Under the Act, the court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The court shall affirm the agency decision unless it finds the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279(3); *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The party challenging the agency decision must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. Idaho Code § 67-5279(4); *Barron*, 135 Idaho at 417, 18 P.3d at 222. "Where conflicting evidence is presented that is supported by substantial and competent evidence, the findings of the [agency] must be sustained on appeal regardless of whether this Court may have reached a different conclusion." *Tupper v. State Farm Ins.*, 131 Idaho 724, 727, 963 P.2d 1161, 1164 (1998). If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary. *Idaho Power Co. v. Idaho Dep't of Water Res.*, 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011).

IV. ARGUMENT

Idaho Code § 42-203A(5) provides that when evaluating a new application for permit, the Director must consider whether the new use will cause injury to other water rights by "reduc[ing] the quantity of water under existing water rights. . . ." An application which would otherwise be denied because of injury to other water rights maybe approved, however, if the applicant provides mitigation to offset the injury. IDAPA 37.03.08.045.01.a.iv. The City's Application proposes a new consumptive ground water diversion from the Eastern Snake Plain Aquifer ("ESPA") which would reduce the amount of water available to satisfy existing water rights from sources hydraulically connected to the ESPA. R. at 207. In recognition of this, and to offset the injury to other water rights, the City submitted a mitigation plan along with the Application. R. at 95-97. Relevant here is the City's proposal to use water right 01-181C as mitigation by recharging 1,066 afa of water into the ESPA. R. at 96.

The question presented in this case is whether mitigation or recharge is an authorized purpose of use for water right 01-181C. The City is entitled to use 01-181C as part of its mitigation plan only if mitigation or recharge is an authorized purpose of use associated with the water right. The Director cannot recognize a purpose of use not authorized by the water right. *See* Idaho Code § 42-351 ("It is unlawful for any person to divert or use water...not in conformance with a valid water right.)

A. The Private Agreement does not need to be considered to decide whether 01-181C currently authorizes the use of water for mitigation or recharge purposes.

To decide whether recharge or mitigation is an authorized use under 01-181C, the hearing officer started with the SRBA decree and concluded that "[t]he beneficial uses of 'recharge' and 'mitigation' are not explicitly authorized under water right 01-181C." R. at 207. The hearing officer recognized that there is a condition referencing seepage but concluded the reference

"does not create or equate to a new or independent beneficial use of water." *Id.* The hearing officer also reviewed the draft transfer approval circulated as part of the finalization of the Transfer involving 01-181C. The draft approval included "ground water recharge" and "ground water recharge storage" as authorized purposes of use. Ex. at 72. In response to the draft approval, counsel for the Coalition, which had protested the Transfer, asked that those uses be removed from the transfer approval because they were contrary to the stipulation reached between parties to the transfer proceeding. Ex. at 46. The Department ultimately removed those uses from the final transfer approval. Ex. at 89. The hearing officer concluded that this was "further evidence" that mitigation and recharge "are not currently authorized under water right 01-181C." R. at 208. In addition, the hearing officer also considered whether the Private Agreement entered into between the City, the Coalition, and NSID during the Transfer proceeding authorizes the City to use 01-181C for mitigation or recharge. The hearing officer found that the Private Agreement "confirms that 'ground water recharge' and 'mitigation' were not intended to be included as beneficial uses on water right 01-181C." *Id.* Based upon the above analysis, the hearing officer concluded that before the City can divert water under 01-181C "for 'mitigation' or 'ground water recharge' purposes, the City must file an application for transfer to describe one or both of these beneficial uses on water right 01-181C." *Id.*

The City appealed the hearing officer's decision to the Director. Like the hearing officer, the Director started by reviewing the SRBA partial decree for 01-181C. The Director observed that "01-181C has five beneficial uses listed: diversion to storage, irrigation, irrigation storage, irrigation from storage, and recreation storage." R. at 272. The Director concluded that "nothing" in the in the purpose of use element "indicate[s] Right 01-181C can be used for ground water recharge." *Id.* The Director also reviewed the transfer approval documents associated

with the previous Transfer and reached the same conclusion as the hearing officer. The Director found that "ground water recharge and ground water recharge storage were deliberately removed from the beneficial uses listed in [the transfer approval]." *Id.* The Director concluded that "[w]ithout expressly listing recharge as a beneficial use, any recharge to the aquifer achieved by diversion and use under Right 01-181C is merely incidental recharge and cannot be used as the basis for claim of a separate or expanded water right." *Id.* (quotations and citations omitted). Unlike the hearing officer, however, the Director concluded he did not need to review the details of the Private Agreement entered into between the City, the Coalition and NSID. He concluded he must rely on the purposes of use listed on the face of the decree to determine which uses were authorized under the water right. *Id.*

1. The Private Agreement is not an element of water right 01-181C.

On appeal to this Court, the City argues the Director erred when he did not review and consider the details of the Private Agreement entered into between the City, the Coalition and NSID in his analysis. *Opening Brief* at 12. The City argues the Private Agreement is "an element of water right No. 01-181C." *Id.* The City points to the provision referencing the Private Agreement in the decree and argues that its inclusion in the decree means the Director must consider it in determining the authorized nature of use for 01-181C. *Id.* The City argues "conditions in a water right license or partial decree are elements of the water right and are no less important than the diversion rate or any other water right element." *Id.*

The Director properly concluded that he does not need to inquire into the details of the Private Agreement. First, contrary to the City's argument, the Private Agreement is not itself an element of the water right. A remark *referencing* the existence of the Private Agreement is

included under the "Other Provisions Necessary" section of the partial decree for 01-181C.[1] This is an important distinction. Since the remark only references the agreement, the question becomes what was the intent of including this information in the water right. It has been a long standing practice in the SRBA to include remarks referencing private contracts or private agreements in the partial decrees to resolve objections. *See, e.g.,* SRBA Subcases 75-5 (Arrowhead Water District)[2] and 75-14608 (Tyacke)[3]. The Department has adopted the same practice with protested transfers and applications for permit and will, as this case evidences, include a condition referencing a private settlement agreement in the approval documents to resolve a protest. The purpose of referencing such agreements, however, is only to provide notice of private agreements that govern the relationships of the parties to the agreements. Remarks such as these are included under the other provision necessary section of the partial decree "as a courtesy to the parties" and "their successors-in-interest." *Memorandum Decision and Order on Motion to Alter or Amend Judgment, Order Granting Motion to Strike,* In Re SRBA Subcase No. 02-2318A at 6, fn.4 (Oct. 31, 2011) (Hon. J. Wildman). That is the limited purpose for its inclusion.

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[1] At least one SRBA Special Master has indicated that remarks in the "Other Provision Necessary" section of a partial decree are not elements of the water rights. *See Order Recommending Partial Decree Be Set Aside,* In Re: SRBA Subcase Nos.: 31-7311, 31-2357 and 31-2395, at 6 (Jan. 30, 2004) (Special Master Bilyeu) ("There is no legal justification for this Special Master to interpret or recommend setting aside the elements of the *Partial Decree.* What is ambiguous in the *Partial Decree* is the 'other provisions necessary' to define or administer section.") (underlining and italics in original); But *See* Idaho Code § 42-1411(2) ("The director shall determine the following elements. . . (j) 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.").

[2] The partial decree includes a remark that provides; "This water right is subject to a private agreement among the City of Salmon; Myrtle, Dale and Laura Edwards; and Arrowhead Water District, and recorded in the Lemhi County Recorder's Office on December 1, 2011, as instrument no. 288296."

[3] The partial decree includes a remark that provides; "The operation, use and administration of this water right is subject to a private water right agreement effective December 21, 2011, among Sunset Heights Water District, Cecil and Judith Bailey Jackson, Michael Tyacke, and the State of Idaho, and recorded in the Lemhi County Recorder's Office as Instrument No. 288625."

2. The reference to the Private Agreement was not intended to make the Director and other water users parties to the private agreement or to bind the Director and other water users to the contents of the private agreement.

The City suggests the intent behind the remark referencing the Private Agreement was to incorporate the Private Agreement into 01-181C and thereby makes its terms and provisions binding on the Director and other water users. *Opening Brief* at 15. The language of the remark suggests otherwise. The language of the remark states the agreement is only "by and between" NSID, the City and the Coalition. Ex. at 93. There are no other parties to the agreement. This reference does not suggest a broader intent to make the Private Agreement binding on others but just the opposite – that it is "by and between" NSID, the City and the Coalition and it only affects the rights and obligations of those parties. Furthermore, enforcement of the agreement is limited to the parties to the agreement. *See Id.* (The agreement is "enforceable by the parties thereto.") This further emphasizes that the Private Agreement only governs the relationship between the parties to the agreement. The inclusion of language referencing the Private Agreement does not suggest an intent to incorporate the agreement into the water right.

The City cites to *Phillips v. Phillips,* 93 Idaho 384, 462 P.2d 49, (1969); *Borley v. Smith,* 149 Idaho 171, 233 P.3d 102 (2010); and *Davidson v. Soelberg,* 154 Idaho 227, 296 P.3d 433 (Ct. App. 2013), divorce cases, to support its reasoning that the Private Agreement is incorporated into 01-181C. *Opening Brief* at 14-15. The City uses the divorce cases "because in divorce cases, the parties will frequently arrive at a property settlement agreement, which may or may not thereafter be incorporated, or merged, into the court's divorce decree." *Opening Brief* at 14.

In *Phillips,* the Idaho Supreme Court held that a separation agreement is presumed merged into a divorce decree absent clear and convincing evidence to the contrary. *Phillips*, 93

Idaho at 387, 462 P.2d at 52. The Idaho Supreme Court in *Borley* went further saying the analysis of whether a separation agreement is merged into the divorce decree begins with the "four corners of the divorce decree." *Borley*, 149 Idaho at 177, 233 P.3d at 108. Once a separation agreement is merged into a divorce decree, "the right to enforce the contract through an action for breach of contract is supplanted by the divorce court's authority to enforce its orders." *Davidson*, 154 Idaho at 230, 269 P.3d at 436. The merged separation agreement is enforceable as a part of the divorce decree and "if necessary may be modified by the court in the future." *Phillips*, 93 Idaho at 387, 462 P.2d at 52.

The City erroneously relies on the concepts of merger within divorce law. The Idaho Supreme Court in *Phillips* explains that the justification for considering agreements merged is the strong policy interest the courts have in maintaining jurisdiction in divorce cases. Specifically, the Court points to the "just and equitable disposition" of matters concerning the "care, custody and support of the minor children of the parties" and also states "[o]ther matters of importance in a divorce action are the disposition and division of the community property of the parties and the award of alimony or support to the wife. Our statutes place the same jurisdiction, responsibility and duty on the district courts in the disposition of these matters." *Phillips* 93 Idaho at 387, 462 P.2d at 52. In essence, merger of separate agreements into a divorce decree is justified because of a policy to provide enforcement of all agreements within one court. Because water administration does not take place through the SRBA Court, there is no similar policy in recognizing merger of the Private Agreement. Once a water right has been decreed it is up to the Department to enforce and administer the provisions of the water right. *See* Idaho Code §§ 42-220 and 42-602. With a divorce decree, the court maintains a more active role. A water right decree and a divorce decree are two very different decrees and as such

merger under a divorce should not be the body of law used to determine if the Private Agreement is incorporated into 01-181C.

To the extent the Court concludes that the doctrine of merger is applicable, the more appropriate body of law involving merger would be the doctrine of merger developed within property law. A water right is "a valuable right which is entitled to protection as a property right." *Murray v. Pub. Utilities Comm'n*, 27 Idaho 603, 619, 150 P. 47, 50 (1915). Since a water right is afforded the same protection as a property right, property law would be more appropriate in determining whether the Private Agreement is merged with 01-181C.

The Idaho Supreme Court has a generally recognized that "[w]here the covenants in the contract do not relate to the conveyance, but are collateral to and independent of the conveyance, they are not merged in the deed. . . ." *Jolley v Idaho Securities, Inc.*, 90 Idaho 373, 384, 414 P.2d 879, 885 (1966). The Private Agreement is not merged or incorporated with the decree for 01-18C because it is collateral and independent of 01-181C.

The Private Agreement is collateral to and independent of 01-181C because it does not relate to the elements of 01-181C but focuses on the rights and duties of the signatories outside of the current administration of the water right. In *Jolley*, the parties agreed to trade properties and provide each other with an abstract of title to the real property being transferred. *Id.* at 378-379, 881. The court determined that the agreement to provide an abstract was not merged with the deed, stating "[a]n abstract does not relate to the title, possession, quantity, or emblements of the land. It is a graphic history of the title, but has nothing to do with the title itself." *Id.* at 384, 885. The Private Agreement does not relate to the elements of 01-181C in the same way an abstract of title doesn't relate to the title possession, quantity or emblements of the land. The Private Agreement details the obligations the City has if it wants to change the elements of 01-

181C but does not govern any of the elements of 01-181C. Therefore the Private Agreement is collateral to and independent of the partial decree.

Further, the terms of the Private Agreement are not inhered to the very subject matter of 01-181C and it is therefore collateral to the partial decree. In *Sells v. Robinson,* Sells and Robinson executed a Real Estate Purchase and Sale Agreement ("REPSA"), which discussed timber rights on an easement. *Sells v. Robinson*, 141 Idaho 767, 770, 118 P.3d 99, 103 (2005). A deed was executed three days later with different language describing the easement and timber rights. *Id.* The court held the terms of the REPSA were merged into the deed because they "inhere in the very subject matter with which the deed deals – the timber on the Sell's remaining property." *Id.* at 772, 104 (internal quotations omitted). The Private Agreement addresses the rights and responsibilities of the City concerning use of 01-181C and permissions needed from the Coalition, while a water right decree defines the nature and extent of a water right and directs the use and administration of that right. The Private Agreement does not affect current administration nor does it define the nature and extent of 01-181C and therefore is not inhered in the very subject matter of the water right.

In *Fuller v Dave Callister*, a seller and a buyer entered into a purchase agreement and subsequently executed an addendum where the seller agreed that it would deed over a portion of the property to ACHD through a condemnation and transfer the proceeds of the conveyance to the sellers. *Fuller v. Dave Callister*, 150 Idaho 848, 850, 252 P.3d 1266, 1268 (2011). The buyer then executed a warranty deed conveying the property to a third party which did not mention the addendum or the anticipated condemnation. *Id.* In analyzing whether the purchase agreement and addendum were merged into the warranty deed the court stated, "[b]y the very nature of the obligation established in Addendum # 1, it is clear that the parties expected that provision to

continue in effect after the execution of the warranty deed." *Id.* at 854, 1272. The Court went on to hold that the doctrine of merger did not apply stating "[w]here the relevant conditions of a contract could not have been performed prior to execution of the warranty deed, merger is inappropriate." *Id.* The Private Agreement outlines how the signatories will interact concerning use of 01-181C after the Transfer. This discussion about the terms of the Private Agreement indicates the City and the Coalition intended it to continue after the elements of 01-181C were finalized in the Transfer. The Private Agreement even contemplates continuing on after 01-181C was partially decreed. Ex. at 21. The Private Agreement is a separate agreement beyond the elements of a water right and therefore merger into the partial decree would be inappropriate.

The Private Agreement does not relate to the elements of 01-181C nor is it inhered to the very subject matter of the water right. The signatories to the Private Agreement intended for the agreement to continue past the Transfer and partial decree making it a separate agreement beyond the elements of the water right. Because the Private Agreement fits into all of the exceptions of the doctrine of merger it is collateral to and independent of 01-181C and is therefore not merged.

3. In order for the Department to properly administer water right 01-181C it must be able to rely on the face of the decree.

The Director must be able to rely on face of decree. To determine the authorized purposes of use, the Director must first look to the purpose of use element on the face of the water right. In this case, the purpose of use element for 01-181C does not include recharge or mitigation. The only authorized purposes of use of 01-181C are: diversion to storage, irrigation, irrigation storage, irrigation from storage, and recreation storage. Ex. at 92. The elements on the face of the water right are conclusive as to the nature and extent of the water right. Idaho Code § 42-1420. Like a judgment, a water right must outline with certainty the nature and extent of

beneficial use of the water. *See* Rangen Decision at 19 (The purpose of SRBA was to provide certainty and finality to water rights.); *see Sinnett v. Werelus,* 83 Idaho 514, 524 (1961) ("A judgment must be definite and certain in itself... It must fix clearly the rights and liabilities of the respective parties to the cause and be such as the parties may readily understand their respective rights and obligations thereunder."). The provisions in a partial decree must be set forth with "the certainty required for a decree which will have application in perpetuity." *A&B Irrigation Dist. v. Idaho Conservation League,* 131 Idaho 411, 423, 958 P.2d 568, 580 (1997) *vacated in part on reh'g* (1998).

The City's argument leads to unacceptable uncertainty of water rights. Here, the City is asking the Court to adopt a rule that requires the Director to go beyond the face of the decrees and interpret private agreements referenced in the decrees. Often times, the Director does not have copies of the private agreements. Moreover, many of these private agreements are subject to change by the signatories. The agreement here highlights the uncertainty that would be injected into water rights.

The Private Agreement provides that it "may [be] amended or modified" by agreement of NSID, the City, and the Coalition. Ex. at 21. The City poses a hypothetical asking the Court to assume that the City and the Coalition amend the Private Agreement and agree "to allow 01-181C to be applied to mitigate a third party's water right." *Opening Brief* at 16. The City suggests it would then be inequitable to not make that agreement binding on the Director and other water users. *Id.* The opposite is true. Not only would it be inequitable to require that the Department and other water users be bound by agreements decided by only the City and the Coalition, it would also be contrary to law.

The hypothetical presented by the City focuses the issue. The hypothetical is premised on the City and the Coalition making an agreement that modifies the elements of the 01-181C. If the Court were to accept the City's argument and conclude that parties to a private settlement agreement are allowed to modify the express elements of a water right, and that those changes would be binding on the Director and all other water users, the parties to the agreement could make a private agreement to change any element of the water right. Taken to its logical conclusion, the City and the Coalition could agree to change the priority date, place of use, point of diversion or any other element and then say that change is binding on the Director and other parties. Idaho Code provides strict processes for changing water rights (Idaho Code § 42-222) and changes that result in enlargement are contrary to law. *See Cf. Jensen v. Boise-Kuna Irr. Dist.*, 75 Idaho 133, 142, 269 P.2d 755, 760 (1954) (A contract that is contrary to law is ultra vires and void.). While the signatories are free to change their agreement, that change cannot affect or modify the elements of the water right.

Furthermore, allowing a private agreement to change a water right is contrary to the notice rights of other water users. In water right permitting (Idaho Code § 42-203A), in the transfer process (Idaho Code § 42-222), and in water right decrees (Idaho Code § 42-1412), third parties have the opportunity to object to elements of the proposed water right that may affect their interests. If private agreements could alter express elements of a water right third parties would be deprived of their right to receive notice of changes. Moreover, the Department would not know with certainty the nature and extent of water rights thereby severely inhibiting the Department's ability to administer water rights.

To be clear, the signatories are free to change their Private Agreement, thereby changing their own rights, duties and obligations. They are also then entitled to seek to have those

changes enforced among the signatories. But they are not entitled to change the elements of a water right simply by agreement among the signatories. Since the Private Agreement cannot change the express elements on the face of the water right and is only binding on the signatories, the Director correctly determined he did not need to look to the settlement agreement when evaluating 01-181C.

B. The plain language of the Private Agreement does not authorize the use of 01-181C for recharge or mitigation.

The City suggests that if this Court concludes the Director erred in failing to engage in the contractual interpretation of the Private Agreement, the Court "should thereafter itself engage in contractual interpretation and rule on this issue" because it is a question of law. *Opening Brief* at 12. Idaho Code § 67-5279(3) is clear: "If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary." Thus, if the Court does not affirm the Director, the Court should not engage in contractual interpretation but rather should remand the matter back to the Director.

Even if the Court were to evaluate the Private Agreement, the plain language of the sections at issue does not authorize use of 01-181C for recharge or mitigation without the City filing a transfer. The City argues sections 1(a), 1(b), and 1(e) of the Private Agreement indicate the City can accrue benefit from ground water recharge. *Opening Brief* at 21. However, the Private Agreement merely mentions the City needs permission from the Coalition to pursue use of Jensen Grove for ground water recharge. And specifically section 1(e) of the Private agreement states "If the CITY proposes to utilize the Water Right for groundwater recharge or mitigation purposes associated with existing or future groundwater rights, the CITY must file the appropriate application for permit and/or transfer." Ex. at 20. This language indicates the City does not get recharge credit for the seepage at Jensen Grove without some affirmative action

either an application for permit or transfer. Therefore the Private Agreement supports the Department's position that 01-181C does not have ground water recharge or mitigation as a purpose of use.

The City also points to paragraph 1(e) of the Private Agreement and argues the City only had to file an "application for permit" to use 01-181C for recharge or mitigation. *Opening Brief* at 22. The City suggests that this provision means that to add mitigation and recharge as purposes of use to 01-181C, all the City had to do was file Application for Permit 27-12261. This is an illogical argument and ignores an important qualifier in the paragraph. The paragraph states that the City must file "the *appropriate* application for permit and/or transfer." It is clear that the City can file a transfer to add recharge or mitigation to 01-181C. But it is also possible for the City to file an application for permit to establish a new water right for recharge or mitigation specifically at Jensen Grove. This would result in the City being able to use water in Jensen Grove for recharge and mitigation purposes. This is clearly the type of application for permit contemplated in the Private Agreement. This would be the appropriate application for permit for the City to file if it wants to use water in Jensen Grove for mitigation or recharge purposes without filing for a transfer to 01-181C.

C. The reference to seepage in the quantity element of 01-181C does not authorize the City to use the water right for mitigation or recharge.

The City argues in its *Opening Brief* that since seepage is expressly mentioned in 01-181C, the City can claim the seepage as recharge to offset the Application. *Opening Brief* at 29. While there is a reference to seepage in a condition under the quantity element, its inclusion was not intended to expand the authorized purpose of use for 01-181C to include recharge or mitigation. The relevant condition states:

> The reservoir established by the storage of water under this right shall not exceed a total capacity of 1100 acre feet or a total surface area of 73 acres. This right authorizes additional storage in the amount of 186 afa to make up losses from evaporation and 980.8 afa for seepage losses.

Ex. at 92.

The reference to seepage in the quantity element of 01-181C is to make clear that an additional volume of water was authorized for storage to make up for losses from both evaporation and seepage. This condition in no way suggests its inclusion was to authorize additional purposes of use that were not included under the purpose of use element. The mention of seepage does not mean recharge or mitigation are authorized uses under 01-181C. To imply otherwise goes against the plain reading of water right 01-181C. The City's argument that seepage is an express element of 01-181C is a just a backdoor attempt by the City to add uses to 01-181C that are not currently authorized under the water right.

Since 01-181C does not contain recharge or mitigation as a purpose of use, the seepage from Jensen Grove is merely incidental recharge and cannot be "used as the basis for claim of a separate or expanded water right." Idaho Code § 42-234(5). Incidental recharge is unintended recharge that is secondary to the express purpose of use of a water right. *See Memorandum Decision and Order on Challenge*, subcase nos. 01-23B et al., Abeerdeen-Springfield Canal Co., at 15, fn 8 (April 4, 2011). The City recognizes this definition. *Opening Brief* at 29 ("incidental recharge is for recharge not included anywhere on the water right."). The water seeping out of Jensen Grove into the aquifer is secondary and incidental to the stated purposes of use listed in 01-181C. If the City wants to use 01-181C as mitigation for the City's Application it should file a transfer. Since incidental recharge cannot be the basis for a new water right the City cannot use 01-181C to mitigate for its new ground water diversion without a transfer.

D. The Court may consider the documents from the earlier transfer proceeding when interpreting the partial decree for 01-181C if the Court concludes the decree is ambiguous.

The City argues that the Private Agreement authorizes the use of water under 01-181 for mitigation or recharge purposes. While the Department believes both the Decree and the Private Agreement are clear and do not authorize the use of water under 01-181C for mitigation or recharge purposes, should the Court determine the Private Agreement introduces ambiguity into decree, it is appropriate for the Court to consider the approval documents related to the Transfer. The rules of interpretation applicable to contracts also generally apply to the interpretation of a water right decree. *A & B Irr. Dist. v. Spackman*, 153 Idaho 500, 523, 284 P .3d 225, 248 (2012). If a court finds the language of a contract ambiguous, parol evidence can be reviewed to ascertain intent behind the contract. *Bilow v. Preco, Inc.*, 132 Idaho 23, 27, 966 P.2d 23, 27 (1998).

In this case, the Transfer documents show that recharge was expressly rejected as an authorized use for 01-181C. The Department originally circulated a draft transfer approval that included "ground water recharge" and "ground water recharge storage" as purposes of use. Ex. at 72. The Coalition informed the Department that inclusion of "ground water recharge" and "ground water recharge storage" were not part of the agreement between it and the City and requested the Department remove them. Ex. at 46. The Department approved the Transfer in February of 2007 without ground water recharge and ground water recharge storage as purposes of use. Ex. at 88.

E. The doctrine of *res judicata* does not preclude the Director from concluding that the City must file a transfer application to add mitigation or recharge as an authorized use to 01-181C.

Finally, the City argues the doctrine of *res judicata* precludes the Director from requiring the City file a transfer application to add mitigation or recharge as an authorized use to 01-181C. *Opening Brief* at 30 ("[U]nder the principles of *res judicata*, the City should not be required to file a transfer application. . . "). The City argues that "[b]ecause the issue of injury has already been addressed, addressing it again in a transfer proceeding is barred by *res judicata*, specifically, the claim preclusion portion of *res judicata*." *Id.* The City states "[i]t would be improper to now give the Coalition a second bite at the apple to assert other bases of injury in a transfer proceeding." *Id.* at 31. The City argues "the Department may not arbitrarily ignore *res judicata* and require the City to give the Coalition multiple chances to protest 27-12261." *Id.* at 32.

Claim preclusion, part of *res judicata*, will bar a subsequent action only if three requirements are met: 1) the subsequent action involves the same parties, 2) the action raises the same claims and 3) there was a final judgment on the merits. *Andrus v Nicholson*, 145 Idaho 774, 777-778, 186 P. 3d 630, 633-634 (2008). *Res judicata* is an affirmative defense and the party asserting it must prove all of the essential elements by a preponderance of the evidence. *Ticor Title Co. v. Stanion*, 144 Idaho 119, 122, 157 P.3d 613, 616 (2007).

Because the City seeks to apply the doctrine to preclude the Director requiring a transfer, the City must point to a final judgment on the merits in a previous action that resolved the same claim. The City has failed to meet its burden in this case because it has failed to point to any final judgment on the merits in a previous action that in any way addresses whether the City is required to file a transfer.

The City points to the proceedings before the hearing officer in this case and discusses the Coalition's arguments related to injury, *Opening Brief* at 31-32, but the doctrine applies only to subsequent actions. *Andrus v Nicholson*, 145 Idaho at 777, 186 P. 3d at 633. Moreover, the Department is not a party to the proceeding but rather decides the contested case. *See* IDAPA 37.01.01.005.2; *see also* IDAPA 37.01.01.150.

Furthermore, the Coalition's arguments related to injury have no bearing on whether Idaho law requires the City to file a transfer to add a new purpose of use to a water right. The City's assertion that the prior Transfer proceeding is binding on the Department is without merit. The fact that there was "no final judgment on the merits" in the Transfer proceeding and the Department was not a party does not preclude the Director from requiring a transfer to add recharge as a purpose of use to 01-181C. The City has failed to meet its burden to show how the doctrine of *res judicata* applies.

The City also seems to be suggesting that the Coalition should not be allowed to raise issues of injury in any future proceeding involving 01-181C. *Opening Brief* at 31. To the extent the City is arguing that this Court should rule that the Coalition is precluded from raising issues of injury in a future proceeding, such a request must be rejected as a request for an advisory opinion. *Taylor v. AIA Servs. Corp.*, 151 Idaho 552, 569, 261 P.3d 829, 846 (2011) (Courts are "not empowered to issue purely advisory opinions.").

The Director denied the City's Application "for failure to submit sufficient information for the Department to consider the City's mitigation plan." R. at 273. He did so without prejudice and suggested a path forward that would allow the City to accomplish its goals with the Application. Denying the application and directing the City to file a transfer to 01-181C in conjunction with a new application for permit does not, as the City suggests, implicate principles

of *res judicata*, causing an error that was arbitrary, capricious and an abuse of discretion.[4] This Court should affirm the Director's Final Order.

F. The City's substantial rights have not been prejudiced.

Idaho Code § 67-5279(4) provides that an "agency action shall be affirmed unless substantial rights of the appellant have been prejudiced." The City claims its substantial rights were prejudiced because the Director failed to consider the Private Agreement when considering whether recharge and mitigation are authorized purposes of use under 01-181C. *Opening Brief* at 33. As discussed above, the Director applied the correct legal standards in evaluating the City's plan to use 01-181C to mitigate for its new ground water use. Because the Private Agreement did not need to be considered, the City's substantial rights have not been prejudiced.

CONCLUSION

Neither recharge nor mitigation are an authorized purposes of use identified on the face of 01-181C. Without recharge or mitigation as a purpose of use, the City cannot use 01-181C to mitigate for the proposed new ground water diversion in its Application. If the City wants to use 01-181C to mitigate for the Application, it needs to file a transfer for 01-181C.

The City has not demonstrated the Director's findings, inferences, conclusions, or decisions are in violation of constitutional or statutory provisions; in excess of the statutory

[4] While the Director has conditionally approved conjunctive management mitigation plans (*see Order Approving IGWA's Fourth Mitigation Plan* filed in *Rangen Inc. v Spackman*, CV-2014-4970, (http://idwr.idaho.gov/files/legal/CM-MP-2014-006/CM-MP-2014-006_20141029_Order_Approving_IGWA's_Fourth_Mitigation_Plan.pdf)) the Director rejected the hearing officer's proposed approach of conditionally approving the Application because of the uncertainty associated with the "yet-to-be-filed" transfer and the possible conflicting provisions that may occur as a result of the transfer. R. at 273. Without seeing the transfer application, it is difficult to impossible to determine how much water is available for mitigation. The hearing officer issued the permit with a diversion rate of 9.71 cfs but did not identify the authorized diversion volume under the quantity element. Instead, the hearing officer drafted a condition that would result in a variable annual diversion volume and in a diversion rate potentially less than 9.71 cfs depending on the outcome of the transfer. R. at 215. Because this condition could result in a confusion and potential conflict within the decree depending on the outcome of the transfer, the Director decided the "the better approach" in this case is to deny the application and provide the City the opportunity to resubmit the application for permit along with the transfer so that they can be considered together. R. at 273.

authority of the agency; made upon unlawful procedure; unsupported by substantial evidence in the record; or arbitrary, capricious, or an abuse of discretion. The Court should affirm the Director's Final Order.

RESPECTFULLY SUBMITTED this 11th day of February 2016.

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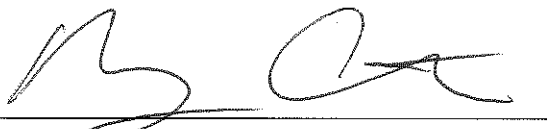

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of February 2016, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the following parties by the indicated methods:

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

Docket No. CV-2015-1687

IN THE MATTER OF APPLICATION FOR PERMIT NO. 27-12261
In the name of the City of Blackfoot

THE CITY OF BLACKFOOT,
Petitioner,

v.

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

A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT#2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, TWIN FALLS CANAL COMPANY and **NORTH SIDE CANAL COMPANY,**
Intervenors.

SURFACE WATER COALITION'S RESPONSE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

CONSTITUTIONAL & STATUTORY AUTHORITY

OTHER AUTHORITIES

STATEMENT OF THE CASE

I. Nature of the Case

This is an appeal of the *Order Addressing Exceptions and Denying Application for Permit* (the "*Final Order*"), issued by the Director of the Idaho Department of Water Resources ("IDWR" or "Department") on September 15, 2015.

II. Course of Proceedings/Statement of Facts

This matter involves an attempt by the City of Blackfoot to use the incidental seepage of water in Jensen Grove to mitigate for new groundwater depletions under Application for Permit No. 27-12261. The facts stated in the City's brief are largely undisputed in this matter. However, the City does not tell the entire story and does not properly frame the Coalition's[1] interests. As such, the following factual information is provided to assist the Court.

A. Stipulations at the Hearing

Following the hearing on this matter, there was very little in dispute. The parties stipulated to the elements of section 42-203A(5)(b) through (f). The parties also stipulated that the modeling performed by the City's experts showed that recharge in Jensen's Grove could offset the impacts resulting from the new consumptive uses contemplated under this application. That modeling showed a slight deficiency in the mitigation proposed, and the Coalition stipulated that leaving a small portion of additional water in the Snake River would offset that mitigation deficiency. R. 203-04.

[1] The "Surface Water Coalition," "Coalition" or "SWC" is comprised of A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company.

In light of these stipulations, the only remaining issues, which was briefed for the Hearing Officer, was whether water right 01-181C could be used as mitigation for the new permit. The Coalition did not stipulate that water seeping in Jensen's Grove, which is diverted pursuant to water right 01-181C, constitutes "groundwater recharge" that can be used to mitigate a new water right. To the contrary, the Coalition asserted, and continues to maintain, that such water is incidental recharge – in that it is incidental to the recreational storage beneficial use authorized under the water right. As confirmed by the City's representative testifying at hearing, the seepage supports and makes it possible for the City to use water right 01-181C for recreational purposes. *See generally* Tr. 26-31 (Mayor Loomis testifying that water must be continually diverted to Jensen's Grove to maintain recreational water levels).

B. Application for Permit No. 27-12261

According to testimony at hearing, at some point during the 1960's, the City's growth required the relocation of the Miner's Ditch. An arrangement was made to remove the portion of the Miner's Ditch that interfered with the City's growth. Water that had historically been diverted through the Miner's Ditch was now pumped directly from the Blackfoot River by the City and injected into the Miner's Ditch at a different location. *See, generally* Tr. at 9-11. From there, the water was conveyed to the private water users – identified as "users of the Miner's Ditch east of Interstate 15 … shareholders from the Corbett Slough Irrigation Company and shareholders from the Blackfoot Irrigation Company." Ex. 1; *see also Id.* at Att. #2 (providing list of water rights and identifying owners of those water rights).

Since the above operation was instituted, sediment in the Blackfoot River has caused high operation and maintenance costs for the pump in the river. According to the City:

> The City of Blackfoot currently provides delivery of several surface water rights (hereinafter, "Rights") through a pump in the Blackfoot River. … The Blackfoot

> River is heavily laden with sediment and requires high maintenance on the pump and delivery system.

Id. As such, the City has determined that it will be more cost effective to divert groundwater.

The City filed Application for Permit No. 27-12261 on September 2, 2014, seeking to divert 9.71 cfs of groundwater for irrigation and conveyance loss. *See* Ex. 1, at 1.[2] Through the application, the City seeks to effectively move its point of diversion from the river to a groundwater well, and from the groundwater well into the Miner's Ditch. *See, generally* Tr. at 9-11. With the exception of a small portion of water that will be left in the river for mitigation, the surface water rights currently diverted from the Blackfoot River would then be available for sale or lease by the owners of those water rights.

C. Proposed Mitigation/The Jensen Grove Water Right (01-181C)

There is no dispute that diversions under application number 27-12261 will result in new consumptive uses of the aquifer and will require mitigation pursuant to Idaho law. To mitigate for the new consumptive uses associated with the application, the City proposed to use the seepage from Jensen's Grove presently occurring as a result of the diversion and use of water right 01-181C for other purposes (i.e. "recreational storage"). *See, generally,* Exs. 1 & 2. In essence, the "recharge" contemplated by the mitigation plan is incidental recharge already occurring at Jensen Grove as part of a recreational storage water right (i.e. 01-181C). *Id.*

Water right 01-181C includes a number of elements and conditions that are relevant to these proceedings. For example, the right authorizes "Recreational Storage" in the amount of 2,266.8 afa and a season of use identified as "01/01 to 12/31." Ex. 106. "Diversion to Storage," in the amount of 46 cfs, is authorized from "4/01 to 10/31." *Id.* When approved, it was recognized that the water

[2] The water diverted is not actually used by the City and the real property on which it is applied is not owned by the City. Rather, the City intends to pump the water into the Miner's Ditch so that it may be delivered by other third party private irrigation entities to real property owned by third party private water users. Tr. 21-23.

right would have significant seepage losses resulting from the use of the right, and as a result the water right includes the follow condition under the "Quantity" element:

> The reservoir established by the storage of water under this right shall not exceed a total capacity of 1100 acre feet or a total surface are of 73 acres. This right authorizes additional storage in the amount of 186 AFA to make up losses from evaporation and 980.8 afa for seepage losses.

Id. The water right also contains an irrigation purpose of use – authorizing a diversion of 1 cfs and storage of 200 af for this purpose. *Id.*[3]

During his testimony at hearing, Mayor Loomis testified that Jensen's Grove is very leaky. *See* Tr. at 25-29. He testified that, but for consistent diversions into Jensen Grove, all of the water would seep and there would be no water in the Jensen's Grove pond for recreational purposes. *Id.* In its briefing here, the City again confirms that water right 01-181C was acquired "to fill ***and maintain*** water levels in Jensen's Grove." *City Br.* at 4 (emphasis added). In other words, in order to enjoy the recreational storage water rights and maintain water levels, water must be regularly diverted into the pond. *See also* Ex. 102 ("The lake loses large amounts of water due to seepage into the ground, so a constant flow into the lake is needed to maintain the lake level"). Water seeping from Jensen's Grove provides "a benefit to the flows in the Snake River and the Eastern Snake Plain Aquifer." *Id.* at 2; *see also Id.* ("The water provided for Jensen Grove Lake under this transfer, should benefit the Snake Plain Aquifer and also benefit the flows of the Snake River below Blackfoot").

D. The Jensen's Grove Transfer & Settlement Agreement

Water right 01-181C has not always been used for recreational storage purposes in Jensen's Grove. Prior to 2005, the water was a relic irrigation water right located within the New Sweden

[3] No evidence was presented that the right has ever been used for irrigation purposes at Jensen Grove and there was testimony that the right is not now being used for irrigation.

Irrigation District boundaries. Ex. 100. On October 27, 2005, the City filed an application for transfer, seeking to move water right 01-181C into Jensen's Grove. *Id.* As originally filed, the application sought to use water right 01-181C for "Diversion to Recharge" and "Storage" – defined as including "Irrigation, Recreation, Fish & Wildlife, Aquifer Recharge & Aesthetics." *Id.* The application further provided that the use would be "systematically non-consumptive" and that "recharge simply moves surface storage to groundwater storage." *Id.* at 6.

The Coalition protested the transfer application. In response, the City, again, confirmed that the use proposed by the transfer (i.e. storage in Jensen's Grove) would be "non-consumptive." Ex. 101 at 2 ("The change proposed in this transfer is non-consumptive").

The Department reviewed the application for transfer and, in a memo dated October 2, 2006, made the following relevant conclusions:

- "The lake loses large amounts of water due to seepage into the ground, so a constant flow into the lake is needed to maintain the lake level. Water that flows into Jensen Grove Lake sinks and returns back to the Snake River and/or sinks into the aquifer." Ex. 102 at 1.

- "Changing an irrigation water right into a recreational storage right will reduce the consumptive use and increase the groundwater recharge and improve Snake River flows." *Id.*

- "The new use of this water right in Jensen Grove Lake will be for the most part non-consumptive and a benefit to the flows in the Snake River and the Eastern Snake Plain Aquifer. The consumptive uses of this water right, after the transfer, would be the 50 acres of irrigation and some evaporation from the lake." *Id.* at 2.

- "The water provided for Jensen Grove Lake under this transfer, should benefit the Snake Plain Aquifer and also benefit the flows in the Snake River below Blackfoot." *Id.*

The parties began negotiations to address the Coalition's protest. To that extent, an agreement was reached between the Coalition and City to allow for the transfer's approval. The resulting "Settlement Agreement" provides:

1. Conditions to Water Right After Transfer:

The City and NSID agree that the following terms and conditions be included in the Water Right ("Conditions") after transfer:

> a. After approval of the pending Transfer, the CITY shall not, temporarily or permanently, thereafter transfer the Water Rights, or any portion thereof, without receiving the written consent of the COALITION.
>
> b. Without the written consent of the COALITION, the CITY agrees to hold the Water Right in perpetuity for diversion of water from the Snake River into storage at the Pond, for irrigation and recreation purposes, and to not transfer the Water Right or change the nature of use or place of use of the Water Right.
>
> ...
>
> e. The CITY shall not lease, sell, transfer, grant or assign to any other person or entity any right to recover groundwater or mitigation for the diversion of groundwater as a result of diversion under the Water Right including any incidental groundwater recharge that may occur as a result of such diversion. Furthermore, the CITY shall not request or receive any such mitigation credit on behalf of any other person or entity. If the CITY proposes to utilize the Water Right for groundwater recharge or mitigation purposes associated with existing or future groundwater rights, the CITY must file the appropriate application for permit and/or transfer.

Ex. 4.

The initial draft of the proposed transfer order included "Groundwater Recharge" and "Groundwater Recharge Storage" as purposes of use. Ex. 103. The Coalition challenged the inclusion of these purposes of use as being contrary to the settlement agreement – reinforcing, as the agreement required, that the City must obtain the Coalition's prior approval and file the necessary applications with the Department in order to seek "recharge" as a purpose of use. Ex. 8. In that letter, the Coalition repeated its position on the issue of "recharge" at Jensen's Grove:

> The Agreement is specific about the transferred purpose of use (irrigation and recreation) and period of use (4/1 to 10/31). *See* Agreement, ¶¶ 1.b, l.c. By agreement, the parties have stipulated to these elements which modifies the original application for transfer filed by the City. Contrary to the Agreement, the draft approval includes "ground water recharge" and "ground water recharge storage" as new purposes of use for water right 1-181C. These proposed uses should be

> removed. ... Further, under paragraph l.e of the Agreement, ***only incidental recharge will be recognized*** and the City is required to file a new application if it desires to change the nature of use to "recharge." Paragraph 1.b of the Agreement further requires the City to obtain approval from the Protestants to change the nature of use of water under this right.

Id. (emphasis added).

Although, at the time, the City asserted that the Coalition's request was "not consistent with our June agreement," Ex. 9, the Director's final transfer order removed any reference to "recharge," Ex. 105. The City did not appeal the transfer order. Finally, water right 01-181C was subsequently decreed in the Snake River Basin Adjudication consistent with the transfer order – without any reference to "recharge" as an authorized beneficial use. Ex. 106. The partial decree represents a final judgment that, like the transfer order, was not appealed by the City.

STANDARD OF REVIEW

Any party "aggrieved by a final order in a contested case decided by an agency may file a petition for judicial review in the district court." *Sagewillow, Inc. v. IDWR*, 138 Idaho 831, 835 (2003). The Court reviews the matter "based on the record created before the agency." *Chisholm v. IDWR*, 142 Idaho 159, 162 (2005).

An agency's decision must be overturned if it (a) violates "constitutional or statutory provisions," (b) "exceeds the agency's statutory authority," (c) "was made upon unlawful procedure," (d) "is not supported by substantial evidence in the record as a whole," or (e) is "arbitrary, capricious or an abuse of discretion." I.C. § 67-5279(3); *Clear Springs Foods, Inc.*, 150 Idaho at 796.

ARGUMENT

The Director rejected the City's application because the City had failed to file a transfer application to add "recharge" and/or "mitigation" as an authorized use of water right 01-181C. R.

273. Absent any transfer to add these uses, the proposed mitigation failed. On appeal, the City asserts that the Director should not have rejected the application because the Settlement Agreement effectively added "recharge" as an authorized use of water right 01-181C.

In order for the City to prevail on its appeal, it must convince this Court that a private agreement, that does not include the Department of Water Resources, can change the elements of a water right such that the water right can be used for purposes other than those identified on the face of the partial decree. The City contends that the Settlement Agreement between the City and the Coalition allow the City to use water right 01-181C for "groundwater recharge"[4] even though that use is not identified as an authorized use of the water right. The law does not support such a contention. Therefore, the Director's decision should be affirmed.

I. The Law Requires that a Transfer be Filed to Change the Use of a Water Right. The City Must File a Transfer in Order to Use Water Right 01-181C as Mitigation For this New Consumptive Use Groundwater Right.

A. The Elements of a Water Right Cannot Be Changed without A Transfer.

Since the Settlement Agreement was reached, the Coalition has maintained that water seeping as a result of diversions under 01-181 is "incidental recharge" and that any reference to recharge "should be removed" from the right. Ex. 8. The Coalition's assertions are important here, as this case involves the interpretation of the City's partial decree.

A water right is defined by its elements. The elements of the water right specify the authorized use of that water. *See* I.C. § 42-1411(2)(f); *see also* I.C. § 42-1412(6) ("The district court shall enter a partial decree determining the nature and extent of the water right which is the

[4] The City repeatedly, and incorrectly, refers to seepage from Jensen's Grove as "groundwater recharge" – as though the mere repetition of the phrase would make the statement true. *See, e.g., City Br.* at 18. However, testimony at hearing confirmed the undisputed fact that water seeping in Jensen's Grove is incidental recharge. *See also* Ex. 8. Water must continually be diverted into Jensen's Grove in order to maintain the level sufficient for the desired recreational activities. *Supra.*

subject of the objection or other matters which are the subject of the objection. 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"); I.C. § 42-1420 (once entered, the decree is "conclusive as to the nature and extent of all water rights in the adjudication"). Where water is diverted for multiple purposes, the water right must identify all such uses. *See* Ex. 106 (identifying multiple authorized uses of water right 01-181C). For example, a water right with a use for "irrigation" cannot be used for "fish propagation" unless that use is also identified on the water right. Similarly, without additional acknowledgement on the water right, a water right with a purpose of use identified as "recreation storage," such as water right 01-181C, cannot be used for "mitigation" or "groundwater recharge." These uses are not the same. *See* I.C. § 42-234 (identifying groundwater recharge as a beneficial use). The water right identifies the uses for which it may be used and the law prohibits a water user from unilaterally changing those uses.

Importantly, the City knows that groundwater recharge is a *separate and distinct* use from the uses identified on water right 01-181C. *See City Br.* at 28 (recognizing that mitigation is not one of the "listed elements of the water right"). Indeed, when filing the transfer of water right 01-181C, the City specifically identified "recharge" as a separate and distinct use of the water right. Ex. 100. When the Department initially included "groundwater recharge" on the draft transfer approval order, Ex. 103, the Coalition challenged that decision explaining that any reference to "recharge" "should be removed" because the Settlement Agreement only recognized "incidental recharge." Ex. 8. In the final transfer order, all reference to "recharge" use was removed from the water right. Ex. 105; *see also* Ex. 106 (SRBA Decree). The City never ap-

pealed the agency's final decision or the subsequent SRBA Partial Decree. Accordingly, the elements are established and cannot now be collaterally attacked by the City. Tr. 44-45 (Former Mayor Reese testifying that the uses for the water right are recreation storage and irrigation).

Any water user seeking to change the purpose of use of a water right must "make application to the department of water resources:"

> Any person, entitled to the use of water whether represented by license issued by the department of water resources, by claims to water rights by reason of diversion and application to a beneficial use as filed under the provisions of this chapter, or by decree of the court, who shall desire to change the point of diversion, ***place of use***, period of use or nature of use of all or part of the water, under the right ***shall first make application to the department of water resources for approval of such change***.

I.C. § 42-222 (emphasis added).

To assist with the transfer process, the Department has issued "Administrator's Memorandum, Transfer Process No. 24."[5] That memo explains when a transfer is required, as follows:

> Section 42-222, Idaho Code, requires the holder of a water right to obtain approval from the department prior to changing: (1) the point of diversion, (2) the place of use, (3) the period of use, or (4) the nature of use of an established water right. An established water right is a licensed right, a decreed right, or a right established by diversion and beneficial use for which a claim in an adjudication or a statutory claim has been filed. Approval is sought by filing an application for transfer with the department.
>
> Changes to Elements of a Water Right. An application for transfer is required if a proposed change would alter any of the four elements of the water right listed above that can be changed pursuant to Section 42-222, Idaho Code, as recorded with the department or by decree.

Transfer Memo at 2-3.[6]

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[5] *See* http://www.idwr.idaho.gov/WaterManagement/WaterRights/PDFs/ESPA_Transfer_Memo.pdf.

[6] The Transfer Memo does provide a brief list of actions that do not require a transfer. *Id.* at 3-5 (listing change in ownership, split rights, replacement of point of diversion, refined descriptions, generally described place of use, municipal places of use, instream stock watering and intensified use of water). However, none of these actions apply to these proceedings and the City does not claim that any apply here.

Both the transfer decision and SRBA decree include a section identifying the "Purpose and Period of Use" for water right 01-181C. Exs. 105 & 106. There is no dispute that neither identify "groundwater recharge" or "mitigation" as authorized purposes of use for the water right. *Id.*

Given the lack of any such authorized use on the face of the water right, the City is forced to point to a *private* settlement agreement to justify its assertion that recharge is authorized under water right 01-181C. The City asserts that the law requiring a transfer does not apply because of the Settlement Agreement. *City Br.* at 17-25. It contends that the *private* agreement, between two *private* parties, that does not include the Department, has the effect of altering the uses authorized under the water right. *Id.* The City even asserts that the Coalition and City could "properly amend the Settlement Agreement to allow 01-181C to be applied to mitigate a third party's water right" and that such an amendment would "settle the issue" – even without the Department's involvement. *Id.* at 16.

Rather than provide legal support for this novel theory, the City spends much of its brief analyzing whether a condition on a water right that references the Settlement Agreement is valid and enforceable. *City Br.* at 12-17. Claiming that this case is more "nuanced" than other water right issues, the City compares the matter to a divorce decree with a merged settlement agreement and concludes that reference to the Settlement Agreement on water right 01-181C is sufficient to alter the elements stated on the face of the water right decree. *Id.*

Even though the condition on the water right references the Settlement Agreement, it does not mean that the Settlement Agreement is binding on, or will be enforced by, the non-Party Department. This is made clear from the law on divorce decrees cited by the City. In *Davidson v. Soelberg*, 154 Idaho 227 (Ct. App. 2013), the Court recognized that the merger of any agreement is based on the language of that merger. There, the stipulated decree provided that it "merged

and incorporated [the settlement agreement] into this decree of divorce, except for Paragraph L which is not merged and shall remain a separate contract between the parties." *Id.* at 231. Since Paragraph L was not merged, it was a matter of contract between the parties and not part of the divorce decree. *Id.* Therefore, the statutes providing for the enforcement of a child support provision in a divorce decree did not apply. *Id.*

In this case, the Department is not a party to the Settlement Agreement. As such, the agreement is only referenced in a condition on the water right. Importantly, the condition referencing the Settlement Agreement provides that it is only "enforceable by the parties thereto." Ex. 106. In other words, the Department is not a party to the Settlement Agreement and does not enforce the terms of that agreement.

The City's arguments miss the point. There is no dispute that the condition is valid and enforceable, that the Coalition and City are bound by the terms of the Settlement Agreement or that the Settlement Agreement provides "additional conditions and limitations" regarding the "diversion and use" of water right 01-181C. Ex. 106. Further, the partial decree is binding on the State, City and the Coalition. I.C. §42-1420. The fact that the condition is binding, however, does not mean that the private Settlement Agreement alters the authorized uses of water right 01-181C and does not somehow force the Director to recognize incidental recharge as mitigation for a new groundwater right. This is particular true, here, where "recharge" was included on both the application for transfer and draft approval, but was removed upon agreement between the Coalition and City. *Supra.* Indeed, Mayor Reese, the Mayor at the time the City entered into the agreement with the Coalition, confirmed that water right 01-181C is used for "irrigation and recreation purposes" and that written consent from the Coalition would be required "if you want to

change that." Tr. at 44-45. The City cannot now shoehorn a changed use for water right 01-181C through an erroneous reading of the Settlement Agreement.

The City asserts that the Director "discarded" and "arbitrarily ignore[d]" an element of water right 01-181C because he refused to consider the Settlement Agreement. *City Br.* at 16. Given the clarity of the law, however, even if the Director had thoroughly analyzed the Settlement Agreement, *the result would have been the same*. The law provides only one mechanism for changing the purpose of use of a water right – a transfer under I.C. § 42-222.[7] Any water user desiring to change the authorized uses of a water right must submit an appropriate application to the Department asking to "transfer" or change the elements of that right. There is nothing in this Settlement Agreement, which is only "enforceable by the parties thereto," that accomplishes any change in the use of water right 01-181C. The City has not filed any transfer application – and continues to refuse such a filing. Since the private Settlement Agreement cannot legally change the authorized uses of a water right, the Director was correct to conclude that "the Settlement Agreement does not in any way affect the Director's decision in this matter. The decision can be made using principles of Idaho water law without referring to the Settlement Agreement." R. 272.[8]

The Director properly rejected the City's attempt to change the purpose of use of water right 01-181C from what is presently authorized. *See also* R. 215, ¶ 9 (The Hearing Officer also

[7] A transfer may result in a permanent change to an element of a water right, or it may result in a temporary change – such as through the Idaho State Water Supply Bank.

[8] Confusingly, the City asserts that the Director "made this decision on his own, not based on a position taken by the Coalition." *City Br.* at 19-20. This assertion is wrong. *See* R. 256-59 (Coalition response to City's exceptions brief asserting that a transfer must be filed and that the Settlement Agreement cannot, by itself, represent a change in the decreed elements of a water right). That notwithstanding, the City's assertion has no bearing on the validity of the Director's decision. *See* I.C. § 67-5245(7) ("The head of the agency or his designee for the review of preliminary orders shall exercise all of the decision-making power that he would have had if the agency head had presided over the hearing").

rejected the City's attempt to change the purpose of use of the water right without a transfer application). These final orders are supported by Idaho Law and should be affirmed on appeal.

B. The City Cannot Use the Settlement Agreement to Circumvent the Law. Further, the City Must Obtain the Coalition's Written Consent Prior to Changing the Nature of Use of Water Right 01-181C.

The City argues that it is not required to follow the law and file a transfer application because the Settlement Agreement states that the City may file "the appropriate application for permit and/or transfer." *City Br.* at 18-23; *see Id.* at 20 ("Because 27-12261 is an application for permit, and not a transfer application, the provisions of Paragraph 1.a. and 1.b do not require written consent from the Coalition"). Again, this contorted reading of the Settlement Agreement fails.

The City demands that the Director engage in contractual interpretation. *City Br.* at 19-21. In doing so, it points the Court to the following language from the Settlement Agreement:

> If the CITY proposes to utilize the Water Right for groundwater recharge or mitigation purposes associated with existing or future groundwater rights, the CITY must file the appropriate application for permit and/or transfer.[9]

Ex. 4. The City asserts that the application for permit is sufficient to authorize groundwater recharge under 01-181C. The City further claims that this language "specifically states that the City can use the mitigation credits as long as it submits the appropriate application for permit and/or transfer." *City Br.* at 22.

The Agreement's language speaks for itself. However, under even the most strained reading, there is no "specific" statement about the City's use of mitigation credits. Quite the op-

[9] There is no dispute that the Settlement Agreement prohibits the City from attempting to obtain any "right to recover groundwater or mitigation" for any third party. Ex. 4. The only issue here is whether the last provision of section 1.e, quoted above, automatically authorized the City to claim credits for the incidental recharge in Jensen Grove.

posite. *See* Ex. 8 (under the Settlement Agreement "only incidental recharge will be recognized"). The language mandates that the City file an "appropriate application." Ex. 104. Such an application – whether that be an application for permit or transfer – would then be reviewed by the Director and open for protest. I.C. §§ 42-203A & 42-222. Such an application could then be approved, approved with conditions/limitations, or denied by IDWR. *Id.* The City is mistaken in its belief that the above language somehow guarantees that water right 01-181C could be used for groundwater recharge merely as a result of a single sentence from the Settlement Agreement.[10]

Further, even if the Coalition and City attempted to "specifically" authorize groundwater recharge through the Settlement Agreement, such an attempt would be contrary to the law requiring a transfer – thus causing the Settlement Agreement to fail. *AED, Inc. v. KDC Invs., LLC*, 155 Idaho 159, 167 (2013) ("a contract [that] cannot be performed without violating applicable law is illegal and void").

Although it quotes the language of the relevant provisions of the Settlement Agreement, the City's arguments overlook vital aspects of the Agreement. Indeed, in all of its arguments, the City completely skips over the requirement that it must file an "***appropriate***" application with the Department. *Supra*. As discussed above, *supra*, Part I.A, the only mechanism in Idaho for changing an element of a water right – i.e. the only "appropriate" filing in this matter – is an ap-

[10] Through the transfer of water right 01-181C, the City sought groundwater recharge as a purpose of use. Ex. 6. That use was challenged by the Coalition and, through the Settlement Agreement, *was removed from the water right*. Exs. 4, 6, 8, 9, 103 & 105. The resulting water right, which has been partially decreed, Ex. 106, authorizes recreational storage as a beneficial use – it does not authorize groundwater recharge or mitigation as a beneficial use. Although the water right identifies a volume of storage in Jensen's Grove as well as a volume of water for seepage, Ex. 106, it does not provide that that seepage is "groundwater recharge" or "mitigation."

plication for transfer. Neither a private settlement agreement – particularly one that is only "enforceable by the parties thereto," Ex. 106 – nor a separate application for permit can alter the elements of water right 01-181C.

Further, and importantly, the City refuses to recognize that it must obtain the Coalition's written consent prior to changing the use of water right 01-181C.[11] The City points to Paragraphs 1.a and 1.b of the Settlement Agreement – even quoting them in their entirety in its brief – and concludes that, since this is an application for permit and not a transfer application, "there is no legal limitation under these provision that would prohibit the City from pursuing 27-12261 without obtaining written consent from the Coalition." *City Br.* at 20. This argument fails for at least two reasons. First, there is no argument that the City must obtain written permission to pursue 27-12261. The Court should not be confused by the City's effort to cloud this matter by conflating two separate issues. The Settlement Agreement mandates written approval for any effort to change the use of water right 01-181C. It does not speak, in any respect, to the City's Application for Permit 27-12261. To the extent the City seeks to use 01-181C to mitigate 27-12261, the Coalition's written permission is required. However, that permission is required due to the necessary changes to water right 01-181C – not due to the City's efforts in "pursuing 27-12261."

Second, although it repeatedly points the Court to Paragraph 1.b, the City misstates the obligations of the provision. In particular, that provision requires *written consent* from the Coalition whenever the City seeks to "transfer the Water rights ***or change the nature of use*** or place of use of the Water Right." Ex. 1 at ¶ 1.b (emphasis added).[12]

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[11] The City complains that any such attempt would be futile because the Coalition will consent and further hearings would be required – and that, as a result, the City will be held" hostage indefinitely." *City Br.* at 28 & 30-31. Because no such application has been provided to the Coalition for review and/or approval, there is no basis to assume that the Coalition will withhold its consent to that unidentified transfer.

[12] Confusingly, even though the City quotes the entire language of Paragraph 1.b, *City Br.* at 18, it fails to acknowledge this important provision. This is likely because the City recognizes the provision is fatal to its arguments.

Confusingly, although the City argues that written consent is required to add "mitigation" or "groundwater recharge" as a use for water right 01-181C, it admits that written consent would be required if the City were to seek to change the use back to "solely an irrigation right." *Id.* at 28, n.4. Nothing in Paragraph 1.b allows for this types of a dual standard. Rather, the obligation to obtain written consent applies to any attempt to alter, in any way, the decreed uses of water right 01-181C – such as here, where the City seeks to alter the uses from "recreational storage" and "irrigation" to include "mitigation" or "recharge." *Supra* Part I.A.

In the end, the City's argument that the Settlement Agreement authorize the use of water right 01-181C as mitigation for a new groundwater right cannot stand. There is absolutely no basis to contend that the Coalition would protest the original transfer of 01-181C in order to remove any reference to "recharge," challenge the insertion of "recharge" as an authorized use on the draft transfer order, and, at the same time, enter into a Settlement Agreement automatically reinserting that use back on the water right.

The City's failure to read the entire language of the Settlement Agreement presents misleading and confusing arguments to the Court. For example, the City contends that "if the parties intended the Settlement Agreement to require the Coalition's consent in all cases where 01-181C is proposed as mitigation, the contract would have simply stated" such a requirement. *City Br.* at 23. Yet, that is exactly what the Settlement Agreement states when it requires that the City obtain the Coalition's written consent whenever it seeks to "transfer the Water rights or change the nature of use or place of use" of water right 01-181C. Ex. 104.

In this case, there is no dispute that the City is attempting to use the water for a purpose not listed on the face of the partial decree. Ex. 105 & 106; *see also* Tr. at 44-45 (Mayor Reese testifying that the water rights are used for "irrigation" and "recreation").

The obligation to obtain written approval was important to the Coalition. Indeed, the Coalition was concerned that the City would attempt to use the incidental recharge from Jensen's Grove for mitigation purposes. The Coalition fought to have the "recharge" uses removed from the transfer approval. Exs. 4 & 8. When the Department originally placed "recharge" as an authorized use on the draft transfer order, the Coalition challenged the inclusion, demanding that the use "should be removed" and that the Settlement Agreement only recognized "incidental recharge." Ex. 8.

The Coalition further sought to protect itself should the City ever attempt to add the use back onto the water right by requiring written consent prior to any such attempted change. Ex. 4. The City cannot circumvent that agreement by filing an application for permit rather than a transfer.

C. It is Not the Department's Fault that the City Failed to File a Transfer Application.

As it did in the administrative proceedings, the City again blames the Department for *the City's* failure to file the appropriate application. *City Br.* at 27 ("It is important to note on this point that the Department did not state or advise the City at the time it submitted its application and revised applications – with which the Department assisted – that the City had to file a transfer of 01-181C before it could be used for mitigation purposes"). The City complains that "the Department should have informed the City before proceeding to a hearing" that a transfer would be required. *City Br.* at 28.

The law is clear – a transfer is required to change the purpose of use on any water right. It is not the Department's job to advise the City as to its compliance with Idaho law. The City cannot blame IDWR for its own failures in this case.

II. The Coalition is Not Bound by any Decision in This Case.

It is unfortunate that the City chose not to file a transfer application in association with this application for permit. There are several related issues that could have been addressed in conjunction with both proceedings and this matter may have been resolved without having to resort to judicial action. However, in an effort to avoid seeking the Coalition's written consent, the City proceeded without a transfer application.

Now, the City complains that, if a transfer is filed, and the Coalition decides to protest that transfer, the Coalition should be limited in its arguments in the proceedings for application for permit 27-12261. Citing to the legal principles of *res judicata*, the City asserts that the Coalition cannot have a second opportunity to challenge the City's actions. *City Br.* at 30-32. Since no transfer has been filed and it is not known what issues will be presented in such a transfer, the City's arguments are not ripe. *Noh v. Cenarrusa*, 137 Idaho 798 (2002) ("The traditional ripeness doctrine requires a petitioner or plaintiff to prove 1) that the case presents definite and concrete issues, 2) that a real and substantial controversy exists, and 3) that there is a present need for adjudication").

Furthermore, the arguments are erroneous. The question before the Department in this case involved the City's application 27-12261 – it did not involve any issues relating to a transfer of water right 01-181C. The Coalition stipulated that the modeling showed that water put in Jensen's Grove could mitigate for the new consumptive uses under water right 27-12261. The remaining question, therefore, was whether incidental recharge under water right 01-181C could be used to provide that mitigation. The Director correctly determined that that question could not be answered absent an application to transfer the water right to add recharge or mitigation as an authorized purpose of use. Since no transfer application was filed, the issue of potential injury

associated with transferring water right 01-181C to allow for the addition of "groundwater recharge" or "mitigation" as a purpose of use, was not before the Hearing Officer and has not been addressed.

A transfer proceeding is separate and distinct from an application for permit. Whereas a transfer proceeding speaks to changes to an existing water right, an application for permit addresses proposals for new diversions. The cases are not the same. As such, the City's attempt to rely on proceedings relative to water right 27-12261 as a bar against the Coalition asserting any injury in a future transfer proceeding for water right 01-181C must fail. *See City Br.* at 30-32 (asserting that the Coalition is barred from "subsequent relitigation of a claim previously asserted [and] also subsequent relitigation of any claims relating to the same cause of action which were actually made or which might have been made"). This is particularly the case where, as the Hearing Officer recognized, there are several issues relating to the transfer of water right 01-181C that were not addressed in these proceedings. R. 209, ¶ 19 ("The parties have not had an opportunity to present evidence on the historical consumptive use of water right 01-181C. The question of historical consumptive use, non-consumptive use and incidental recharge are best addressed within an application for transfer").

If any party is barred by *res judicata*, it is the City. As stated above, the original transfer application for water right 01-181C sought to include "groundwater recharge" as a permitted use. Ex. 100. The Coalition protested that use. When the draft transfer order was issued and identified "recharge" as an authorized use, Ex. 103, the Coalition challenged the inclusion of that use as contrary to the Settlement Agreement. Ex. 8. Although the City disagreed with the Coalition's interpretation of the Settlement Agreement at that time, Ex. 9, it did not challenge the final

transfer order removing all references to "recharge" from the face of the decree. Ex. 105. The City is therefore bound by the final agency decision on the transfer.

Moreover, the Coalition's interpretation of the Settlement Agreement at the time of the transfer was crystal clear. Ex. 8. The Department apparently agreed with the Coalition and removed the "recharge" use without further discussion in the record. Had the City believed that to be in error, it was required to challenge the decision at that time. I.C. § 42-222(5) ("any person or persons feeling themselves aggrieved by the determination of the department" may seek judicial review). The City's failure to challenge the decision bars its current attempt to construe water right 01-181C as authorizing any "recharge" or "mitigation." If the City truly believed that such uses were authorized under 01-181C, it should have challenged the transfer order as required by Idaho law. *See Hindmarsh v. Mock*, 138 Idaho 92, 94 (2002) (*res judicata* bars relitigation of issues that should have been raised in prior proceedings).

III. Incidental Recharge from a Water Right Cannot be Used to Mitigate New Consumptive Uses.

On April 30, 1993, the Director entered the *Amended Moratorium Order*, which prohibits processing any applications for new consumptive uses within the Eastern Snake Plain Aquifer without sufficient mitigation to offset the impacts of the new consumptive uses.[13] One way that water users may mitigate for their new consumptive uses is through recharge. *See* I.C. § 42-234(2) (recharge is a beneficial use). However, the use of recharge for mitigation of a new water right has been specifically limited by the Legislature. Indeed, the Legislature has determined that the use of "incidental recharge" to mitigate for "separate or expanded water rights" is prohibited:

> (5) The legislature further recognizes that incidental groundwater recharge benefits are often obtained from the diversion and use of water for various beneficial purposes. ***However, such incidental recharge may not be used as the basis for claim of a separate or expanded water right.*** Incidental recharge of aquifers

[13] http://idwr.idaho.gov/files/legal/orders/19930430_Moratorium_ESA.pdf.

> which occurs as a result of water diversion and use that does not exceed the vested water right of water right holders is in the public interest. The values of such incidental recharge shall be considered in the management of the state's water resources.

I.C. § 42-234(5).

The issue of using incidental recharge was also addressed by the SRBA in subcases concerning water rights claims filed by the Aberdeen-Springfield Canal Company ("ASCC"). *See Memorandum Decision & Order on Challenge*, SRBA Subcase Nos. 01-23B, et al. (Apr. 4, 2011). There, the Department recommended ASCC's irrigation water rights with a purpose of use identified as "Recharge for Irrigation." *Id.* at 2. The "Recharge for Irrigation" recommendation was based on the Department's determination that the ASCC system was extremely leaky. *Id.* As water was diverted for irrigation purposes, it leaked through the ASCC canal system and into the aquifer. *Id.*

The Presiding Judge, in reversing an order granting summary judgment in favor of ASCC, provided valuable guidance for determining whether "recharge" may be considered an authorized use under an existing water right. For example, ASCC claimed that the water seeping through its system should be characterized as "recharge" through an accomplished transfer theory. *See* I.C. § 45-1425. The SRBA Court rejected this theory:

> An assumption that water was diverted for recharge is countered by common practices of carriage or head which is required to operate the delivery system. This is required whether or not all shareholders are diverted the surface water and applying it to their lands. In fact, Idaho Code § 42-1201 requires that a water delivery entity keep its system charged. ***Thus, one inference that can reasonably be drawn from the facts is that the claimed recharge resulting from the use of the 01-23B right is incidental recharge associated with ASCC's delivery practices.***

ASCC Order. at 24 (emphasis added); *see also Id.* at 25 ("These facts do not show whether ASCC was purposefully engaged in recharging the groundwater for use by its shareholders or whether the

recharge was merely incidental to its overall delivery operation").

In this case, the facts are clear – any water seeping into the ground in Jensen's Grove, under water right 01-181C is incidental recharge – i.e. it is "merely incidental" to the recreational storage beneficial use of the water right. The testimony and record clearly shows that Jensen's Grove is a leaky lake feature and that water must constantly be diverted into the lake in order to enjoy recreational uses under water right 01-181C. The Department stated that the "lake loses large amounts of water due to seepage into the ground, so a constant flow into the lake is needed to maintain the lake level." Ex. 102 at 1. Even the water right itself provides 980 acre-feet for seepage losses. Ex. 106. The City's Mayor confirmed that water must be continually diverted into Jensen's Grove in order to maintain the water levels and use the water for recreational purposes. Tr. 27-31 (Mayor Loomis Testimony). Since the City cannot enjoy the benefits of its water right unless it regularly diverts water into the lake, the resulting seepage is incidental recharge and cannot be used for a "separate or expanded water right." Stated another way, but for the losses under the water right, the authorized beneficial uses of the water right could not be supported. Just like an irrigation right that must include conveyance losses to deliver water to a shareholder's headgate, so too are the losses associated with the City's water right at Jensen's Grove.

The City argues that the seepage cannot be considered "incidental recharge" because the Settlement Agreement "is a condition of 01-181C and it allowed the City to claim the groundwater recharge benefits occurring under 01-181C." *City Br.* at 29. It further claims that, since the water right identifies a specific portion of the volume diverted as seepage, there is some "express" recognition that the right may be used for recharge and/or mitigation. *Id.* These arguments do nothing but further illuminate the City's misunderstanding of the law regarding the use of water rights and the nature of incidental recharge.

The law, as discussed above, is clear. The only way to change the use of a water right is through a transfer process – not a private settlement agreement. The fact that the private settlement agreement is referenced in a condition on the water right does not alter that law. Recharge is a statutorily recognized beneficial use of water in Idaho. I.C. § 42-234(2). Any authorized uses of water must be identified on the water right. I.C. §§ 42-1411(2)(f) & 42-1412(6). In this case, it is undisputed that recharge is not identified as a use on the face of the partial decree. The law does not allow the City to simply alter the authorized use of water right 01-181C based on one sentence contained in a *private* settlement agreement that is only referenced in the decree and that is only enforceable between the parties to that agreement.

The City contends that the Department's identification of a specific volume of water needed to maintain the levels in Jensen's Grove, somehow, transmutes the use of that water from "incidental" to "express" recharge. *City Br.* at 29. This argument lumbers under the same legal errors identified above. Further, water rights generally include – whether expressly identified or not – an amount necessary to allow the water user to enjoy the use of the water. For example, the ASCC irrigation rights discussed above, include a sufficient quantity to divert water from the river to the headgate – i.e. the "carriage" water. *Supra*. This is a common practice under Idaho water law. In this instance, however, the same carriage water has been identified with a volume. Ex. 106. Importantly, while water right 01-181C references a volume for "seepage losses," it does not identify those losses as anything other than incidental recharge. The law does not allow the Department – or this Court – to "read between the lines," as the City demands, and presume a use that is not identified on the decree. It is the State's recognition that some water rights require a greater diversion at the river to compensate for seepage that the Legislature enacted the limitations in section 42-234(5). The City's attempt to circumvent the law should be rejected.

CONCLUSION

Any change to the purpose or nature of use of a water right can only be accomplished through the transfer process. Yet, the City failed to file any such a transfer. The Director's order requiring a transfer of water right 01-181C, therefore, should be upheld.

Furthermore, nothing in the Settlement Agreement guarantees that the City will be able to use water right 01-181C for mitigation or groundwater recharge. Such uses were specifically protested and removed in the prior transfer proceedings.

Accordingly, the Director's *Final Order* should be affirmed.

DATED this 11th day of February, 2016.

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

THE CITY OF BLACKFOOT,

Petitioner,

v.

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

Respondents.

IN THE MATTER OF APPLICATION FOR PERMIT NO. 27-12261

In the name of the City of Blackfoot.

Case No. CV-2015-1687

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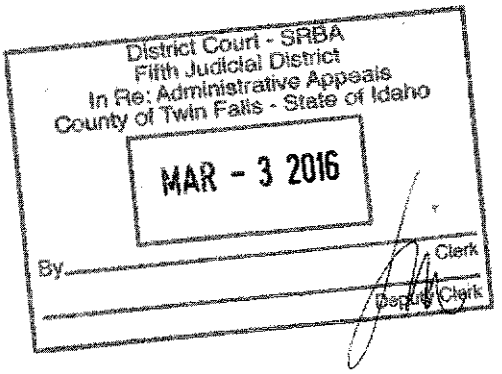

PETITIONER'S REPLY BRIEF

Judicial Review from the Idaho Department of Water Resources
Honorable Eric J. Wildman, District Judge, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

CONSTITUTIONAL & STATUTORY AUTHORITY

REGULATORY AUTHORITY AND PROCEDURAL RULES

OTHER

Petitioner, the City of Blackfoot, hereby submits *Petitioner's Reply Brief.*[1] This brief responds to briefs filed by the Director and Department (collectively, "Respondents"), as well as the Coalition, and is filed pursuant to this Court's *Procedural Order* of October 27, 2015; I.R.C.P. 84(p); I.A.R. 35; and I.A.R. 36.

This Court should approve the issuance of a permit for 27-12261, because the uncontroverted facts show that a substantial amount of water seeps from Jensen's Grove into the ESPA and the City is not required to obtain the Coalition's approval before claiming credit for the mitigation provided by that seepage through an application for water right permit. By disregarding the *Settlement Agreement*, which was incorporated as an element of 01-181C, and refusing to acknowledge the mitigation occurring at Jensen's Grove, the Director ruled incorrectly in this case, in violation of statutory provisions; in excess of the statutory authority of the Department; without support of substantial evidence; and arbitrarily, capriciously, and as an abuse of discretion—which has prejudiced the City's substantial rights. By ignoring the *Settlement Agreement*, Respondents have failed to consider all of the elements of 01-181C and, with only that incomplete picture, have erred.

I. THE PROPER INTERPRETATION OF WATER RIGHT NO. 01-181C.

This case demands the consideration and interpretation of 01-181C in order to determine whether the City retained the ability to apply the admitted reality of the situation—that more than 2,000 acre-feet of water annually re-enters the ESPA through Jensen's Grove—as mitigation for 27-12261.

---

[1] Unless otherwise noted herein, all defined terms are used as defined in *Petitioner's Opening Brief.*

A. There is no difference between conditions and elements contained in a water right.

All water right elements and conditions are limitations on how a right to divert water is exercised. These limitations are in place to protect other water right holders from injury. Use of water outside of the limitations set forth in a water right works to the detriment of other water users, and such detriment is often called "enlargement" or "injury." *See, e.g., Barron v. Idaho Dep't of Water Res.*, 135 Idaho 414, 18 P.3d 219 (2001). "[T]here is *per se* injury to junior water rights holders anytime an enlargement receives priority." *City of Pocatello v. Idaho*, 152 Idaho 830, 835, 275 P.3d 845, 851 (2012) (quoting *A&B Irrigation Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 753, 118 P.3d 78, 85 (2005)).

Every water right is made up of elements that determine its nature and extent. The "nature and extent" of a water right is defined by its elements and often such elements are determined in the context of a water rights adjudication, such as the SRBA. *See* Idaho Code §§ 42-1420, 42-1411(2). "[A] decree entered in a general adjudication such as the SRBA is conclusive as to the nature and extent of the water right." *Rangen, Inc. v. Idaho Dep't of Water Res.*, 2016 Opinion No. 21, at *8 (February 29, 2016) (quoting favorably from the underlying administrative decision by the Director of IDWR) (hereinafter cited to as *Rangen*).

01-181C received a partial decree in the SRBA determining and confirming the nature and extent of the water right by defining its elements. R. at 92-93. Idaho's adjudication statutes describe what the elements of a water right are. Each partial decree must include "***each element*** of a water right ***as stated*** in subsections (2) and (3) of section 42-1411, Idaho Code, as applicable." Idaho Code § 42-1412(6) (emphasis added). In turn, Idaho Code § 42-1411(2)

explicitly provides that "[t]he [D]irector shall determine the following ***elements***," which are then listed, including:

> (i) ***conditions*** on the exercise of any water right included in any decree, license, or approved transfer application; and
>
> (j) such ***remarks and other matters*** as are necessary for definition of the right, for clarification of any element of the right, or for administration of the right by the [D]irector.

Idaho Code § 42-1411(2) (emphasis added).

The items outlined in Idaho Code § 42-1411(2)(i) and (j)—conditions and remarks—are elements of a water right defined by statute. Not surprisingly, case law is in accord with these statutory provisions. After quoting the entirety of Idaho Code § 42-1411(2), the Idaho Supreme Court has determined that "[t]he elements listed ***describe the basic elements of a water right*** . . ." *City of Pocatello v. Idaho*, 152 Idaho 830, 839, 275 P.3d 845, 850, 855 (2012) (internal citation omitted). Accordingly, the conditions incorporated into the partial decree of 01-181C—including reference to the "terms and conditions" of the *Settlement Agreement*—are elements of 01-181C.

The two recent Idaho Supreme Court cases of *City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) and *Rangen, Inc. v. Idaho Dep't of Water Res.*, 2016 Opinion No. 21 (February 29, 2016) demonstrate the importance of recognizing all elements of a water right.

In *Pocatello*, the City appealed the SRBA Court's holding on a number of items, including the SRBA's inclusion of the following condition: "To the extent necessary for administration between points of diversion for ground water, and between points of diversion for ground water and hydraulically connected surface sources, ground water was first diverted under

this right from Pocatello well [description] in the amount of ___ cfs." *City of Pocatello v. Idaho*, 152 Idaho 830, 834, 275 P.3d 845, 849 (2012). The condition was included in IDWR's recommendation to the SRBA Court because IDWR "asserted that the ***condition was necessary to avoid injury*** to other water rights and to assist in the administration of water rights in times of shortage." *Id.* at 835, 275 P.3d at 850 (emphasis added). Conditions, or limitations on a water right, avoid many types of injury, including injury that has nothing to do with physical interference of water delivery. On this topic, the Idaho Supreme Court favorably quoted the SRBA Court regarding the possible scope of injury:

> Specifically, injury to an existing water right is not limited to the circumstance where immediate physical interference occurs between water rights as of the date of the change. Injury also includes the diminished effect on the priority dates of existing water rights in anticipation of there being insufficient water to satisfy all rights on a source (or in this case a discrete region of the aquifer) and priority administration is sought. Even though the priority administration may occur at some point in the future, injury to the priority date occurs at the time the accomplished transfer is approved.

Id. Ultimately, the Idaho Supreme Court concluded that the condition Pocatello objected to must be enforced like other elements of a water right, because they serve the dual purposes of "avoid[ing] injury to other water rights and to assist in the administration of water rights in times of shortage." *Id.* at 835, 275 P.3d at 850.

In the *Rangen* case just decided on February 29, 2016, Rangen first argued on appeal that the Director erred in interpreting its partially decreed water rights referencing the "Martin-Curren Tunnel" and referring to a 10-acre tract as its authorized point of diversion. Specifically, Rangen argued the following:

> Rangen contends that the Director erred in interpreting its partial decrees. It argues that the source element in its partial decrees is ambiguous and that in the relevant context 'Martin-Curren Tunnel' refers to the entire spring complex comprised of Curren Tunnel plus the other springs scattered across the canyon wall. Additionally, Rangen argues that it should be entitled to divert water via the Bridge Diversion because the dam is "part of a diversion structure that lies partially within the [decreed] ten acre tract.'

Rangen at *8 (brackets in original). In other words, Rangen argued for administration of its rights based on something other than what was contained in the plain language of its partially decreed water rights. In the underlying administrative proceeding, the Director determined that "[a]dministration ***must comport with the unambiguous terms of the SRBA decrees***." *Id.* at *10 (emphasis added).

Accordingly, the Director determined that "[b]ecause the SRBA decrees identify the source of the water as the Curren Tunnel, Rangen is ***limited*** to only that water discharging from the Curren Tunnel. Because the SRBA decrees list the point of diversion as SESWNW Sec. 32, T7S, R14E, Rangen is ***restricted*** to diverting water that emits from the Curren Tunnel in that 10-acre tract." *Id.* (emphasis added). The Director's choice of words is consistent with what the City has asserted in this case above, which is that elements of a water right are limitations or restrictions on the use of water no matter how they are documented on a water right. In *Rangen*, the district court upheld the Director's determination on this issue, and on appeal, the Idaho Supreme Court also affirmed: "This Court agrees and affirms the district court's holding that Rangen's partial decrees entitle it to divert only that water emanating from the Martin-Curren Tunnel and only within the decreed ten-acre tract. If Rangen wanted its water rights to be interpreted differently, it should have timely asserted that in the SRBA." *Id.* at *11.

In addition to Rangen's first argument, it argued that it should be permitted to use the so-called "Bridge Diversion" because it lied mostly with the ten-acre tract and was integral to its diversion structure consisting also of the so-called "Farmers' Box" and "Rangen Box." *Id.* The Idaho Supreme Court rejected this argument, and focused on the importance of strict interpretation of elements:

> Logically, if separate and distinct individual diversion structures in different tracts were treated as a single diversion structure, any water right holder could claim an entitlement to divert water in any tract, as long as at least one component of one diversion structure were sited in a decreed tract. ***This approach would render the point of diversion element of a water right meaningless.***

Id.

The *Pocatello* and *Rangen* cases make it clear that elements and conditions are not to be ignored or interpreted loosely. Otherwise, the conditions are meaningless, and the result would be injury, enlargement, and conflict between water users. Elements and conditions are limitations on the exercise of a water right and they cannot later be ignored by the Director in the appropriation (Idaho Code § 42-201, *et seq.*), administration (Idaho Code § 42-601, *et seq.*), or adjudication of water rights (Idaho Code § 42-1401, *et seq.*). Stated another way, any attempt to distinguish between conditions and elements is to argue a distinction without a difference. No matter what they are called, conditions or elements limit how a water right can be exercised, and such limitations are binding upon the water right holder and must be enforced by the Department. See *Petitioner's Opening Br.* at 12-13.

In light of this clear and recent precedent, it is surprising that the Respondents maintain the position that they do not need to recognize the provisions of the *Settlement Agreement* as an element of 01-181C. The City's response to this position is addressed in the next section.

B. The *Settlement Agreement* was incorporated into 01-181 as a condition of the exercise of 01-181C, which cannot be ignored by the Director.

Despite the clear statutory provisions contained in Title 42 of the Idaho Code, as well as Idaho cases concerning elements of a water right, Respondents are unequivocal that the *Settlement Agreement* "is not an element of water right 01-181C." *Respondents' Brief* at 10. Respondents argue that because the reference to a private agreement is under the "Other Provisions Necessary" section of the partial decree for 01-181C, the *Settlement Agreement* is relegated to non-element status, and in support of this argument, footnote a 2004 decision from Special Master Bilyeu.[2] *Id.* at 11. Additionally, the Respondents argue that reference to settlement agreements "is ***only to provide notice*** of private agreements that govern relationships of the parties to the agreements." *Id.* (emphasis added). Therefore, the argument continues, reference to the *Settlement Agreement* was not intended to "make the Director and other water users parties to the private agreement," *Id.* at 12.

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[2] The facts faced by Special Master Bilyeu in Subcase Nos. 31-7311, 31-2357, and 31-2395 are quite distinguishable from the facts of this case. In that decision, there was ambiguity in the "other provisions necessary" portion of a water right because it authorized water use without a water right or any specific elements of that right. This ambiguity led the Special Master to recommend a deadline for IDWR to file an ADR addressing only the uncultivated land issue "and that IDWR assign a new water right claim number to that portion of the claim." See *Order Recommending Partial Decree Be Set Aside*, In re: SRBA Nos. 31-731131-2357, and 31-2395, at 8 (Jan. 30, 2004) (Special Master Bilyeu). The Special Master held that the "language of that provision is ambiguous because it is unclear whether the language defines a vested water right or not." She did not unequivocally state that "other provisions necessary" are not elements of a water right.

The Respondents arguments are both misplaced and unavailing. Concerning the first "Other Provisions Necessary" argument asserted, Respondents acknowledge the plain language of Idaho Code § 42-1411(2) in their brief, even if it is only in footnote form. *Id.* at 11 (fn. 1). But small font size does not diminish the force of law embodied in this statutory provision. The City has already addressed the argument above that "other provisions necessary" contained in a water right as conditions—limitations—on the exercise of a water right are elements of a water right and are no different than the point of diversion, source element, or any other element of a water right.

In terms of settlement agreements in general, Respondents assert that all references to settlement agreements are informational only and do not implicate the Department because, the argument goes, the Department is not a party to the *Settlement Agreement*. In support of this argument, Respondents seize on the words of the transfer approval and the partial decree to surmise that "enforcement of the agreement is limited to the parties to the agreement." *Respondents' Br.* at 12. From that premise, Respondents incorrectly conclude that the *Settlement Agreement* could not have been incorporated, since it "only governs the relationship between the parties to the agreement." *Respondents' Br.* at 12.

This argument is misleading. The fact that the *Settlement Agreement* "is enforceable by the parties thereto," Ex. 106 at 93 (capitalization modified), is not surprising. Any judgment, decree, or order from any court is not self-effectuating. Its enforcement is dependent on the interested parties. An agreement (whether incorporated into a court order or not) must be

enforced either by a signatory, a party in privity with a signatory, or another plaintiff who can establish standing.

However, while the Department may not be a ***party*** to a settlement agreement, it necessarily becomes a ***participant*** in a water right settlement agreement containing additional limitations on the exercise of the right because of the Director's statutory duty to administer each water right consistent with its elements.

In nearly all cases, the very reason a water right involves a settlement agreement is that it resolved a dispute over either the adjudication of a water right or it outlined other limitations of the water right to resolve injury concerns and/or protests raised in an administrative action involving a water right (such as an application for permit for a transfer application). In fact, settlement both in the SRBA and in administrative proceedings was and is actively encouraged by the SRBA Court and the Department. The proceedings involving 27-12261 illustrate this encouragement from the Department.

Immediately after 27-12261 was protested on October 6, 2014, R. at 66-68, the Department sent two letters each dated October 20, 2014 to the City and to the Coalition as the protestants. The City's letter outlines three options available for resolution of the contested application, and all three include some component of settlement encouragement and one even specifically references "a mediated agreement" (each of which is emphasized below):

> ***-Direct contact with the protestant(s) to determine the nature of the protests(s) and to attempt to resolve the protest. Sincere conversation between the parties prior to initiation of formal proceedings can often resolve protest(s).***

> -Formal proceedings administered by the department pursuant to the Department's Rule of Procedure (IDAPA 37.01.01). ***A pre-hearing conference identifies the protestant's concerns and reviews the resolution possibilities with the parties.*** If the concerns cannot be resolved, a formal hearing will be scheduled.
>
> ***-Mediation through a certified professional mediator can reduce costs and time that are associated with formal proceedings, present the opportunity to address non-water concerns, provide influence over a final settlement, and fast track the processing of the application if a mediated settlement agreement is reached. If you are interested in this option, please contact our office for details.***

Id. (emphasis added). The Department's letter to the Coalition contains the exact same language actively encouraging the parties to settle their concerns. R. at 73.

Most protestants raise injury arguments, and those issues are resolved either through a settlement agreement that resolves those concerns, or the issue is resolved after an administrative hearing on the issue. In counsel's experience, settlement of contested cases to avoid an administrative hearing is never accomplished without some sort of written settlement document. And even after an administrative hearing, the hearing officer will often include conditions to address injury concerns (which he can do under Idaho Code § 42-203A(5)). No matter how the conditions get incorporated into a water right, they are often included to address some form of injury, and they often do not fit easily into one of what the Respondents' would call the "explicit" elements of a water right.[3] Two examples are worth noting.

First, a water right permit for ground water recharge (1-10625) was approved after a stipulation was entered into between the applicant, Peoples Canal & Irrigating Co., and the Coalition, IDFG, BLM, and the Idaho Power Co. The stipulations for withdrawal or protest are

[3] *Respondents' Brief* at 8 ("[t]he beneficial uses of 'recharge' and 'mitigation' are not explicitly authorized under water right 01-181C.").

available at http://www.idwr.idaho.gov/apps/ExtSearch/RelatedDocs.asp?Basin=1&Sequence=10625&SplitSuffix=. The issued permit included stipulated conditions which further limit the exercise of 1-10625. A copy of the permit is available at http://www.idwr.idaho.gov/apps/ExtSearch/ DocsImages/lz1g01_.PDF. This is an example of a water right permit which includes conditions agreed to by the parties.

Second, after a contested case involving Karl and Jeffrey Cook and their application for permit no. 35-14402—which this court recently ruled on after appeal in its *Memorandum Decision and Order*, CV-42-2015-2452 (filed December 14, 2015)—the hearing officer imposed a condition that neither the applicants nor the Coalition agreed to by limiting the exercise of 35-14402 and six other base rights to a diversion volume of 1,221 acre-feet. This was done to ensure no use of water beyond a determined historical use (had the applicant been held to the diversion rate of their base rights) after an analysis by the hearing officer. In other words, it was included by the hearing officer to prevent injury to the Coalition, but it was not agreed to by the Coalition or the Cooks.

Importantly, in either instance where a condition is included in a water right, the Respondents were not parties to the proceeding that led to the condition being included in the water right. But Respondents do not have to be a party to a settlement agreement to be impacted or bound by the conditions. The Respondents are not bound ***by contract*** to a settlement agreement, but they are necessarily participants in a settlement agreement ***by statute*** because of the Director's statutory obligation to distribute water according to water rights. The Director's obligation to distribute water according to water rights was recently well explained by this Court:

> The IDWR has a statutory duty to allocate water. The Idaho legislature gave the IDWR's Director the power to make appropriation decisions in Idaho Code section 42–602: "[t]he director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the ... facilities diverting therefrom." The Director also "shall distribute water in water districts in accordance with the prior appropriation doctrine." *Id.* ***This means that the Director cannot distribute water however he pleases at any time in any way; he must follow the law.***
>
> Idaho Code section 42–602 gives the Director broad powers to direct and control distribution of water from all natural water sources within water districts. *In re Idaho Dep't of Water Res. Amended Final Order Creating Water Dist. No. 170,* 148 Idaho 200, 211, 220 P.3d 318, 329 (2009). That statute gives the Director a "clear legal duty" to distribute water. *Musser v. Higginson,* 125 Idaho 392, 395, 871 P.2d 809, 812 (1994) (*abrogated on other grounds by Rincover v. State Dep't of Fin.,*132 Idaho 547, 976 P.2d 473 (1999)). However, "the details of the performance of the duty are left to the director's discretion." *Id.* ***Therefore, from the statute's plain language, as long as the Director distributes water in accordance with prior appropriation, he meets his clear legal duty. Details are left to the Director.***
>
> . . .
>
> Similarly, this Court has stated that the Director "is charged with the duty of direction and control of distribution of the waters from the streams to the ditches and canals." *DeRousse v. Higginson,* 95 Idaho 173, 179, 505 P.2d 321, 327 (1973). More recently, this Court further articulated the Director's discretion: "Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director." *AFRD#2,* 143 Idaho at 880, 154 P.3d at 451. Thus, the Director's clear duty to act means that the Director uses his information and discretion to provide each user the water it is decreed. And implicit in providing each user its decreed water would be determining when the decree is filled or satisfied.

In re SRBA, Case No. 39576, Subcase 00-91017 (Basin-Wide Issue 17—Does Idaho Law Require a Remark Authorizing Storage Rights to 'Refill', Under Priority, Space Vacated for Flood

Control), Nos. 40974 and 40975, 157 Idaho 385, 393-94, 336 P.3d 792, 800-01 (2014) (hereinafter cited to as "*BW 17*").

In short, it is a red herring to argue that because the Director is not a party to a settlement agreement, he is not bound to honor it and distribute water diverted under the conditioned water right accordingly.[4] He certainly is bound by such conditions as he exercises his statutory duties to distribute water, even if such conditions do not "explicitly" fit into one of the standard elements of a water right. To use a real world example, IDFG would certainly object if Peoples diverted water under 1-10625 in an amount that reduced flows in the Snake River below 2,070 cfs measured in the Snake River at Blackfoot U.S.G.S. Gage No. 13062500 and the Director did nothing to enforce this provision against Peoples or otherwise initiate an enforcement action under Idaho Code § 42-1701B. Permit No. 1-10625 (Condition No. 4). And the Coalition would certainly object if water was diverted under 1-10625 if less than 2,700 cfs was flowing past Minidoka Dam and the Director did nothing to enforce this provision against Peoples or otherwise initiate an enforcement action under Idaho Code § 42-1701B. *Id.* (Condition No. 5). These conditions were included to protect against local public interest impacts and injury to an existing unsubordinated hydropower water right. IDFG and the Coalition should expect that the Director will honor these provisions and ensure compliance by Peoples accordingly because the Director "cannot distribute water however he pleases at any time in any way; he must follow the law." *BW 17*, 157 Idaho at 393, 336 P.3d at 800

[4] Again, divorce jurisprudence demonstrates that a court can incorporate documents into its decrees that are not drafted by the court or in consultation with the court or any other agency that will administer the subject matter. For example, in divorce proceedings, the Idaho Department of Health and Welfare will oversee child support payments.

In terms of water distribution in accordance with water rights, it is also important to note that there is no private ability provided by statute for a party to assume the role of the Director and shut and fasten headgates for non-compliant water users. The protestants can file a complaint with the Director, but ultimately, the Director must perform the function of water distribution and if it is not done to the satisfaction of the protestants, this court has explained the remedy:

> The Director has the authority and discretion to determine how water from a natural water source is distributed to storage water rights pursuant to accounting methodologies he employs. ***The Director's discretion in this respect is not unbridled, but rather is subject to state law and oversight by the courts***. See *American Falls Reservoir Dist. No. 2*, 143 Idaho at 880, 154 P.3d at 451 (addressing court oversight on a properly developed record). When review of the Director's discretion is this respect is brought before the courts in an appropriate proceeding, and upon a properly developed record, the courts can determine whether the Director has properly exercised his discretion regarding accounting methodologies.

Memorandum Decision, Basin Wide Issue 17, Subcase No. 00-91017, at 11-12 (emphasis added). The protestants could sue privately for damages for the non-compliance, Idaho Code § 42-1701B(7), but would have no ability to assume the role of the Director in water distribution. The protestants could only challenge the exercise of his discretion. This further supports the City's position that the Director is a participant in the *Settlement Agreement* because he is duty-bound to ensure compliance with any limitations in the water right, even though he is not a party to the *Settlement Agreement*.

In terms of settlement agreements in general, we cannot think of a stipulated settlement agreement referenced in a water right that would not have at least ***something*** to do with the water right. Otherwise, what is the point of referring to such an agreement in a water right? Yet the

Respondents and the Coalition would like to categorize the language in the approval and the partial decree of 01-181C as just such a "reference" to the *Settlement Agreement*. *See Respondents' Br.* at 11; *Surface Water Coalition's Joint Response Br.* (hereinafter "*Coalition's Resp. Br.*") at 11-12.

However, in contrast to the examples provided by Respondents, *Respondents' Br.* at 11, n. 2 and 3, the conditions on 72385, which transferred 01-181C to Jensen's Grove, provide more than mere "notice" of the *Settlement Agreement*. The language in the transfer approval and the partial decree for 01-181C states that the terms of the *Settlement Agreement* provides "conditions and limitations" in 01-181C. This is a textbook case of incorporation, which is explicitly authorized by Idaho Code § 42-1412(6).

Additionally, in the *Settlement Agreement*, the parties stated that they "understood and agreed that any subsequent partial decree issued by the Snake River Basin Adjudication District Court should ***contain the terms and Conditions*** of this Agreement." Ex. 4 at 4 (paragraph 4 of the *Settlement Agreement*) (capitalization in original, emphasis added). In entering into the *Settlement Agreement* to resolve the Coalition's protest, the parties recited: "It is the Parties' understanding that [the Department] is prepared to grant the proposed Transfer providing: . . . 4) ***the conditions agreed to below are incorporated in the Water Right through the transfer approval***" and "The Parties have . . . ***agreed upon certain conditions to be included in the Water Right after its transfer***." Ex. 4 at 1-2 (recitals D and E of the *Settlement Agreement*) (emphasis added).

Accordingly, the approval of 72385, which transferred 01-181C to Jensen's Grove, and the corresponding partial decree both include the following language:

> ***The diversion and use of water under this transfer is subject to additional conditions and limitations contained in a Settlement Agreement***-IDWR Transfer of Water Right, Transfer No. 72385, dated June 2006, including any properly executed amendments thereto, entered into by and between the New Sweden Irrigation District, [the City], [and the Coalition]. The Settlement Agreement has been recorded in Bingham County (Instrument No. 575897) and Bonneville County (Instrument No. 1249899) and is enforceable by the parties thereto.

Ex. 105 at 90, ¶ 9 (emphasis added); *see also* Ex. 106 at 93. The Department's approval classifies this as one of the "Conditions of Approval." Ex. 105 at 90. The partial decree classifies this language under the heading "other provisions necessary for definition or administration of this water right." Ex. 106 at 93 (capitalization modified). Neither example provided by Respondents does anything but state that each water right is "subject to a private agreement." *Respondents' Br.* at 11, n. 2 and 3; *see also* SRBA Subcases 75-5 and 75-14608.[5] As described above, and in clear contrast to these examples, 01-181C's condition is explicit that the *Settlement Agreement* was intended to be considered "additional conditions and limitations."

Moving on to Respondents' next argument, in determining whether the *Settlement Agreement* is incorporated into 01-181C, "the intent of including" the above-quoted language,

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[5] Counsel for the City was directly involved in 75-14608 (Tyacke), and drafted the settlement agreement that was recorded. A copy is available at http://www.idwr.idaho.gov/apps/ExtSearch/DocsImages/hrhq01_.pdf. The agreement addresses distribution issues from the South Fork of Sevenmile Creek and from a spring used to service the Sunset Heights Subdivision, both natural water sources, which would likely involve the Department's involvement in water distribution because these are natural water sources. It also involved other diversion system issues, which are not matters over which the Department has jurisdiction. But it is evident that this agreement contains provisions that further limit exercise of the water rights outlined in the agreement, and reference to it was not merely for informational purposes.

Respondents' Br. at 11, in the approval and the partial decree is completely immaterial. The recent *Rangen* decision explains how water decrees are to be interpreted:

> Idaho courts interpret water decrees using the same interpretation rules that apply to contracts. *A & B Irrigation Dist.*, 153 Idaho at 523, 284 P.3d at 248. 'Whether an ambiguity exists in a legal instrument is a question of law, over which this Court exercises free review.' *Knipe Land Co. v. Robertson*, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011). Ambiguity may be either patent or latent. *Id.* 'A latent ambiguity exists where an instrument is clear on its face, but loses that clarity when applied to the facts as they exist.' *Id.* Idaho law permits '[f]irst, the introduction of extrinsic evidence to show that the latent ambiguity actually existed; and, second, the introduction of extrinsic evidence to explain what was intended by the ambiguous statement.' *Snoderly v. Bower*, 30 Idaho 484, 487, 166 P. 265, 265 (1917). Interpreting an ambiguous term is an issue of fact. *Knipe Land Co.*, 151 Idaho at 455, 259 P.3d at 601 (citing *Potlatch Educ. Ass'n v. Potlatch School Dist. No. 285*, 148 Idaho 630, 633, 226 P.3d 1277, 1280 (2010)).

Rangen at *12.

Additionally, "[t]he 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) (citation omitted). Therefore, where a contract, judgment, or water right is unambiguous, the document's "meaning and legal effect are questions of law to be decided by the court." *Bondy v. Levy*, 121 Idaho 993, 996, 829 P.2d 1342, 1345 (1992). It is only when the document is ambiguous that "the interpretation of the document presents a question of fact which focuses upon the intent of the parties." *Id.*

Here, Respondents agree that a water right is like a judgment. *Respondents' Br.* at 16-17 ("Like a judgment, a water right must outline with certainty the nature and extent of beneficial use of the water"). But Respondents have made ***no showing*** that the *Settlement Agreement* is

ambiguous and, therefore, any inquiry into intent is premature and improper. *See Respondents' Br.* at 11 ("Since the remark only references the agreement, the question becomes what was the intent of including this information in the water right") and 22 (providing argument "should the Court determine the [Settlement Agreement] introduces ambiguity into decree [sic]"). While Respondents repeatedly return to the issue of intent extrinsic to the *Settlement Agreement*, their failure to demonstrate ambiguity negates those arguments.

The text of 01-181C is clear and unambiguous. The *Settlement Agreement* says what it says: the conditions agreed to in the *Settlement Agreement* will be "incorporated" and "included" in 01-181C. Ex. 4 at 1-2 (recitals D and E of the *Settlement Agreement*). As a preface to the most specific conditions imposed on 01-181C, the *Settlement Agreement* again provides that "the following terms and conditions be included in the Water Right . . . after transfer." Ex. 4 at 2 (paragraph 1 of the *Settlement Agreement*). Likewise, the partial decree says what it says: 01-181C is "subject to additional ***conditions and limitations contained in***" the *Settlement Agreement*. Ex. 106 at 93 (capitalization modified, emphasis added). That is enough to unambiguously answer the question of whether the *Settlement Agreement* was incorporated into the partial decree.

Because incorporation of water right elements pursuant to a settlement agreement is contemplated by Idaho Code § 42-1412(6), but has rarely been analyzed in the water law context, the City and Respondents have each provided analogous bodies of law to which the Court can look for guidance. *Petitioner's Opening Br.* at 14-15 (looking to divorce jurisprudence); *Respondents' Br.* at 13-16 (looking to the property law doctrine of merger). But

Respondents' analogy to the doctrine of merger in property law, while coming from an admittedly more closely related body of law, is a poor analogy for the situation faced by the Court here. The doctrine of merger deals with the warranties made in a sales contract, between a buyer and a seller, merging into the deed between the buyer and seller. *Fuller v. Dave Callister*, 150 Idaho 848, 853, 252 P.3d 1266, 1271 (2011). In broad terms, the doctrine is that only those warranties or covenants that are collateral, or not related to, the property itself will survive the sale of the property at issue, which is manifested by the execution and acceptance of the deed. *Jolley v. Idaho Sec., Inc.*, 90 Idaho 373, 382, 414 P.2d 879, 884 (1966). However, it is not helpful because of factual distinctions and legal differences.

Factually, the incorporation of a private contract into a court order is an entirely different situation from the merger of covenants into the final performance of the contract. First, this case does not deal with a conveyance of property; it deals with the determination of the nature and extent of a property right. *See* Idaho Code § 55-101 (defining a water right as real property). Second, this case does not deal with one contract between private parties being merged into another contract between those parties; the documents at issue here are one private contract and a decree issued by the SRBA Court. Third, this case does not deal with the satisfaction of one contract by the consummation of another; it deals with an agreement between litigants that facilitated the entry of a court order in the form of a partial decree.

In addition to being factually distinct, the doctrine of merger, which occurs automatically in property transfers, provides very little insight into explicit incorporation. First, incorporation is an exception to the doctrine of merger. *Belstler v. Sheler*, 151 Idaho 819, 823, 264 P.3d 926,

930 (2011) (noting "a generally recognized exception to the [doctrine of merger,] which exception relates to collateral stipulations of the contract, ***which are not incorporated in the deed***" (citation and quotation marks omitted, emphasis added)). Because incorporation is an exception to merger, the doctrine of merger provides little help in determining when an extrinsic document is incorporated into a judgment—as is the question here. Further, merger deals with the dissolution of the covenants contained in the prior agreement into the warranties of the deed, because the delivery and acceptance of the deed is the purpose of those covenants. The purpose of the conditions in the *Settlement Agreement* was not just to obtain 01-181C, but to restrict the City's ability to use 01-181C in certain ways. In other words, there is nothing in the water right for the *Settlement Agreement* to dissolve into, but they are included in the water right to describe the limitations imposed. Finally, Respondents' arguments that the *Settlement Agreement* "is collateral to and independent of 01-181C and is therefore not merged" make little sense. *Respondents' Br.* at 16. Besides the language in the partial decree incorporating (or merging) the *Settlement Agreement*, it is impossible to accept Respondents' contention that the *Settlement Agreement* "does not relate to the elements of 01-181C nor is it inhered to the very subject matter of the water right." *Respondents' Br.* at 16. To argue that the conditions in the *Settlement Agreement* are not elements is unsupportable, but it is frivolous to maintain that the *Settlement Agreement* does not even relate to the elements of 01-181C. For these reasons, the doctrine of merger, borrowed from property law, makes a poor analogy and provides little useful guidance for the Court in this case.

Divorce law, while different factually from water law, deals with the issue of incorporation frequently. *See Petitioner's Opening Br.* at 14-15. As the partial decree determined the nature and extent of 01-181C in this case, divorce decrees incorporate private agreements between the litigants to determine the parties' rights to child custody, support, and other property. As the partial decree is a court order that integrates the *Settlement Agreement*, divorce decrees that incorporate settlement agreements are court orders that include a private contract as a term of the order. As the partial decree was facilitated by the *Settlement Agreement*, divorce decrees are aided by the entry of private agreements between the parties.

Respondents argue that the policy considerations underlying incorporation in divorce cases are not present in water disputes. *Respondents' Br.* at 13-14. First, this argument fails to account for the statutory language that explicitly mandates that a partial decree "shall contain ***or incorporate*** a statement of each element of a water right," Idaho Code § 42-1412(6) (emphasis added), in contrast to divorce law where incorporation is a common law doctrine that requires the support of policy. This Court cannot ignore incorporation, which is a statutory principle of water law, merely on the basis of policy arguments. *Saint Alphonsus Reg'l Med. Ctr. v. Gooding Cnty.*, 159 Idaho 84, 356 P.3d 377, 382 (2015). The Idaho Supreme Court has explained that "[t]he wisdom, justice, policy, or expediency of a statute are questions for the legislature alone," and therefore the Court is "reluctant to second-guess the wisdom of a statute." *Id.* (citations and quotation marks omitted, brackets in original). Because incorporation is specifically allowed by statute, this Court must consider whether the partial decree incorporated the *Settlement Agreement* and, upon the appropriate analysis, the Court should conclude that it did.

Further, Respondents' policy argument[6] is misplaced. Whether the Department or a court maintains an "active role" in the administration of a water right does not matter, since the partial decree dictates how each water right is to be administered by the Department. *See* Idaho Code § 42-1412(6).

Finally, Respondents again emphasize the false distinction between elements and conditions by arguing that the *Settlement Agreement* "is collateral to and independent of 01-181C because it does not relate to the elements of 01-181C but focuses on the rights and duties of the signatories outside of the current administration of the water right." *Respondents' Br.* at 14. Aside from again trying to distinguish an "element" from a "condition" (*see above*), Respondents mischaracterize the *Settlement Agreement*. It ***does not*** merely "focus[] on the rights and duties" of the City and the Coalition. *Respondents' Br.* at 14. Rather, the *Settlement Agreement* substantively limits how the City can divert and use 01-181C and informs the Director through his statutory duty to administer water how the right is limited and should be administered.

In sum, the *Settlement Agreement* was incorporated into the partial decree. Incorporation is authorized by statute for describing elements of a water right. The partial decree does more than provide notice of the *Settlement Agreement*, but incorporates it by describing its terms as "conditions and limitations" on 01-181C. As an element of 01-181C, the *Settlement Agreement* clarifies how 01-181C may and may not be used by the City. Respondents erred by failing to consider the *Settlement Agreement* at all.

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[6] Respondents' policy argument is that the policy in divorce law of "provid[ing] enforcement of all agreements within one court" has no relation to water law since "water administration does not take place through the SRBA Court" and "it is up to the Department to enforce and administer the provisions of the water right." *Respondents' Br.* at 13.

II. 01-181C MAY BE CONSIDERED AS MITIGATION.

A. Mitigation does not have to be listed as an express beneficial use of a water right in order for such water right to be used for mitigation purposes.

Mitigation is not explicitly defined or described by statute, but use of mitigation associated with water is implied from the Department's ability to approve any application "upon conditions." Idaho Code § 42-203A(5). The Department has specified that "[a]n application that would otherwise be denied because of injury to another water right may be approved upon conditions which will mitigate losses of water to the holder of an existing water right, as determined by the Director." IDAPA 37.03.08.045.01.a.iv. This singular mention of mitigation in the context of a water right application suggests that it is broad and involves analysis of the actual utilization of water rather than only looking at the beneficial uses listed on the face of the water right.

Contrary to the Department's rules, the Director, in this case, ***refused*** to consider compliance with the *Settlement Agreement* as a "condition[] which will mitigate losses of water" to other water users. There is no factual dispute that 2,080.8 AF of water seeps from Jensen's Grove into the ESPA each year. *See Coalition's Resp. Br.* at 1 (noting that the City and the Coalition "stipulated that the modeling performed by the City's experts showed that recharge in Jensen's Grove could offset the impacts resulting from" 27-12261). This amount of water re-entering the aquifer provides mitigation for 27-12261 and nothing prevents Respondents from considering those facts in mitigation.

Non-use of one water right can, ***without the filing of a transfer***, mitigate for another water right. The reasoning for this principle is that the non-use of an existing water right is a

condition for the approval of the permit for the new water right, which the Department can impose. Idaho Code § 42-203A(5). In this case, the non-use is a "condition[] which will mitigate losses of water," and allows the Department to approve the subsequent water right. IDAPA 37.03.08.045.01.a.iv. In doing so, the Department takes reality into account, and is not constrained by the black-and-white details on the face of each water right, because these are situations where mitigation is not required to be explicitly listed as a beneficial use.

It is noteworthy in this case that the Coalition has not protested that portion of the City's other water rights in the Blackfoot River which the City proposes to hold unused. *See* R. at 204 ("The Coalition did not challenge the City's proposal to hold 6.2 acres of Blackfoot River right unused to offset depletions to the Snake River downstream of Blackfoot"). In fact, "the Coalition stipulated that leaving a small portion of additional water in the Snake River [system] would offset [the] mitigation deficiency." *Coalition's Resp. Br.* at 1. This is important, because the City has not filed any transfer application to use these Blackfoot River water rights as mitigation for 27-12261, nor was the City requested to do so by the Coalition. This fact alone defeats the Coalition's own argument.

Yet here, Respondents and the Coalition seek to ignore reality and exalt form over substance. The Coalition's repeated emphasis that "the elements of a water right cannot be changed without a transfer," *Coalition's Resp. Br.* at 8 (capitalization modified and emphasis omitted), is an oversimplification. Recently, this Court ruled on an appeal in *In the Matter of Application for Permit No. 35-14402*, a case in which the Coalition was involved. In that matter, the Cooks were allowed to proceed with 35-14402 using their proposed mitigation plan that

included a reduction of volume of their other base water rights. *See Memorandum Decision and Order*, CV-42-2015-2452 (filed December 14, 2015). The Cooks did not file a transfer application to amend their other base water rights (Water Right Nos. 35-7280, 35-7281, 35-13241, 35-14334, 34-14335, and 35-14336). Based upon the action taken in relation to their application for water right 35-14402, the Department administratively amended the Cooks' other water rights to add the applicable volume limitations contained in 35-14402 to the other base water rights. The Cooks were informed by letter of the Department's amendment of the base water rights and it contains no mention of the need to file a transfer. See *Letter to Cook from Shelley Keen*, February 5, 2016, *available at* http://www.idwr.idaho.gov/apps/ExtSearch/DocsImages/ncv901_.pdf (a copy of which is included as **Exhibit 1** for the convenience of the Court). The Cooks' case demonstrates that, contrary to the Coalition's assertion and the Respondents' position, it is unnecessary to file transfer applications for water rights that are utilized in a mitigation plan for a separate application for a water right permit. The Department can, and ***does***, modify the elements of water rights administratively without a transfer application. The City has sought the same procedure employed by the Department in the Cooks' case, and the City's application in 27-12261 is sufficient to claim the benefits associated with the elements of 01-181C in accordance with the City's mitigation plan.

It also makes sense that mitigation or ground water recharge was not listed as a beneficial use on the face of 01-181C since the mitigation could only be sought or claimed under certain strict conditions. Therefore, it is nonsensical to look for mitigation on the "face" of any water

right in a vacuum. The 2,080.8 AF that annually seeps into the ESPA was not, and could not be, claimed as mitigation until the City applied for 27-12261.

Respondents' contention that they are entitled to rely solely on the "face of the water right" to determine how the water is used or employed, *Respondents' Br.* at 16-19, fails to consider mitigation at all in any circumstances where mitigation is not listed as a beneficial use and there is no transfer application concurrently filed—which the Cooks' case demonstrates is not how the Department normally operates. *See Memorandum Decision and Order*, CV-42-2015-2452 (filed December 14, 2015).

The City has used the correct procedure in this application, *i.e.*, the ***appropriate*** application, to claim the mitigation credit for the 2,080.8 AF of annual seepage from 01-181C. Respondents erred by failing to even consider the admitted reality of the mitigation provided by 01-181C by solely looking at face of 01-181C where mitigation is not listed as a beneficial use.

B. The *Settlement Agreement* restricts certain abilities with regard to 01-181C, but not the City's ability to claim, nor the Department's ability to consider, the admitted substantial seepage occurring as mitigation.

"[I]ncidental ground water recharge . . . may not be used as the basis for claim of a separate or expanded water right." Idaho Code § 42-234(5). Both the Coalition and Respondents argue that the 2,080.8 AF that annually seeps into the ESPA from Jensen's Grove is merely incidental recharge and therefore cannot be used as mitigation for 27-12261. *See Coalition's Resp. Br.* at 21-24; *Respondents' Br.* at 21.

The City has already argued that "incidental recharge is for recharge not included anywhere on the water right." *Petitioner's Opening Br.* at 29; *see also* BLACK'S LAW

DICTIONARY 830 (defining incidental as an adjective, meaning "[s]ubordinate to something of greater importance; having a minor role"). The Coalition has stipulated that the City's mitigation plan and modeling shows that 01-181C provides sufficient water to the ESPA to mitigate for 27-12261, but merely challenges whether the City is entitled to claim credit for the seepage, which the Coalition categorizes as incidental.

As previously asserted, as a legal matter, both the *Settlement Agreement* and the reference to seepage losses on the face of 01-181C expressly acknowledge the ground water recharge that occurs under 01-181C. As a factual matter, and in terms of the ***quantity*** of the recharge, it is anything but incidental. The 2,080.8 AF is more than 678 million gallons of water that seeps into the ESPA. It is almost 92% of the annual portion of 01-181C allocated to Recreation Storage (the remainder is lost to evaporation). It is more than 72% of 01-181C's total water. The sheer volume of water and the context of that quantity in relation to 01-181C belies the conclusion that the City's proposed mitigation is merely "incidental." The movement of such a large amount of water was never minor or just of subordinate importance to the City.

It is for that reason that the *Settlement Agreement* deals extensively with the issue of mitigation, delving into the minutiae of various circumstances to specify the City's rights. The *Settlement Agreement* does not categorically deny mitigation. Instead, the *Settlement Agreement* treats the issue of mitigation with a scalpel rather than a cleaver.

In attempting to interpret the *Settlement Agreement*, both the Coalition and Respondents accentuate what is arguably their best fact: that ground water recharge was included on the draft approval for 72385, but was excluded from the final approval. *See Coalition's Resp. Br.* at 18;

Respondents' Br. at 22. However, these documents are parol evidence, meaning it is only helpful to interpret the 01-181C if the text of the water right is found to be ambiguous. *See Respondents' Br.* at 22 ("If a court finds the language of a contract ambiguous, parol evidence can be reviewed to ascertain intent behind the contract") (citing *Bilow v. Preco, Inc.*, 132 Idaho 23, 27, 966 P.2d 23, 27 (1998)). Yet, Respondents only present this argument for consideration in the event the Court concludes 01-181C is ambiguous, without any argument or analysis on the issue of ambiguity. *Respondents' Br.* at 22. Further, the Coalition does not even categorize this fact as parol evidence, and encourages the Court to consider it to determine the parties' intentions in the *Settlement Agreement*. *Coalition's Resp. Br.* at 18. First and foremost, this parol evidence should not be considered by the Court because 01-181C is not ambiguous.

Even if the Court were to find 01-181C or the *Settlement Agreement* ambiguous, this evidence is not as helpful as it seems. Respondents contend that the evidence shows "that recharge was expressly rejected as an authorized use for 01-181C." *Respondents' Br.* at 22. However, the record does not disclose the procedure upon which the Department addressed the Coalition's letter concerning the draft approval that included recharge. *See Coalition's Resp. Br.* at 21 ("The Department apparently agreed with the Coalition and removed the 'recharge' use ***without further discussion in the record***" (emphasis added)). But there is ***no record of a formal adjudication of the issue***, but merely the letter and the comparative differences between the draft approval and the final approval. In fact, it is equally probable that the Department determined that with the limitations contained in the *Settlement Agreement*, ground water recharge should not have been explicitly listed on the face of the water right because it could be interpreted to

authorize recharge by the City for mitigation ***without limitation***. The safer route for the Department, which it followed, was to not include it as an express beneficial use, but to simply incorporate the *Settlement Agreement* and its provisions to dictate when the recharge water could be claimed as mitigation. The competing inferences highlight why the law is to first look at the plain language of the document being interpreted before moving on to parol evidence.

Finally, it bears repeating that the majority of the record in this case was submitted by the City. The City elicited testimony from its witnesses at the hearing before the Department, while the Coalition chose not to do so. So if this Court does consider parol evidence, most of the parol evidence supports the City's position that the *Settlement Agreement* was never meant to totally prevent the City's ability to claim the 2,080.8 AF of annual seepage as mitigation for other water rights. *See Petitioner's Opening Br.* at 24-25. As a result, the *Settlement Agreement* and, if it is considered ambiguous, the parol evidence related to the *Settlement Agreement* show that the seepage into the ESPA from Jensen's Grove under 01-181C was never completely given up by the City, and therefore may be claimed as mitigation for 27-12261.

III. 01-181C'S SEEPAGE MITIGATES FOR 27-12261, REGARDLESS OF THE STATUS OF THE *SETTLEMENT AGREEMENT*.

The City unequivocally believes that the *Settlement Agreement* is a part of 01-181C that describes certain "limitations and conditions" on the water right's use that constitute elements of 01-181C. However, the Respondents' failure to consider the *Settlement Agreement* is only one error committed in this case. Ultimately, whether the *Settlement Agreement* is an element of 01-

181C or not affects the Coalition's arguments much more than the City's, as Respondents should have considered the reality of 01-181C's 2,080.8 AF of seepage as mitigation for 27-12261.

A. As the Coalition appears to have argued, the *Settlement Agreement* possibly fails as a contract.

The Coalition's brief raises two alternative reasons why the *Settlement Agreement* may fail as a contract. Since there is no severability clause in the *Settlement Agreement* and no apparent intention that it be severable, if one provision is void for either reason, the entire contract will fail. First, because the *Settlement Agreement* may "be contrary to the law requiring a transfer—thus causing the *Settlement Agreement* to fail." *Coalition's Resp. Br.* at 15 (italics added). Second, as has become increasingly apparent (though limited by the brevity of the record created by the Coalition on its behalf), the Coalition and the City may have never had a meeting of the minds, in which case no bargain was created and no contract formed.

1. <u>According to the Coalition's argument, at least one of the provisions of the *Settlement Agreement* violates Idaho law and, since it is not severable, the entire contract possibly fails.</u>

With regard to severability of a contract, the Idaho Supreme Court has explained that, in the absence of a severability clause:

> [w]hether a contract is entire or severable depends on the intention of the parties which is to be ascertained and determined, when the contract is unambiguous, from the subject matter of the agreement and the language used therein, taking the agreement as a whole and not its separate parts without regard to one another. . . .
>
> The test chiefly relied upon is whether the parties have apportioned the consideration on the one side to the different covenants on the other. If the consideration is apportioned, so that for each covenant there is a corresponding consideration, the contract is severable. If, on the other hand, the consideration is not apportioned, and the same consideration

> supports all the covenants and agreements, the contract is entire. A contract is entire when by its terms, nature, and purpose, it contemplates and intends that each and all of its parts and the consideration shall be common to each other and interdependent. On the other hand, it is the general rule that a severable contract is one which in its nature and purpose is susceptible of division and apportionment.'

Vance v. Connell, 96 Idaho 417, 419, 529 P.2d 1289, 1291 (1974) (internal quotation marks and citations omitted). If a contract is entire, it "is indivisible, [and] must stand or fall in its entirety." *Morgan v. Firestone Tire & Rubber Co.*, 68 Idaho 506, 514, 201 P.2d 976, 980 (1948).

Here, the *Settlement Agreement* has no severability clause. *See* Ex. 4. The consideration provided by the Coalition (the resolution of its protest) is not apportioned, but supports all of the City's covenants, which became conditions of 01-181C. *See, e.g.*, Ex. 4 at 3 (paragraph 3 of the *Settlement Agreement*, providing that "[i]n the event [the Department] does not approve the Transfer of the Water Right with the above Conditions, the Coalition reserves all rights to protest the application"). The *Settlement Agreement* is "entire," because "it contemplates and intends that each and all of its parts and the consideration shall be common to each other and interdependent." *Vance*, 96 Idaho at 419, 529 P.2d at 1291. The Coalition and the City intended the *Settlement Agreement* to be an all-or-nothing agreement that resolved the Coalition's protest ***only*** if it was incorporated in its entirety in the Department's approval and the associated partial decree.

The language of the *Settlement Agreement* allows the City to employ 01-181C as mitigation if it will "file the appropriate application for permit and/or transfer." Ex. 4 at 3 (paragraph 1.e of the *Settlement Agreement*). The use of "and/or" in this clause permits the City

to claim mitigation credit for 01-181C by filing (a) an appropriate application for permit, (b) an appropriate transfer, or (c) both. *Id.*

If the Court accepts the Coalition's argument (which the City disputes), that the only mechanism in Idaho to claim mitigation is to file a transfer, to any degree, then option (a) from the preceding sentence is unlawful. In the Coalition's words, the *Settlement Agreement* may "be contrary to the law requiring a transfer – thus causing the *Settlement Agreement* to fail." *Coalition's Resp. Br.* at 15 (citing *AED, Inc. v. KDC Invs., LLC*, 155 Idaho 159, 167, 307 P.3d 176, 184 (2013) ("a contract [that] cannot be performed without violating applicable law is illegal and void"). Therefore, because the *Settlement Agreement* is entire, the failure of one section causes the whole contract to fail, *see Morgan*, 68 Idaho 506, 201 P.2d 976, and a contested case regarding 01-181C should reconvene as a protested application.

2. Given the divergent expressions of intent on the part of the City and the Coalition in entering into the *Settlement Agreement*, it appears the *Settlement Agreement* was never formed.

For a contract to be formed, "there must be a meeting of the minds," which "must occur on all material terms to the contract." *Barry v. Pac. W. Const., Inc.*, 140 Idaho 827, 831, 103 P.3d 440, 444 (2004). At least based on the arguments in this proceeding involving 27-12261, there was never a meeting of the minds between the Coalition and the City as to at least a portion of the *Settlement Agreement*, which is entire. *See* Section III.A.1, *supra*. The testimony of Mayor Reese demonstrates what the City believed the bargain to be with regard to claiming credit for the mitigation provided by 01-181C. Tr., p. 38, l. 5–p. 40, l. 19. Despite presenting no evidence, the Coalition has argued strongly that, in essence, it never shared Mayor Reese's

understanding. As demonstrated by the adversarial proceeding and this litigation, the City's ability to claim mitigation credit for the 2,080.8 AF of seepage is material to both the City and the Coalition. Again, because the *Settlement Agreement* is entire, the failure of one section causes the whole contract to fail. *See Morgan*, 68 Idaho 506, 201 P.2d 976.

B. Even if the *Settlement Agreement* is not a part of 01-181C, the City is still entitled to claim 01-181C's seepage as mitigation for 27-12261.

The effect of the complete failure of the *Settlement Agreement* is more profound on the Coalition than on the City. Before the Director's *Final Order*, the Coalition centered its argument on the *Settlement Agreement* and objected to the City's ability to file 27-12261 without the Coalition's consent, as it claimed was required by the *Settlement Agreement*. While that argument has understandably evolved, given the course of this adversarial proceeding and litigation, the Coalition continues to argue the substance of the *Settlement Agreement*, which puts limits and conditions on the City's use of 01-181C.

While the City is not required by the *Settlement Agreement* to obtain the Coalition's permission before filing 27-12261, *see* Ex. 4 at 3 (paragraph 1.e.), if the *Settlement Agreement* were void for either of the above-described reasons, the realities of the use of 01-181C should still have been considered by the Respondents and the City should have been allowed to claim credit for 01-181C. *See* Section II.A., *supra*.

IV. CONCLUSION.

By the terms of the approval and the partial decree, the *Settlement Agreement* imposes "conditions and limitations" on the City's use of 01-181C, and therefore constitutes an element

of 01-181C. The language of the approval and the partial decree do more than provide notice of the *Settlement Agreement*; by subjecting 01-181C to the "conditions and limitations" of the *Settlement Agreement*, the approval and partial decree incorporated the *Settlement Agreement*.

When considering mitigation for a new water right permit, the circumstances of reality, and not just the black-and-white of the face of a water right must be considered—as demonstrated by the Department's common practice of allowing non-use or limited use of one water right to provide mitigation for a new water right permit. In this case, neither the Coalition nor the Respondents argue against the City's voluntary limitation of use of its Blackfoot River water rights being applied as mitigation for 27-12261, despite "mitigation" not being listed as a beneficial use on any of those water rights.

The City is allowed to claim credit for the mitigation provided by the annual seepage of 2,080.8 AF under 01-181C. The *Final Order* was made in violation of statutory provisions; in excess of the statutory authority of the Department; without support of substantial evidence; and arbitrarily, capriciously, and as an abuse of discretion. The errors have violated the City's substantial right in the proper adjudication of this matter by the application of correct legal standards.

Where, as here, "there is no indication in the record that further findings of fact could be made from the paucity of evidence that would affect the outcome of this case," remand to the Department is unnecessary. *Bonner Gen. Hosp. v. Bonner Cnty.*, 133 Idaho 7, 11, 981 P.2d 242, 246 (1999); *see also* I.C. § 67-5279(3). The Coalition has only ever made a legal argument in this case, which can be answered by this Court upon the record already established because

contract interpretation is a matter of law. This Court should issue an order approving the issuance of a permit for 27-12261 because there are no legal impediments to using ground water recharge under 01-181C to mitigate for 27-12261.

Dated this 2nd day of March, 2016.

Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the following described pleading or document on the parties listed below by hand delivery, email, mail, or by facsimile, with the correct postage thereon, on this 2nd day of March, 2016.

DOCUMENT SERVED: PETITIONER'S REPLY BRIEF

ORIGINAL TO: Eric J. Wildman
District Judge
253 3rd Avenue North
P.O. Box 2707
Twin Falls, Idaho 83303-2707

ATTORNEYS AND/OR INDIVIDUALS SERVED:

Paul L. Arrington Barker Rosholt & Simpson LLP 195 River Vista Place, Suite 204 Twin Falls, ID 83301-3029 pla@idahowaters.com	( ) First Class Mail ( ) Hand Delivery ( ) Facsimile (✓) Overnight Mail (✓) Email
W. Kent Fletcher Fletcher Law Office P.O. Box 248 Burley, ID 83318 wkf@pmt.org	( ) First Class Mail ( ) Hand Delivery ( ) Facsimile (✓) Overnight Mail (✓) Email
Garrick Baxter Idaho Department of Water Resources P.O. Box 83720 Boise, ID 83720 Garrick.baxter@idwr.idaho.gov	( ) First Class Mail ( ) Hand Delivery ( ) Facsimile (✓) Overnight Mail (✓) Email

Robert L. Harris, Esq.
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G:\WPDATA\RLH\18653-000 CITY OF BLACKFOOT\PLEADINGS\REPLY BRIEF V5.DOCX:SM

State of Idaho
DEPARTMENT OF WATER RESOURCES
322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098
Phone: (208) 287-4800 • Fax: (208) 287-6700 • Website: www.idwr.idaho.gov

C.L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

February 5, 2016

JEFFREY M COOK
KARL T COOK
C/O ROBERT L HARRIS
PO BOX 50130
IDAHO FALLS ID 83405-0130

RE: Water Rights 35-7280, 35-7281, 35-13241, 35-14334, 34-14335, and 35-14336

Dear Water Right Owners:

On December 14, 2015, Fifth Judicial District Judge Eric Wildman affirmed the issuance of Permit 35-14402 with the following condition:

> Rights 35-7280, 35-7281, 35-13241, 35-14334, 34-14335, 35-14336, and 35-14402 when combined shall not exceed a total diversion rate of 8.20 cfs, a total annual maximum diversion volume of 1,221 af at the field headgate, and the irrigation of 560 acres.

Because each of the listed water rights is bound by the condition, IDWR has added the condition to the record for each.

If you have any questions, please call me at 208-287-4947, or email me at shelley.keen@idwr.idaho.gov.

Sincerely,

Shelley W. Keen

Shelley W. Keen, Manager
Water Rights Section

EXHIBIT
Kebbler
1
000203

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

THE CITY OF BLACKFOOT, Petitioner, vs. GARY SPACKMAN, in his official capacity as Director of the Idaho Department of Water Resources, and THE IDAHO DEPARTMENT OF WATER RESOURCES Respondents, A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY and TWIN FALLS CANAL COMPANY, Intervenors. IN THE MATTER OF APPLICATION FOR PERMIT NO. 27-12261 In the name of the City of Blackfoot.	Case No. CV-2015-1687 **JUDGMENT**

District Court - SRBA
Fifth Judicial District
In Re: Administrative Appeals
County of Twin Falls - State of Idaho

APR - 6 2016

By _____ Clerk

_____ Deputy Clerk

JUDGMENT IS ENTERED AS FOLLOWS:

The Director's *Order Addressing Exceptions and Denying Application for Permit* entered on September 22, 2015, **is affirmed**.

Dated April 6, 2016

ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the JUDGMEMT was mailed on April 06, 2016, with sufficient first-class postage to the following:

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MILNER IRRIGATION DISTRICT
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DIRECTOR OF IDWR
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BOISE, ID 83720-0098

Julie Murphy
Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

THE CITY OF BLACKFOOT,

Petitioner,

vs.

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

Respondents,

A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY and TWIN FALLS CANAL COMPANY,

Intervenors.

IN THE MATTER OF APPLICATION FOR PERMIT NO. 27-12261

In the name of the City of Blackfoot.

Case No. CV-2015-1687

MEMORANDUM DECISION AND ORDER

I.

STATEMENT OF THE CASE

A. Nature of the case.

This case originated when the City of Blackfoot ("City") filed a *Petition* seeking judicial review of a final order of the Director of the Idaho Department of Water Resources ("IDWR" or "Department"). The order under review is the Director's *Order Addressing Exceptions and Denying Application for Permit* entered on September 22, 2015 ("*Final Order*"). The *Final Order* denies application for permit number 27-12261 filed by the City. The City asserts the *Final Order* is contrary to law and asks this Court to issue an order approving the issuance of a permit pursuant to its application.

B. Course of proceedings and statement of facts.

This matter concerns an application to appropriate water filed by the City. The application seeks 9.71 cfs of ground water for the irrigation of 524.2 acres in Bingham County.[1] R., pp.92-105. The City seeks the appropriation for two purposes. *Id.* at 93. First, it currently operates a pump station that diverts water from the Blackfoot River for delivery to irrigators east of I-15. *Id.*; Ex.1, p.1; Tr.,pp.9-10. Due to cost, the City desires to develop a new right to deliver ground water to those irrigators instead of surface water. R., p.98; Ex.1, p.1. Second, the City presently holds water right 27-7577, which permits it to divert ground water for delivery to irrigators west of I-15. Ex.105. To supplement alleged deficiencies with that right, the City desires to develop a new right to deliver additional ground water to those irrigators. R., p.93; Ex.1, p.1.

To compensate potential injury resulting from the appropriation, the City proposes mitigation. Ex.1, pp.2-3. It seeks 1,066 afa of mitigation credit resulting from ground water recharge under water right 01-181C. *Id.* That right permits the City to divert 2,466.80 afa from the Snake River for, among other things, recreation storage at Jensen Grove. Ex.106. Jensen Grove is a recreation area owned by the City which includes a 73-acre reservoir. The reservoir is

[1] The City's original application was filed on September 12, 2013. R., pp.1-27. The City subsequently submitted two amended applications. *Id.* at pp.28-58; 92-105.

filled with water from the Snake River under water right 01-181C. Ex.106. The City describes the reservoir operation and alleged recharge as follows:

> During the irrigation season, water is continually delivered to the reservoir to maintain its water level. As described in the water right, 1,100 acre-feet remain in the reservoir for recreation storage, 980.9 acre-feet seep into the aquifer, and 186 acre-feet are lost to evaporation. Once delivery of water to Jensen Grove ceases at the end of the irrigation season, the remaining water in the reservoir sinks into the aquifer, adding an additional recharge of 1,100 acre-feet under water right 01-181C. . . . As the water right owner of 01-181C, the applicant proposes to use a portion of this recharge as mitigation for the new application.

Ex.1 p.2. The City seeks an additional mitigation credit of 6.2 afa resulting from the proposed non-use of certain Blackfoot River water rights. *Id.* at 3.

The City's application was protested by the Coalition.[2] R., pp.66-68. Among other things, the Coalition asserts the City failed to establish the new appropriation will not reduce the quantity of water under existing rights. *Id.* An administrative hearing was held before the Department on April 21, 2015. Tr., p.1. Department employee James Cefalo acted as hearing officer. *Id.* at 5. On May 15, 2015, he issued his *Preliminary Order*. R., pp.200-219. He found that the proposed appropriation constitutes a consumptive use of water and, without mitigation, will reduce the quantity of water under existing rights. *Id.* at 207. In evaluating the proposed mitigation, he determined that water right 01-181C does not authorize the City to use water for recharge. *Id.* Notwithstanding, he approved the City's application on the condition that it successfully pursue a transfer to add recharge as an authorized purpose of use under the right. *Id.* at 213-214.

The City filed exceptions to the *Preliminary Order*. *Id.* at 220-245. It challenged the hearing officer's conditional of approval of its application and his requirement that it pursue a transfer of water right 01-181C. *Id.* On September 22, 2015, the Director issued his *Final Order*. *Id.* at 271-277. Like the hearing officer, the Director found that water right 01-181C does not authorize the City to use water for recharge. *Id.* at 272-273. He agreed that a transfer would be required to authorize such use. *Id.* However, the Director disagreed with the conditional approval of the application. *Id.* at 273. Given the uncertainty and complications

[2] The term "Coalition" refers collectively to the A&B Irrigation District, Burley Irrigation District, American Falls Reservoir District #2, Minidoka Irrigation District, Milner Irrigation District, North Side Canal Company and Twin Falls Canal Company.

associated with a potential transfer, the Director determined that the better approach "is to deny the application, without prejudice, for failure to submit sufficient information for the Department to consider the City's mitigation plan." *Id.* The Director therefore rejected the City's application, and suggested it could refile in conjunction with the pursuit of a transfer of water right 01-181C. *Id.* at 274.

On October 16, 2015, the City filed the instant *Petition*, asserting that the Director's *Final Order* is contrary to law. The case was reassigned by the clerk of the court to this Court on October 26, 2015. On November 16, 2015, the Court entered an *Order* permitting Coalition members to appear as intervenors. The parties subsequently briefed the issues raised on judicial review. A hearing on the *Petition* was held before the Court on March 10, 2015. The parties did not request the opportunity to submit additional briefing and the Court does not require any. Therefore, this matter is deemed fully submitted for decision on the next business day or March 11, 2015.

II.
STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1). The court shall affirm the agency decision unless it finds that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). Further, the petitioner must show that one of its substantial rights has been prejudiced. I.C. § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record. *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision.

Payette River Property Owners Assn. v. Board of Comm'rs., 132 Idaho 552, 976 P.2d 477 (1999).

III.

ANALYSIS

An application for permit to appropriate water is evaluated against the criteria set forth in Idaho Code § 42-203A. One criterion is whether the proposed appropriation "will reduce the quantity of water under existing water rights." I.C. § 42-203A(5). If so, the Department may reject the application. *Id.* However, an application that may otherwise be rejected because of injury to another water right "may be approved upon conditions which will mitigate losses of water to the holder of an existing water right, as determined by the director." IDAPA 37.03.08.045.01.a.iv. The Director held that the appropriation proposed by the City constitutes a consumptive use of water. R., 273. Without mitigation it will reduce the quantity of water available under existing water rights. *Id.* The City contends it presented adequate mitigation to compensate for the consumptive use and asserts that the Director improperly rejected its application. This Court disagrees. For the reasons set forth herein, the Director's *Final Order* is affirmed.

A. The Director's determination that water right 01-181C does not authorize the City to use water for recharge is affirmed.

Ground water recharge constitutes the lion's share of mitigation proposed by the City. It asserts recharge is authorized under water right 01-181C. After reviewing the *Partial Decree* for water right 01-181C, the Director held that recharge is not an authorized purpose of use under the right. R., pp.272. This Court agrees. The same rules of interpretation applicable to contracts apply to the interpretation of a water right decree. *A & B Irr. Dist. v. Spackman*, 153 Idaho 500, 523, 284 P.3d 225, 248 (2012). If a decree's terms are clear and unambiguous, the decree's meaning and legal effect are questions of law to be determined from the plain meaning of its own words. *Cf., Sky Cannon Properties, LLC v. The Golf Club at Black Rock, LLC*, 155 Idaho 604, 606, 315 P.3d 792, 794 (2013). A decree is ambiguous if it is reasonably subject to conflicting interpretations. *Cf., Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 308, 160 P.3d 743,

747 (2007). Whether a decree is ambiguous is a question of law over which this Court exercises free review. *Id.*

i. Recharge is not an authorized use under the purpose of use element of the *Partial Decree.*

The plain language of the *Partial Decree* sets forth the uses authorized thereunder. Ex.106. The purpose of use element unambiguously provides that water may be diverted for: (1) irrigation storage, (2) irrigation from storage, (3) diversion to storage, (4) recreation storage, and (5) irrigation. *Id.* Notwithstanding, the City asserts it is also authorized to use water for recharge under the right. It relies on the other provisions element of the *Partial Decree*, which provides in part:

> The diversion and use of water under transfer 72385 is subject to additional conditions and limitations contained in a settlement agreement-IDWR transfer of water right, transfer no. 72385, date June 2006, including any properly executed amendments thereto, entered into by and between the New Sweden Irrigation District, the City of Blackfoot, A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, Twin Falls Canal Company, and North Side Canal Company. The settlement agreement has been recorded in Bingham County (Instrument No. 575897) and Bonneville County (Instrument No. 1249899) and is enforceable by the parties thereto.

Id. The City asserts that the referenced settlement agreement acknowledges its ability to use water for recharge. Further, that the other provisions element, by way of reference to that agreement, authorizes recharge as an additional purpose of use under the right.

The City's argument is untenable. Water rights are defined by elements. I.C. § 42-1411(2).[3] One defining element is purpose of use. I.C. § 42-1411(2)(f). In a general stream adjudication, the court must decree each purpose of use authorized under a state-based claim. I.C. §§ 42-1411and 1412. The adjudication statutes require those uses be set forth in the purpose of use element of the decree. *Id.* The City's argument that the other provisions element may

[3] *See also e.g., Olson v. Idaho Dept. of Water Resources*, 105 Idaho 98, 101, 666 P.2d 188, 191 (1983) (providing, "[a] water right is defined, not in terms of metes and bounds as in other real property, but in terms of priority, amount, season of use, purpose of use, point of diversion and place of use").

authorize additional uses of water not identified in the purpose of use element is inconsistent with Idaho law. *Id.*

The other provisions element of a *Partial Decree* serves several purposes. It may set forth conditions on the exercise of a water right. I.C. § 14-1411(2)(i). It may also contain remarks to define, clarify or administer a right. I.C. § 14-1411(2)(j). It may not, however, enlarge another defining element of a water right. For instance, the other provisions element cannot authorize the use of a larger quantity of water than that set forth in the quantity element of a decree. This is because the adjudication statutes specially require the authorized quantity to be set forth in the quantity element of a decree. I.C. § 14-1411(2)(c). Under the same rationale, it cannot enlarge the purpose of use element of a water right by authorizing additional uses of water not identified therein. I.C. § 14-1411(2).

The other provisions element relied upon by the City recognizes this and contradicts its position. It begins, "[t]he diversion and use of water under transfer 72385 is subject *to additional conditions and limitations* contained in a settlement agreement." Ex.106 (emphasis added). It is appropriate for the other provisions element of a partial decree to contain "additional conditions and limitations" on the exercise of a right. I.C. §§ 14-1411(2)(i) and (j). However, it is the City's position that the other provisions element of its *Decree* does far more than that. It argues it fundamentally changes how water under the right may be used. It argues it expands the right to authorize a use of water not identified under the purpose of use element. What the City argues is not an additional condition and limitation. It is an impermissible expansion of the purpose of use element of the water right.

There is no ambiguity in the purpose of use element of the *Partial Decree* issued for water right 01-181C. It authorizes the City to divert water for five purposes of use. Recharge is not one of them. The City argues that recharge was not included in the purpose of use element because it would have been too burdensome to list all of the conditions on its ability to use water for that purpose.[4] The Court does not follow the argument. It is not too burdensome to place the term "recharge" under the purpose of use element. This is simply done.[5] If there are numerous

[4] The City alleges these conditions are set forth in the settlement agreement.

[5] In fact, the Draft Approval of Transfer 72385 prepared by the Department specifically included ground water recharge as a purpose of use and referred to the settlement agreement. Ex. 103. Ultimately, the final transfer still referred to the settlement agreement but omitted recharge as a purpose of use. Ex. 105.

conditions on the exercise of that use, those conditions may be set forth in the other provisions element of the right. That is the purpose of that element. I.C. §§ 14-1411(2)(i) and (j). Therefore, if the City believed water right 01-181C authorized it to divert water for recharge, it is not burdensome to identify "recharge" under the purpose of use element – it is necessary.[6]

Further scrutiny of the *Decree* reinforces that recharge is not an authorized purpose of use. An examination of the period of use element reveals the absence of any identified period of year wherein the City is authorized to use water for recharge. The adjudication statutes require a decree to include the period of the year when water may be used for each authorized purpose of use. I.C. § 42-1411(2)(g). Likewise, the *Decree* fails to identify the quantity of water which may be used by the City for recharge.[7] For the reasons set forth herein, the City's argument that it is authorized to use water for recharge is inconsistent with the plain and unambiguous language of its *Partial Decree*.

ii. This proceeding is not the proper time or place to raise the argument that recharge is an authorized purpose of use.

If the City believed recharge should be authorized under water right 01-181C, this proceeding is not the proper time or place to raise that argument. Some history is relevant here. Water right 01-181C was acquired by the City in 2005 to fill and maintain the reservoir at Jensen Grove. Ex.5. It was purchased from the New Sweden Irrigation District, which used the right for irrigation purposes. *Id.* To change the nature of use to accommodate Jensen Grove, the City filed an application for transfer with the Department. Ex. 6. In addition to irrigation, it sought to

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[6] In interpreting whether the *Decree* issued for water right 01-181C authorizes recharge, the Director relied upon the plain language of the purpose of use element. R., p.272. He did not engage in an interpretation of the settlement agreement referenced the other provisions element. *Id.* The City argues that the Director erred in this respect. For the reasons set forth herein he did not.

[7] Under the quantity element, the *Decree* authorizes the diversion of 980.80 afa for "seepage losses." Ex.106. The City appears to argue that 980.80 afa is therefore the quantity of water it is authorized to use for recharge purposes. This Court disagrees. The seepage loss was quantified by the Director, and approved by this Court, to justify a total authorized diversion of water under the right that exceeds the capacity of the reservoir. In this respect it is similar to the Director's recognition of conveyance loss when quantifying certain irrigation rights. However, seepage loss does not automatically equate to authorized recharge. Here, since recharge is not an authorized purpose of use under the right, neither the Director nor the Court was required to evaluate whether all of the water that is attributed to seepage losses for purposes of quantifying the right indeed acts to, and/or should be authorized as, recharge ground water.

add "recreation," "storage" and "recharge" as authorized uses under the right. *Id.* at 1 and 4. The Coalition initially protested the transfer, but ultimately withdrew that protest pursuant to a settlement agreement.[8] Ex. 4, p.2. On February 14, 2007, the Director approved the City's transfer for the following purposes of use:

Beneficial Use	From To	Diversion Rate	Volume
Diversion to Storage	04/01 to 10/31	46.00 CFS	
Irrigation	04/01 to 10/31	1.0 CFS	200.0 AF
Irrigation Storage	01/01 to 12/31		200.0 AF
Irrigation from Storage	04/01 to 10/31		200.0 AF
Recreation Storage	01/01 to 12/31		2,266.8 AF

Ex.105., p.2. Notably, he did not approve the City's request to add recharge as an authorized purpose of use. *Id.* In fact, recharge was deliberately withheld from the approved transfer. Ex.8; Ex.103. If the City believed the Director erred in this respect, it was required to timely exhaust its administrative remedies and, if necessary, seek judicial review. I.C. §§ 67-5271, *et seq.* It did neither.

Then, on May 29, 2009, the SRBA District Court entered a *Partial Decree* for the right in the Snake River Basin Adjudication. Ex.106. When the Director issued his recommendation for the right, he did not recommend a recharge purpose of use. *Amended Director's Report*, Twin Falls County Case No. 39576, subcase no. 01-181C (April 16, 2007). If the City believed it was authorized to divert water for recharge, it had a duty to timely object to the Director's recommendation and present evidence to rebut the same in the SRBA. I.C. § 42-1411(5). It did not. The SRBA District Court proceeded to enter a *Partial Decree* for the right consistent with the Director's recommendation. Ex.106. The uses of water authorized under the *Decree* are ascertainable from a simple reading of the purpose of use element. They did not include recharge. If the City believed the Court erred in failing to identify recharge as an authorized purpose of use, it was required to timely appeal. I.A.R. 14. It is inappropriate to now argue, in the context of this judicial review proceeding, that the *Partial Decree* issued for 01-181C authorizes a use of water not identified in the purpose of use element of that *Decree*.

[8] This is the settlement agreement reference in the other provisions element of the *Partial Decree*.

B. The Director's determination that the City must pursue a transfer if it desires to divert water for recharge is affirmed.

In his *Final Order*, the Director held that "if the City wants to use Right 01-181C as mitigation through ground water recharge, it must file a transfer." R., p.272. The Director is correct. Idaho Code § 42-222(1) requires that any person who desires to make a change to the nature of use of a water right shall make application to the Department for approval of such change. Therefore, if the City desires to add recharge as an authorized purpose of use under 01-181C, it must follow the transfer requirements set forth in Idaho Code § 42-222.

The City argues that the Director has previously approved mitigation for new appropriations in the context of an appropriation proceeding, without requiring the applicant to undergo a separate transfer proceeding. It cites to application for permit number 35-14402 in the name of Karl and Jeffrey Cook and application for permit number 35-14240 in the name of Lance and/or Lisa Funk Partnership, among others. The cases cited are distinguishable. The mitigation proposed in those cases consisted of the non-use of existing water rights. A transfer is not required under Idaho Code § 42-222 to effectuate the non-use of an existing right. Using his authority under IDAPA 37.03.08.045.01.a.iv., the Director can approve such non-use to mitigate losses and memorialize it as a condition of approval of an application for permit. Here, the City does not propose the non-use of water right 01-181C. Rather, it proposes using the right for the additional purpose of recharge in order to mitigate for a new appropriation. To do so, Idaho law requires the City to file a transfer application with the Department to add recharge as an authorized purpose of use under that right. I.C. § 42-222.

A transfer application is necessary to ensure the additional purpose of use satisfies the criteria set forth in Idaho Code § 42-222. When the City transferred the 01-181C right for use at Jensen Grove, among other things, the Director approved a storage volume greatly exceeding the reservoir's capacity of 1100 AF. The transfer authorized storage of 2466.80 AFY, or over twice the reservoir's capacity. The excess volume recognized the extensive seepage loss due to the permeable nature of the reservoir bed. As a general matter, extensive carriage and/or seepage loss can be a basis for the disapproval of a transfer or placing conditions on the transfer so as to reduce carriage or seepage loss. Despite extensive seepage loss, the City's transfer was approved, in part due to the non-consumptive nature of the transfer and the benefits that would accrue to the ESPA and the Snake River. Ex.102. To now use those same considerations as the

basis to support a new consumptive use without going through a transfer proceeding potentially undermines the very considerations that supported the transfer in the first place. A transfer is therefore necessary so that the Director may reevaluate the entire right taking into account the additional purpose to ensure that the criteria set forth in Idaho Code § 42-222 are still being met. As it now stands, if the City's position is to be accepted that the transfer already approved recharge for mitigation, a quantity determination for such a purpose has never been made. As such, would the City be authorized to use the entire non-consumptive portion of the right as recharge to support mitigation or some lesser quantity? Attempting to address the issue in the context of the proceedings for a new groundwater right doesn't resolve the issue of how much water is authorized for recharge under the 01-181C water right.

In its briefing, the City recognizes there are limitations on the ability to claim recharge as the basis for a new or expanded water right. These limitations are set forth in Idaho Code § 42-234(5). The City argues that the recharge it alleges is not subject to the limitations of Idaho Code § 42-234(5). The Director did not reach this issue in his *Final Order*. He was careful not to prejudge any legal issues that may arise in the context of a potential transfer proceeding. R., p.273. The Court affirms the Director in this respect. Whether a transfer of water right 01-181C implicates Idaho Code § 42-234(5) is an issue appropriately raised in the context of a transfer proceeding. As a result, the Court does not address the issue here.

C. The Director's determination to reject the City's application is affirmed.

The Director has the authority to reject an application to appropriate water where the appropriation "will reduce the quantity of water under existing water rights." I.C. § 42-203A(5). He did so here, finding that the City's application "will reduce the amount of water available to satisfy water rights from sources connected to the Eastern Snake Plain Aquifer." R., p.273. The Director's finding is supported by the record. It is undisputed that the proposed appropriation constitutes a consumptive use of water, and as discussed above, the mitigation proposed by the City to offset that use is not legally viable at present. Since the Director did not abuse his discretion or act contrary to law in rejecting the City's application, his *Final Order* must be affirmed.

IV.

ORDER

Therefore, based on the foregoing, IT IS ORDERED that the Director's *Order Addressing Exceptions and Denying Application for Permit* entered on September 22, 2015 **is hereby affirmed.**

Dated Apr. 16, 2016

ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER was mailed on April 06, 2016, with sufficient first-class postage to the following:

IDWR AND GARY SPACKMAN IN HIS
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BURLEY IRRIGATION DISTRICT
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Julie Murphy
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Attorneys for the City of Blackfoot

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

THE CITY OF BLACKFOOT,

Petitioner/Appellant,

v.

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

Respondents.

IN THE MATTER OF APPLICATION FOR PERMIT NO. 27-12261

In the name of the City of Blackfoot.

Case No. CV-2015-1687

NOTICE OF APPEAL

Fee Category L.4. – $129.00

TO: THE ABOVE-NAMED RESPONDENTS, GARY SPACKMAN, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE IDAHO DEPARTMENT OF WATER RESOURCES, AND THE IDAHO DEPARTMENT OF WATER RESOURCES;

THE RESPONDENTS' ATTORNEY, GARRICK L. BAXTER, DEPUTY ATTORNEY GENERAL, P.O. BOX 83720, BOISE, IDAHO 73720, TELEPHONE (208) 287-4800, GARRICK.BAXTER@IDWR.IDAHO.GOV;

THE INTERVENORS, THE SURFACE WATER COALITION;

THE INTERVENORS' ATTORNEYS, BARKER ROSHOLT & SIMPSON LLP, 195 RIVER VISTA PLACE, SUITE 204, TWIN FALLS, IDAHO 83301-3029, TELEPHONE (208) 733-0700, PLA@IDAHOWATERS.COM, AND W. KENT FLETCHER, P.O. BOX 248, BURLEY, IDAHO 83318, TELEPHONE (208) 678-3250, WKF@PMT.ORG; AND

THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The City of Blackfoot, by and through its above-listed counsel of record, appeal against the above-named respondents, Gary Spackman, in his official capacity as the Director of the Idaho Department of Water Resources, and the Idaho Department of Water Resources, to the Idaho Supreme Court from the *Memorandum Decision and Order* and *Judgment*, both filed April 6, 2016, entered in the above-entitled action by the Honorable Eric J. Wildman, District Judge, presiding. A copy of the judgment or order being appealed is attached to this notice.

2. The Appellant has a right to appeal to the Idaho Supreme Court, and the judgment or orders described in paragraph 1, above, are appealable orders under and pursuant to Rule 11(a)(1) and 11(f), Idaho Appellate Rules.

3. A preliminary statement of the issues on appeal which the Appellant intends to assert in the appeal (which does not prevent the Appellant from asserting other issues) is as follows:

    a. Whether the Director erred in a manner described in Idaho Code § 67-5279(3) by failing to consider the *Settlement Agreement, IDWR Transfer*

of Water Right, Transfer No. 72385, June 2006, as an element of Water Right No. 01-181C.

b. Whether the Director erred in a manner described in Idaho Code § 67-5279(3) by not engaging in contractual interpretation of the *Settlement Agreement, IDWR Transfer of Water Right, Transfer No. 72385, June 2006.*

c. Whether the Director erred in a manner described in Idaho Code § 67-5279(3) by concluding that "[n]othing in Transfer No. 72[3]85 [sic] or the Partial Decree issued by the Snake River Basin Adjudication indicate Right 01-181C can be used for ground water recharge." *Final Order* at 2. Stated another way, whether the City gave away its ability to use 01-181C to mitigate for 27-12261 when it entered into the *Settlement Agreement, IDWR Transfer of Water Right, Transfer No. 72385, June 2006.*

d. Whether the Director erred in a manner described in Idaho Code § 67-5279(3) by concluding that the City must file a transfer if it wants to use 01-181C for mitigation purposes. *Final Order* at 2.

e. Whether the Director erred in a manner described in Idaho Code § 67-5279(3) by determining that "any recharge to the aquifer achieved by diversion and use under Right 01-181C, is merely incidental recharge [under Idaho Code § 42-234(5)] and cannot be 'used as a basis for claim of a separate or expanded water right.'"

4. There is no order sealing any portion of the record in this case.

5. The Appellant requests that the transcript of the administrative proceedings held before the Idaho Department of Water Resources be made part of the record on appeal. The Appellant

currently possesses a copy of the transcript, as it was previously prepared by the Idaho Department of Water Resources in conjunction with the District Court's judicial review of this action. A copy of the transcript may be obtained from the Idaho Department of Water Resources or the City of Blackfoot. In addition, the Appellant requests that a copy of the transcript from the hearing on the City of Blackfoot's *Petition for Judicial Review*, held before the District Court on March 10, 2016, also be included. No other transcripts are requested.

6. The Appellant requests that all pleadings and attachments filed in this case along with all other documents in the clerk's record automatically included under Rule 28 of the Idaho Appellate Rules be made part of the record. Specifically, the pleadings are as follows:

   a. Notice of Appeal and Petition for Judicial Review of Final Agency Record, filed October 16, 2015;

   b. Notice of Reassignment, filed October 26, 2015;

   c. Procedural Order Governing Judicial Review of Final Order of Director of Idaho Department of Water Resources, filed October 27, 2015;

   d. Surface Water Coalition's Notice of Appearance, filed November 4, 2015;

   e. Notice of Lodging Agency Record and Transcript with the Agency, filed November 10, 2015;

   f. Order Treating Appearance as Motion to Intervene and Granting Same, filed November 16, 2015;

   g. Order Settling Agency Record and Transcript, filed December 8, 2015;

   h. Notice of Lodging the Settled Agency Record and Transcript with the District Court, filed December 8, 2015;

i. Agency's Certificate of Record, filed December 8, 2015;

j. Petitioner's Opening Brief, filed January 12, 2016;

k. Unopposed Motion for Extension of Time to File Respondents' Brief, filed February 8, 2016;

l. Affidavit of Meghan Carter in Support of Unopposed Motion for Extension of Time to File Respondents' Brief, filed February 8, 2016;

m. Order Granting Motion for Extension of Time, filed February 8, 2016;

n. Respondent's Brief, filed February 11, 2016;

o. Surface Water Coalition's Response Brief, filed February 11, 2016;

p. Petitioner's Reply Brief, filed March 3, 2016;

q. Memorandum Decision and Order, filed April 6, 2016; and

r. Judgment, filed April 6, 2016.

7. The Appellant requests that all of the exhibits included in the agency record be copied and sent to the Supreme Court.

8. I certify:

a. That a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

i. Name and Address: Sabrina Vasquez, P.O. Box 2707, Twin Falls, Idaho 83303-2707.

b. That the Clerk of the District Court and the Idaho Department of Water Resources have been paid the estimated fee for preparation of the reporter's transcript.

c. That the estimated fee for preparation of the clerk's and agency's record has been paid.

d. That the appellate filing fee has been paid.

e. That service has been made upon all parties required to be served pursuant to Rule 20 of the Idaho Appellate Rules and upon the Attorney General pursuant to Section 67-1401(1), Idaho Code.

Dated this 13th day of May, 2016.

for Garrett Sandow
Attorney for the City of Blackfoot

Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
Attorneys for the Appellant

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the following described pleading or document on the attorneys and/or individuals listed below, by the method indicated, a true and correct copy thereof on this 13th day of May, 2016.

Document Served: NOTICE OF APPEAL

Attorneys and/or Individuals Served:

Director Gary Spackman c/o Deborah Gibson, Administrative Assistant IDAHO DEPARTMENT OF WATER RESOURCES P.O. Box 83720 Boise, Idaho 83720-0098 deborah.gibson@idwr.idaho.gov	(✓) Mail ( ) Hand Delivery ( ) Facsimile, (208) 287-6700 ( ) Courthouse Box
Garrick L. Baxter DEPUTY ATTORNEY GENERAL P.O. Box 83720 Boise, Idaho 83720-0098 garrick.baxter@idwr.idaho.gov	(✓) Mail ( ) Hand Delivery ( ) Facsimile, (208) 287-6700 ( ) Courthouse Box
Paul L. Arrington BARKER, ROSHOLT & SIMPSON, LLP 195 River Vista Place, Suite 204 Twin Falls, Idaho 83301-3027 pla@idahowaters.com	(✓) Mail ( ) Hand Delivery ( ) Facsimile, (208) 735-2444 ( ) Courthouse Box
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, Idaho 83318-0248 wkf@pmt.org	(✓) Mail ( ) Hand Delivery ( ) Facsimile, (208) 878-2548 ( ) Courthouse Box

Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
Attorneys for the Appellant

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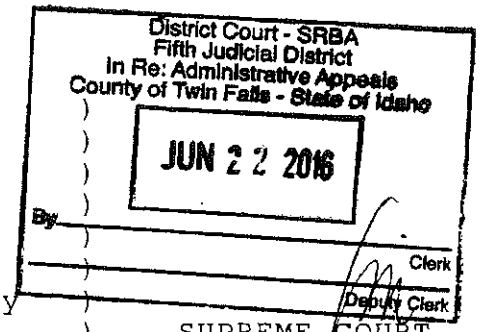
IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM



THE CITY OF BLACKFOOT, Petitioner/Appellant, vs. GARY SPACKMAN, in his capacity as Director of the Idaho Department of Water Resources, and THE IDAHO DEPARTMENT OF WATER RESOURCES, Respondents/Respondents, A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL CO., and TWIN FALLS CANAL CO., Intervenors/Respondents.	SUPREME COURT NO. 44207 Bingham County Case No. CV-2015-1687 NOTICE OF LODGING
IN THE MATTER OF APPLICATION FOR PERMIT NO. 27-12661 In the Name of the City of Blackfoot.	

TO: THE CLERK OF THE IDAHO SUPREME COURT

NOTICE IS HEREBY GIVEN that on June 22, 2016, I lodged a transcript of 72 pages in length for the above-referenced appeal with the District Court Clerk of the SRBA Court in the Fifth Judicial District via email.

The transcript includes: Oral Arguments on Petition for Judicial Review, 3/10/16.

A PDF copy of the transcript will be e-mailed to sctfilings@idcourts.net; jmurphy@idcourts.net; rharris@holdenlegal.com; and garrick.baxter@idwr.id.gov.

/s/Sabrina Vasquez
Sabrina Vasquez
Official Court Reporter

EXHIBIT 1

ON SEPARATE CD

Agency Record & Transcript (12/8/15)

as Lodged with the District Court

City of Blackfoot v. Gary Spackman, et al.

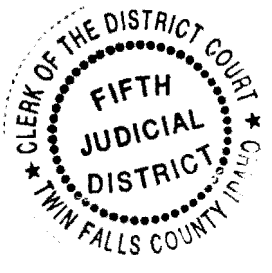
Case No. CV-2015-1687

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

THE CITY OF BLACKFOOT, Petitioner/Appellant, v. GARY SPACKMAN, in his capacity as Director of the Idaho Department of Water Resources, and THE IDAHO DEPARTMENT OF WATER RESOURCES, Respondents / Respondents, A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY and TWIN FALLS CANAL COMPANY, Intervenors / Respondents. IN THE MATTER OF APPLICATION FOR PERMIT NO. 27-12261 In the name of the City of Blackfoot.	**Supreme Court Docket No. 44207** **Case No. CV-2015-1687** **CLERK'S CERTIFICATE**

I, Julie Murphy, Deputy Clerk of the Court, Fifth Judicial District, State of Idaho, in and for the County of Twin Falls, hereby certify that the foregoing *Clerk's Record on Appeal* was compiled under my direction and is a true, correct and complete record of the pleadings and documents required by Idaho Appellate Rule 28, and documents requested in the *Notice of Appeal* filed by the City of Blackfoot.

Signed and sealed this 28th day of June, 2016.



JULIE MURPHY
Deputy Clerk of the Court

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

THE CITY OF BLACKFOOT, Petitioner/Appellant, v. GARY SPACKMAN, in his capacity as Director of the Idaho Department of Water Resources, and THE IDAHO DEPARTMENT OF WATER RESOURCES, Respondents / Respondents, A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY and TWIN FALLS CANAL COMPANY, Intervenors / Respondents. IN THE MATTER OF APPLICATION FOR PERMIT NO. 27-12261 In the name of the City of Blackfoot.	**Supreme Court Docket No. 44207** **Case No. CV-2015-1687** **CLERK'S CERTIFICATE OF SERVICE**

I, Julie Murphy, Deputy Clerk of the Court, Fifth Judicial District, State of

Idaho, in and for the County of Twin Falls, hereby certify that a true and correct copy of the ***Clerk's Record on Appeal*** was served this day on the following parties:

Robert L. Harris and **D. Andrew Rawlings**, Holden Kidwell Hahn & Crapo PLLC, 1000 Riverwalk Dr., Suite 200, PO Box 50130, Idaho Falls, Idaho, 83405, appearing for Petitioner-Appellant, City of Blackfoot.

Garrick L. Baxter, Deputy Attorney General, Idaho Department of Water Resources, PO Box 83720, Boise, Idaho, 83720-0098, appearing for Respondents / Respondents, IDWR and Gary Spackman.

Paul L. Arrington, Travis L. Thompson, and **John K. Simpson,** Barker Rosholt & Simpson LLP, 163 2nd Ave W, PO Box 63, Twin Falls, Idaho, 83301-0063, appearing for Intervenors / Respondents, A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company and Twin Falls Canal Company.

NOTICE OF SERVICE WAS ALSO SERVED ON:

Garrett H. Sandow, 220 N. Meridian, Blackfoot, Idaho, 83221, appearing for Petitioner-Appellant, City of Blackfoot

W. Kent Fletcher, Fletcher Law Office, 1200 Overland Ave., PO Box 248, Burley, Idaho, 83318-0248, appearing for Intervenors / Respondents, Minidoka Irrigation District and American Falls Reservoir District #2.

Signed and sealed this 28th day of June, 2016.

Julie Murphy

JULIE MURPHY
Deputy Clerk of the Court