10-6-2016

City of Blackfoot v. Spackman Appellant's Brief Dckt. 44207

IN THE SUPREME COURT OF THE STATE OF IDAHO

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,

and

A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILER IRRIGATION DISTRICT, AMERICAN FALLS IRRIGATION DISTRICT #2, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, 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. 44207-2016

Snake River Basin Adjudication
Case No. CV-2015-1687

APPELLANT'S BRIEF

Appeal from the District Court of the Seventh Judicial District
of the State of Idaho, in and for the County of Bingham;
Honorable Eric J. Wildman, District Judge, Presiding

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Appellant, the City of Blackfoot (the "City" or "Blackfoot"), through its attorneys of record, Garrett H. Sandow, Blackfoot's City Attorney, and Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby submits *Appellant's Brief.*

I. STATEMENT OF THE CASE.

A. Nature of the Case.

The City is seeking a water right to allow it to replace an expensive surface water pump system with an easier-to-maintain well system, and offers the annual seepage from the Jensen's Grove gravel pit into the Eastern Snake Plain Aquifer (the "ESPA") as mitigation. A prior proceeding concerning the Jensen's Grove water right was settled by agreement, which allows the City itself to utilize the seepage as mitigation. Without considering the settlement agreement, the Idaho Department of Water Resources ("IDWR" or the "Department") denied the application and the District Court affirmed.

B. Course of Proceedings.

The City submitted the Application for Permit No. 27-12261 ("12261") on September 12, 2013. Agency Record ("A.R."), pp. 1-27. The original application was signed by then-Mayor Mike Virtue. A.R., p. 3. On September 2, 2014, the Department assisted the City with preparation of an amended application for permit, which was signed by Mayor Paul Loomis.[1] A.R., pp. 28-58. On January 27, 2015, the City submitted a second amended application with the further assistance of Rocky Mountain Environmental Associates, Inc., complete with an

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

amended mitigation plan. A.R., pp. 92-105. The second amended application was also signed by Mayor Paul Loomis. A.R., p. 93.

After these amendments, 12261 sought a water right permit to develop 9.71 cfs of ground water for the irrigation of 524.2 acres with a portion of Water Right No. 01-181C ("181C"), a Snake River surface water right, being offered as mitigation for the depletive effects to the ESPA resulting from diversion of groundwater under 12261. A.R., pp. 200-01.

12261 was protested by the Surface Water Coalition (the "Coalition").[2] At the contested case 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 a gravel pit known as Jensen's Grove from the diversion of 181C into Jensen's Grove or the proposal to leave small portions of certain surface water rights in the Blackfoot River to mitigate for modeling impacts to downstream reaches of the Snake River. A.R., pp. 203-04, 207. More specifically, the Coalition's concern was not **factual** in nature, but only based on **legal** issues surrounding interpretation of a document entitled *Settlement Agreement, IDWR Transfer of Water Right, Transfer No. 72385*, dated June 2006 (the "*Settlement Agreement*"), which was entered into when 181C was amended and moved for use at Jensen's Grove through a transfer application submitted pursuant to Idaho Code § 42-222. A.R., Hrg. Exh. List, Exhibit 4, pp. 18-23.

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[2] The Surface Water Coalition is comprised of: A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company (represented by Barker Rosholt & Simpson LLP); together with American Falls Reservoir District #2 and Minidoka Irrigation District (represented by Fletcher Law Office).

In fact, the Coalition presented no witnesses at the hearing. Transcript of Administrative Proceedings ("Admin. 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 181C. The only assertion of injury was that use of 181C for mitigation would injure the Coalition because it would be used differently than the Coalition believed the *Settlement Agreement* allowed it to. A.R., pp. 155-56. The Coalition asserts that 181C was not authorized to be used for mitigation purposes. A.R., pp. 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?" A.R., p. 200. Therefore, the only item under Idaho Code § 42-203A(5) at issue was subpart (a), which is whether 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 181C for mitigation purposes.

On June 30, 2015, the hearing officer issued a *Preliminary Order Issuing Permit* (the "*Preliminary Order*"), which issued 12261 with the condition that the City file a transfer application under Idaho Code § 42-222 to allow it to use the recharge provided by 181C as mitigation for 12261. A.R., pp. 200-16. On July 14, 2015, the City filed exceptions to the *Preliminary Order* pursuant to Idaho Code § 67-5245(3) and IDAPA 37.01.01.430.02.b. and asked the Director of the Idaho Department of Water Resources, Gary Spackman (the

"Director") to correct perceived errors made by the hearing officer in reaching his conclusion. A.R., pp. 220-44. The Coalition responded on July 30, 2015. A.R., pp. 249-69.

On September 22, 2015, the Director issued an *Order Addressing Exceptions and Denying Application for Permit* (the "*Final Order*") within which the Director refused to consider the *Settlement Agreement*, found that 181C could not be used for ground water recharge without an approved transfer application, and denied the City's application for 12261. A.R., pp. 271-74.

The City filed a petition for judicial review with the District Court, pursuant to Idaho Code §§ 42-1701A(4), 67-5270, and 67-5279, on October 16, 2015. A.R., pp. 278-85. On April 6, 2016, the District Court affirmed the *Final Order*, in its *Memorandum Decision and Order* (the "*Memorandum Decision*"), which led to the *Judgment*, also filed April 6, 2016.

C. Statement of Facts.

With a population of nearly 12,000, the City of Blackfoot is one of eastern Idaho's major cities. *See, e.g.,* http://quickfacts.census.gov/qfd/states/16/1607840.html; **Error! Hyperlink reference not valid.**. 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. Admin. Tr., p. 35, l. 22–p. 36, l. 10. 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. Admin. Tr., p. 36, ll. 19-23.

The City therefore effectively replaced Snake River riverfront property with a gravel pit, which has since been used to mine gravel for road construction. Admin. Tr., p. 29, l. 16–p. 30, l. 17. 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. A.R., pp. 203-04.

Decades after the City allowed the federal government to relocate the Snake River channel, the City was awarded a federal grant of approximately $250,000, through the help of Congressman Mike Simpson, to secure a water right to fill and maintain water levels in Jensen's Grove during the summer months. Admin. Tr., p. 36, l. 24–p. 37, l. 11. The City used these funds to purchase 181C from the New Sweden Irrigation District. Admin. Tr., p. 37, ll. 12-15; *see also* A.R., Hrg. Exh. List, Exhibit 2, p. 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 creating a recreational area and facility for local residents. In order to use 181C, which was originally solely an irrigation right, Admin. Tr., p. 37, ll. 16-19, for all the purposes intended by the City—including recreation—the City filed a transfer application on October 27, 2005 to amend 181C which was numbered as Transfer No. 72385 ("72385"). A.R., Hrg. Exh. List, Exhibit 6, pp. 28-43. The transfer requested (1) a change in the place of use to relocate it to Jensen's Grove and (2) changes to the nature of use of 181C to diversion to storage, storage, diversion to recharge, as well as retaining a small portion for irrigation purposes. A.R., Hrg. Exh. List, Exhibit 6, p. 28.

The Coalition protested 72385. *See* A.R., Hrg. Exh. List, Exhibit 3, p. 15. Eventually, the parties agreed to resolve the Coalition's protest pursuant to the terms and conditions of the *Settlement Agreement*. A.R., Hrg. Exh. List, Exhibit 4, pp. 18-23; *id.*, Exhibit 104, pp. 74-87; *see also id.*, Exhibit 8, pp. 46-47. The draft approval of 72385 included ground water recharge and ground water recharge storage as expressly listed beneficial uses of 181C. A.R., Hrg. Exh. List, Exhibit 103, p. 72. However, the Coalition took issue, as expressed in a letter from one of the Coalition's attorneys, which asserted that "[c]ontrary to the [*Settlement*] *Agreement*, the draft approval includes 'ground water recharge' and 'ground water recharge storage' as new purposes of use for [181C]. These proposed uses should be removed." A.R., Hrg. Exh. List, Exhibit 8, p. 46 (italics added). There is nothing in the record indicating the City's objection to this assertion, but for the reasons explained below, the City felt that any such objection was unnecessary. 72385 was approved on February 14, 2007. A.R., Hrg. Exh. List, Exhibit 105, pp. 88-90. 181C now allows the City to divert (1) 46 cfs as diversion to storage; (2) 1 cfs and 200 AF for irrigation; (3) 200 AF for irrigation storage; (4) 200 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. A.R., Hrg. Exh. List, Exhibit 105, p. 90. As stated by condition no. 5 of the transfer approval for 181C:

> 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.**

A.R., Hrg. Exh. List, Exhibit 105, p. 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 aquifer as ground water recharge for an overall total annual loss of 2,080.8 AF. *See* A.R., Hrg. Exh. List, Exhibit 105, p. 90. The Coalition has not challenged these facts or the effects described in the City's modeling. It is this annual seepage loss—ground water recharge—of 2,080.8 AF that the City seeks to use as mitigation for 12261. *See* A.R., Hrg. Exh. List, Exhibit 1, p. 2.

Additionally, condition no. 9 of the transfer approval for 181C 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.

A.R., Hrg. Exh. List, Exhibit 105, p. 90 ("Condition No. 9") (emphasis added). Condition No. 5 and Condition No. 9 were incorporated into the SRBA partial decree for 181C as part of the quantity element and as an "other provision necessary for definition or administration of this water right," respectively. A.R., Hrg. Exh. List, Exhibit 106, pp. 91-94 (the "*Partial Decree*"). Thus, both the Department's approval of 72385 and the SRBA partial decree for 181C incorporate the *Settlement Agreement*. *See* A.R., Hrg. Exh. List, Exhibit 105, p. 90; *compare id.*,

Exhibit 106, p. 93. For that reason, the interpretation of the elements and conditions of 181C, including the provisions of the *Settlement Agreement*—particularly paragraph 1—was at issue in the contested case of 12661. *See* A.R., pp. 137, 155-156.

The City applied for 12661 in order to replace an expensive and dated surface water pump station on the Blackfoot River that the City currently operates. The City delivers several surface water rights through the pump station. Admin. Tr., p. 9, l. 22–p. 10, l. 1. The water right entitlements diverted at the pump station include water rights[3] that were previously delivered through a facility known as the "Miner's Ditch," as well as water allocated to shares owned by certain shareholders of the Corbett Slough Irrigation Company and shareholders of the Blackfoot Irrigation Company. A.R., Hrg. Exh. List, Exhibit 1, p. 1; A.R., p. 201.

Prior to the 1960s, Miner's Ditch ran through the City and crossed I-15. Admin. 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 local school district decided to eliminate Miner's Ditch and replace it with a pump station on the Blackfoot River to provide water to the water users who took delivery of their water through Miner's Ditch. Admin. Tr., p. 9, l. 18–p. 10, l. 1. The pump station arrangement was accepted by the City, not by agreement, but by actions of the Blackfoot City Council. Admin. Tr., p. 10, ll. 2-9. Since its construction, the City has maintained the pump station almost entirely on its own. Admin. Tr., p. 10, ll. 10-14. The City only receives a small yearly stipend from the irrigators who benefit from

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

the pump station, but receives no contribution from the local school district, the State of Idaho, or others for maintenance and operation of the pump station. Admin. Tr., p. 10, ll. 10-14.

The pump station has proven to be a major burden for the City, both operationally and financially, particularly with no help from the local school district or the State of Idaho. The pump station requires significant maintenance because of the high sediment load in Blackfoot River water. Admin. 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. Admin. 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. Admin. Tr., p. 35, ll. 1-10. Currently, the concrete culvert and other attendant equipment associated with the pump station have aged and may need to be replaced soon. Admin. 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. Admin. Tr., p. 11, l. 10–p. 13, l. 13. 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. Admin. 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, and that settling ponds would be very expensive as well. Admin. Tr., p. 12, ll. 5-14. The most cost effective option was drilling a new well, at an estimated cost of $80,000. Admin. Tr., p. 12, ll. 10-11.

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 essentially changing a water right's source. Admin. Tr., p. 11, ll. 13-24; *see also Administrator's*

Memorandum, Transfer Processing No. 24, p. 26 (December 21, 2009) ("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 on 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. Admin. Tr., p. 12, l. 25–p. 13, l. 6. With so little margin of error, the City elected to look at other options instead. Admin. Tr., p. 13, ll. 7-13.

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. Admin. Tr., p. 13, ll. 7-24. The operational costs of the new well are anticipated to be between $12,000 and $14,000 per year, compared to $40,000 to $50,000 per year to maintain the Blackfoot River pump station. Admin. Tr., p. 15, ll. 1-12. The result would be an estimated savings of between $26,000 and $38,000 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. Admin. Tr., p. 15, ll. 13-21. Accordingly, the City filed 12261 to authorize development of a water right to provide water to the Miner's Ditch users. *See* A.R., pp. 1, 28, and 92.

12261was protested by the Coalition. A.R., pp. 66-67. The only matter at issue at the hearing on this matter was the legal question of whether, under Idaho Code 42-203A(5)(a), 12261 "will reduce the quantity of water under existing water rights" based on the *Settlement Agreement* and the use of 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, 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 pursue a transfer application 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.'"

III. ARGUMENT.

While this Court "will review an agency's decision independent of the district court's determination," *McCoy v. State, Dep't of Health & Welfare*, 127 Idaho 792, 793, 907 P.2d 110, 111 (1995) (citations omitted); *see also* Idaho Appellate Practice Section, IDAHO APPELLATE HANDBOOK V-46 (4th ed. 2015), "[t]his Court will not consider issues that were not raised before the district court even if those issues had been raised in the administrative proceeding." *Clear Springs Foods v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 78 (2011). As this Court has explained:

> In an appeal from a district court where the court was acting in its appellate capacity under the Idaho Administrative Procedure Act ("IDAPA"), "we review the decision of the district court to determine whether it correctly decided the issues presented to it." *Clear Springs Foods v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 78 (2011). However, we review the agency record independently of the district court's decision. *Spencer v. Kootenai Cnty.*, 145 Idaho 448, 452, 180 P.3d 487, 491 (2008). A reviewing court "defers to the agency's findings of fact unless they are clearly erroneous," and "the agency's factual determinations are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record." *A & B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 505–06, 284 P.3d 225, 230–31 (2012). "This Court freely reviews questions of law." *Vickers v. Lowe*, 150 Idaho 439, 442, 247 P.3d 666, 669 (2011).
>
> The district court must affirm the agency action 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); *Clear Springs Foods*, 150 Idaho at 796, 252 P.3d at 77. Even if one of these conditions is met, an "agency action shall be affirmed unless substantial rights of the appellant have been prejudiced." I.C. § 67–5279(4).

Rangen, Inc. v. Idaho Dep't of Water Res., 160 Idaho 251, _____, 371 P.3d 305, 309 (2016); *see also Idaho Ground Water Assoc. v. Idaho Dep't of Water Res.*, 160 Idaho 119, _____, 369 P.3d 897, 903–04 (2016), *reh'g denied* (May 9, 2016); *North Snake Ground Water Dist. v. Idaho Dep't of Water Res.*, 160 Idaho 518, 376 P.3d 722 (2016).

In this case, the Coalition did not present any testimony or other factual challenge to the City's mitigation plan to use a component of 181C to mitigate for 12261. Thus, the only issues on appeal are questions of law, over which "[t]his Court has free review." *A&B Irr. Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 516, 284 P.3d 225, 241 (2012).

A. The *Settlement Agreement* is incorporated into 181C, and should therefore have been considered in construing 181C.

The *Settlement Agreement* is explicitly incorporated into 72385, the transfer that amended 181C. A.R., Hrg. Exh. List, Exhibit 105, p. 90 (Condition 9). And, in accordance with the Department's recommendation in the SRBA, the *Settlement Agreement* is explicitly incorporated into the *Partial Decree* for 181C, with identical language. A.R., Hrg. Exh. List, Exhibit 106, p. 93 (under "Other Provisions Necessary for Definition or Administration of this Water Right" (capitalization modified)). Because these documents, which define 181C, incorporate the *Settlement Agreement*, any consideration or determination of the complete nature of 181C must include the *Settlement Agreement* as a component of 181C.

The Director refused to "consider[] or discuss[]" the *Settlement Agreement*. A.R., p. 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*." A.R., p. 272 (italics added). The District Court affirmed, again without considering the *Settlement Agreement*, because the *Partial Decree* is unambiguous as to its "purpose of use element" and therefore its "meaning and legal effect are questions of law to be determined from the plain meaning of its own words." A.R., pp. 210-211. However, the Director and the District Court erred by considering the *Settlement Agreement* to somehow be extrinsic to the *Partial Decree*—and thus efficacious only if the *Partial Decree* is ambiguous. As an incorporated part of the *Partial Decree*, the *Settlement Agreement* is **part** of the *Partial Decree*. The error committed by the Director and the District Court lies in their consideration of only a portion of the *Partial Decree*, while ignoring the portion contained in the *Settlement Agreement*. This is because conditions contained in a water right are recognized as part of the water right. For a water right permit, 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 therefore must incorporate any permit conditions and is part and parcel to all elements of the water right. 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) (emphasis added). Simply stated, conditions in a water right license are elements of the water right and are no less important than the diversion rate or any other water right element. It is impossible to correctly interpret a contract, decree, or other legal document without having (and considering) all of the pages of the document—yet that is precisely the faulty analysis engaged in by both the Director and the District Court.

The *Settlement Agreement* is incorporated into 181C. The Department's approval of 72385 specifically states that it is "subject to additional conditions and limitations contained in [the *Settlement Agreement*]." A.R., p. 90. The corresponding *Partial Decree* relating to 72385 contains the exact same language, explicitly incorporating the *Settlement Agreement* by reference. A.R., p. 93. In terms of analyzing whether the *Settlement Agreement* should be considered incorporated into the *Partial Decree*, the principle is perhaps best illustrated in divorce jurisprudence. In divorce cases, the parties will frequently arrive at a property settlement agreement, which may or may not 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 on that issue. *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 such a 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, neither the Director nor the District Court conducted any analysis relating to the incorporation of the *Settlement Agreement* into the *Partial Decree*. The Director considered the elements of 181C in the approval of 72385 and the *Partial Decree* (A.R., Hrg. Exh. List, Exhibits 105 and 106, respectively) without considering the *Settlement Agreement* at all. A.R., p. 272. In the same vein, the District Court found the *Partial Decree* to be unambiguous, and therefore refused to consider the *Settlement Agreement*. A.R., pp. 210-211. The practical rationale underlying these decisions, expressed by the Department, is that a watermaster should be entitled to rely on the "face of the decree" to know how to administer and enforce the water right. However, this flies in the face of the statute, which unambiguously and plainly allows a water right to **either "contain or incorporate** a statement of each element of a water right." Idaho Code § 42-1412(6) (emphasis added).

While it may be the best practice to include all of the detail pertaining to each water right element on a one or two page document, that is not required by Idaho Code § 42-1412(6). An example of a complicated partial decree with numerous provisions is the *Partial Decree for Federal Reserved Water Rights 75-13316 and 77-11941*, decreed by the SRBA Court on November 16, 2004. While the Department may want every water right to be like this, it cannot disregard elements that are not in exactly such a form. It is unreasonable and overly formalistic to be limited to looking only to the certain space to the right of each element's heading on a partial decree for the complete description of that element, especially as water rights become more complicated with creative settlement provisions or creative conditions imposed by a hearing officer after a contested case meant to address injury concerns specifically raised in the unique facts of the contested case. Further, it is beyond the Department's statutory authority to impose a restriction that a water right must contain all of its elements either on the face of the document or in a particular place on a form document because the Idaho Code allows a water right to either "contain or incorporate" those elements. Idaho Code § 42-1412(6). For the same reason, the Director and the District Court erred when they exalted form over substance, and ignored an incorporated document that stated elements of 181C—the *Settlement Agreement*.

By conducting the germane analysis, this Court must conclude that the *Settlement Agreement* was incorporated into the approval of 72385 and the *Partial Decree* that affected 181C. 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*. Both the approval and the Partial Decree state that the diversion and use under 181C is "subject to additional conditions and limitations contained in [the *Settlement Agreement*]." A.R., Hrg. Exh. List, Exhibit 105, p. 90; *id.*, Exhibit 106, p. 93. The reference to the *Settlement Agreement* is not informational or informative; rather, it is integrative. With this language, the relevant provisions of the *Settlement Agreement* are elevated to being conditions and limitations—*i.e.*, elements—of 181C. There is no ambiguity in this language, and thus no need to consider any evidence extrinsic to those documents to determine whether the *Settlement Agreement* was incorporated into 181C. To consider 181C without the *Settlement Agreement*, as the Director and the District Court did, is to consider only **part** of the City's water right. Any interpretation of a legal document that refuses to review or consider part of that document is erroneous, particularly when the unconsidered portion bears on the issue requiring interpretation. The *Settlement Agreement* is not extrinsic, parol evidence that can only be considered after the *Partial Decree* is found to be ambiguous—rather, it is an incorporated part of the *Partial Decree* that must be interpreted along with the rest of that document.

The Director and the District Court did not give appropriate consideration to the *Settlement Agreement* and, instead, focused on the remainder of 181C to excuse any analysis of the provisions of the *Settlement Agreement*. In effect, the Director and District Court used one portion of 181C to disregard another portion of 181C, despite the statutory edict that all such conditions are "binding upon the state." Idaho Code § 42-220. Ignoring and disregarding those conditions of 181C contained in the *Settlement Agreement* was not a lawful exercise of the Director's discretion or the District Court's discretion.

The only way to understand 181C is to consider and construe (by contractual interpretation) the *Settlement Agreement*. The Director's error is in violation of applicable statutory provisions (Idaho Code §§ 42-203A(5), 42-219, 42-1409, 42-1411, 42-1412(6)) because the Director may not arbitrarily ignore any 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 181C.

B. The *Settlement Agreement*, as part of 181C, demonstrates that 12261 can be approved with reference to the recharge actually provided by 181C.

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

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

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.

A.R., Hrg. Exh. List, Exhibit 4, pp. 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.*; *see also Kepler–Fleenor v. Fremont Cnty.*, 152 Idaho 207, 211, 268 P.3d 1159, 1163 (2012). This is

especially true where, as here,[4] 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, neither the Director nor the District Court considered or interpreted the *Settlement Agreement*. The Director found that 181C as currently described could not be used for mitigation, "using principles of Idaho water law without referring to the *Settlement Agreement*." A.R., p. 272 (italics added). Surprisingly, that position was not based on arguments advocated by the Coalition. The District Court affirmed, finding "no ambiguity in the purpose of use element of [181C]" that would require consideration of the *Settlement Agreement*. A.R., p. 212. However, both the Director and the District Court should have engaged in the contractual interpretation process.

Paragraph 1.a. and 1.b. both refer to a "transfer" or to "change the nature of use or place of use" of 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 in the nature

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[4] The *Settlement Agreement* is an integrated agreement. *See* A.R., Hrg. Exh. List, Exhibit 4, p. 21, ¶ 7.

of use" 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 Agreement, and it perhaps goes without saying that the Coalition is very familiar with Idaho water law. Use of these specific terms of art borrows that specific meaning. Because 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 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 181C already approved through the prior transfer that changed its nature of use. Through that transfer, 181C expressly recognized the seepage that would occur in Jensen's Grove and incorporated the provisions of the *Settlement Agreement* wherein the City retained the right to claim the benefits of the recharge.

In what appears to be a clear attempt to prevent **others** from benefitting from Jensen's Grove recharge under 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**.

A.R., p. 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 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." A.R., p. 20. Additionally, while this sentence mentions "incidental groundwater recharge," it does not define all the mitigation provided by 181C as incidental, but merely includes the incidental language as a catch-all. A.R., p. 20; *see also* Section III.B.2., *infra* (regarding incidental recharge).

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. Again, this sentence recognizes the recharge benefits the City generates, and it does not say that the City itself cannot claim any credit from the ground water recharge occurring through the annual seepage. While the first sentence prevents the City from transferring 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 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**.

A.R., p. 20 (underlining and bold emphasis added, capitalization in original). This sentence does not prohibit the City from using ground water recharge under 181C for mitigation. In fact, it specifically states that the City can use the mitigation benefits as long as it submits the appropriate **application for permit** and/or transfer. The use of "and/or" unambiguously allows the City to file (a) an appropriate application for permit, (b) an appropriate transfer, or (c) both—in order to claim credit for the mitigation occurring under 181C. Under the plain language of Paragraph 1.e, the City is permitted to use 181C "for groundwater recharge or mitigation purposes associated with future groundwater rights," A.R., p. 20, and 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 (and/or transfer) to realize the benefits of the seepage under 181C. Accordingly, the City has submitted 12261, a permit application. There is nothing ambiguous about these provisions. If the *Settlement Agreement* was intended to bar the City from using 181C for any mitigation or recharge purposes, it should have simply said so. The *Settlement Agreement* does not say this. In fact, the *Settlement Agreement* is preoccupied with preventing the City from conveying the mitigation benefits of 181C (either directly or indirectly) to any third party. In other words, the *Settlement Agreement* specifically recognizes the mitigation, in the form of ground water recharge, resulting from 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 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 181C. Or it could say that there is no recharge benefit from 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.

The Director erred by relying on parol evidence (correspondence between the parties' attorneys) to find an ambiguity sufficient to consider parol evidence in construing 181C. A.R., p. 272 (citing exhibits 8 and 103 from the administrative hearing, presently A.R., Hrg. Exh. List, Exhibit 8, p. 46 and *id.*, Exhibit 103, p. 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 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).

The only evidence 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. Admin. 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 181C in the settlement negotiations. Admin. 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 181C. Admin. 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 extraneous evidence supporting the Coalition's interpretation of the *Settlement Agreement*. As stated above, the Coalition did not elicit any testimony from its clients or anyone on its clients' behalf on this issue. Even if this Court reviews and considers the correspondence of the Coalition's attorney regarding approval of 72385, A.R., Hrg. Exh. List, Exhibits 8 and 9, pp. 46-48, nothing there states that the City cannot claim the annual seepage from 181C for mitigation under a permit application. The correspondence provides a conclusory legal argument based on the language of the *Settlement Agreement*, rather than a factual argument that illuminates any parties' intent; therefore the correspondence has only minor probative value of the parties' intent in drafting the *Settlement Agreement*. *See* A.R., Hrg. Exh. List, Exhibits 8 and 9, pp. 46-48. In fact, the correspondence only addresses a request to not expressly include ground water recharge as a beneficial use at the time of the transfer approval. 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 12261) or a transfer application. In other words, the City could not claim recharge credit for recharging under 181C alone. The *Settlement Agreement* required the City to pair it with a separate water right permit or to amend 181C through a transfer. Accordingly, it was correct to not list groundwater recharge as an express beneficial use under 181C when

72385 was approved because there was an agreed-to second step that the City had to take before realizing the recharge benefits.

In contrast to the Director's analysis, the District Court found that the *Partial Decree* "unambiguously provide[d] that water may be diverted" under 181C for five, and only five, purposes. A.R., p. 211. The District Court focused on those five purposes of use listed under the "purpose of use" heading on the face of the *Partial Decree*, where that court found "no ambiguity," and concluded that the City's argument—considering the incorporated *Settlement Agreement* along with the other elements of 181C—was "not an additional condition and limitation," but rather is "an impermissible expansion of the purpose of use element of [181C]." A.R., p. 212. In other words, the District Court focused on the lack of ambiguity under the "purpose of use" heading, and disregarded any application, interpretation, or construction of the *Settlement Agreement*. A.R., p. 212. The error in the District Court's analysis occurs in only allowing an element of a water right to be defined in a certain place within its decree and nowhere else in that decree. Such an approach exalts form over substance, and finds no legal support in Idaho or elsewhere.

The Director and District Court both erred in failing to consider that the *Settlement Agreement*, as part of 181C, expressly forbids the City from conveying any mitigation credit associated with 181C to any third party without the Coalition's approval and, while tacitly acknowledging that 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 181C to mitigate for 12261.

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

The *Settlement Agreement*, which is incorporated into 181C, already acknowledges the recharge occurring under 181C and the parties' limitation of the circumstances upon which the City could use that recharge. The Director and the District Court both 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, and for good reason. As explained above, until 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 and the District Court read the elements of 181C much too narrowly. The *Settlement Agreement* condition is just as much part of the water right as any other element of the water right.

Unfortunately, after incorrectly ignoring the *Settlement Agreement*, the *Final Order* proceeds down an analytical track that it should not have gone, and we see no need to respond to the nuances 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 does require one). 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.

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

No additional conditions on 181C are needed because the *Settlement Agreement* already recognizes the mitigation, or ground water 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 181C—which was already approved, expressly recognized the seepage occurring in Jensen's Grove, 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 District Court affirmed and correspondingly required that the City file a transfer to add recharge as an express beneficial use of 181C. A.R., pp. 213-14. Again, the court dwells on the fact that "[t]he uses of water authorized under the [*Partial*] *Decree* are ascertainable from a simple reading of the purpose of use element. They did not include recharge." A.R., p. 214. It was significant to the court below that the City did not appeal the *Partial Decree*'s omission of recharge as an element of the face of the decree. *See* A.R., p. 214. This lack of an appeal arises from an internally consistent application of the Court's implicit presumption: the form of the water right (*i.e.*, the location of each element can only be on the face of the decree and only under the heading describing that element). The City challenges that unsupported presumption. And it is because the City believes that any element of a water right may be stated anywhere in the decree (even in an incorporated document, as contemplated by Idaho Code § 42-1412(6)) that

the City considered that 181C already recognized and quantified the mitigation provided by the seepage in Jensen's Grove; thus, there was nothing to appeal in the *Partial Decree*.

The City arrives at this conclusion based on the statutory definition of a water right. 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), this 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, 854 (2012) (internal citation omitted); *see also Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 367 P.3d 193 (2016). Accordingly, the conditions incorporated into the partial decree of 181C—including reference to the "terms and conditions" of the *Settlement Agreement*—are elements of 181C.

No single element is more important than any other element. Likewise, there is no requirement—in statute, administrative rule, or case law—that elements, or terms, can only be effective under the heading under which they are listed. "Idaho courts interpret water decrees using the same interpretation rules that apply to contracts." *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho at _____, 367 P.3d at 202 (citation omitted). "When interpreting a [water right decree], this Court begins with the document's language." *Potlatch Educ. Ass'n v. Potlatch Sch. Dist. No. 285*, 148 Idaho 630, 633, 226 P.3d 1277, 1280 (2010). "The purpose of interpreting a [water right decree] is to determine the intent of the [decreeing court] at the time the [water right decree] was entered. In determining the intent of the [decreeing court], this Court must view the [water right decree] as a whole." *Pocatello Hosp., LLC v. Quail Ridge Med. Inv'r, LLC*, 156 Idaho 709, 720, 330 P.3d 1067, 1078 (2014). Thus, rather than exalting form over substance by narrowing the interpretation of a water right decree to just considering only the elements under each heading as affecting that listed element, the better legal analysis is to consider a decree as a whole. This makes the entirety of the decree efficacious, as required by contractual analysis, and the practical consideration that a water right decree may take more than one form. While it is clear that an adjudication court may adopt a specific template for drafting partial decrees for general consistency, use of such a template does not automatically mean other drafted forms of a partial decree are defective.

The result here is that there is no need for the City to file a second transfer for 181C and then renew another permit application proceeding like 12261 (as required by the *Final Order* and affirmed by the District Court) 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 undisputedly seeps into the ESPA from Jensen's Grove each and every year.

Instead, consistent with 72385 and the *Settlement Agreement*, approval of 181C's seepage as mitigation for 12261 should be addressed through the conditions of approval for 12261. Providing conditions for approval is something that the Department does routinely and the mitigation provided by 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 181C before it could be used for mitigation purposes. The City believed that any question of injury caused by using 181C for mitigation purposes was to be—and actually was—addressed in this contested case. A transfer would be an unnecessary, duplicative proceeding; again, an exaltation of form over substance. As a result, this Court should determine that seepage from 181C can be designated in the approval order for 12261 as mitigation without the need for the City to file a transfer for this water right.

Finally, if a transfer for 181C was required, the Department should have informed the City before proceeding to a hearing on 12261. The transfer could have been filed and consolidated with the 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 181C's annual seepage was already approved through 72385 that changed 181C's nature of use and expressly recognized the seepage that occurs annually and incorporated the provisions of the *Settlement Agreement*, wherein the City retained the right to claim the benefits of the mitigation itself. It is only if the City wanted to file a transfer to add beneficial uses which would allow the City to recharge under the express terms of the water right and possibly assign those benefits to others that the *Settlement Agreement* addressed and limited. Accordingly, a transfer application is not the only way for the City to utilize 181C and the Coalition's consent is not necessary to utilize the ground water seepage occurring under 181C for mitigation purposes.[5]

C. Regardless of the elements of 181C, the uncontroverted, actual circumstances of 181C demonstrate that it provides mitigation for 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 181C, is merely incidental recharge and cannot be 'used as the basis for claim of a separate or expanded water right.'" A.R., p. 272 (quoting Idaho Code

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[5] We note that if the City were to 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.

§ 42-234(5)). While the City agrees that, pursuant to Idaho Code § 42-234(5), incidental recharge cannot be used as the basis for an additional water right, the proposition that because ground water recharge is not an expressly-listed beneficial use on one water right, any recharge is *ipso facto* incidental is unsupported and unsupportable.

This Court has recently made clear that "[t]here is nothing improper about mitigation as a beneficial use." *North Snake Ground Water Dist.*, 160 Idaho at _____, 376 P.3d at 731. However, it is equally apparent that mitigation does not have to be listed as a beneficial use for a water right to be used as mitigation. This flexibility exists, at least in part, because 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. IDAPA 37.03.08.045.01.a.iv. There is no factual dispute that 2,080.8 AF of water seeps from Jensen's Grove into the ESPA each year. *See* Clerk's R., p. 136 (page 1 of the Coalition's response brief below, 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 as 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* A.R., p. 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." Clerk's R., p. 136. This is important, because the City has not filed any transfer application to use these Blackfoot River water rights as mitigation for 12261, nor was the City requested to do so by the Coalition.

Incidental recharge is a term of art referring to recharge not expressly listed as an element of a water right but occurs as an incident to the exercise of the water right. The primary example of incidental recharge is canal seepage associated with the diversion of surface water under an irrigation water right. The recharge occurring through the diversion of water under 181C is the "incidental recharge" described under Idaho Code § 42-234(5). The *Settlement Agreement* is an express condition of 181C. 181C was previously an irrigation water right, and when its nature of use was changed, 72385 described how it could be used and 72385 specifically includes as a condition of the exercise of 181C that it is subject to the conditions of the *Settlement Agreement*. Both the *Settlement Agreement* and the reference to seepage losses on the face of 181C expressly acknowledge the ground water recharge that occurs under 181C. That which is express is not implied or incidental. The annual seepage accounted for in 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 181C and the *Settlement Agreement* (*see* Section III.B., *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 12261.

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 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*—as affirmed by the District Court—erroneously failed to consider the *Settlement Agreement*, which is an incorporated part of 181C and the application of Idaho water law to this case in the absence of the entirety of 181C was incorrect. Additionally, the law was applied by the Director incorrectly, since he wholly failed to consider mitigatory conditions for 12261 since his analysis hung solely on the fact that ground water recharge is not listed as a beneficial use of 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 181C's diversion and use in Jensen's Grove. The plain language of the *Settlement Agreement* supports the City's position that it never gave away its rights to use the recharge occurring in Jensen's Grove from diversion of water under 181C. If it did, why didn't the *Settlement Agreement* just say that it could not ever claim those benefits?

For the reasons set forth above, there is no legal impediment to using 181C's annual seepage in a mitigation plan for 12261. Under the plain language of Paragraph 1.e of the *Settlement Agreement*, the City is permitted to use 181C "for groundwater recharge or mitigation

purposes associated with future groundwater rights," and 12261 is a future ground water right. 12261 provides substantial benefits to the City in the form of reduced costs of maintaining the Blackfoot River pump station. Furthermore, because 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 were arbitrary, capricious, and 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* Idaho Code § 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 12261 because there are no legal impediments to using ground water recharge under 181C to mitigate for 12261. Indeed, such mitigation for a water right permit like 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 181C to aid the growing City of Blackfoot.

Dated this 5th day of October, 2016.

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