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City of Blackfoot v. Spackman Respondent's Brief 1 Dckt. 44207

IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court Docket No. 44207-2016

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 JOINT RESPONSE BRIEF

On 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
(District Court Case No. CV-2015-1687)

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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. A.R. 271.[1] The District Court affirmed the *Final Order* in its April 6, 2016 *Memorandum Decision & Order*. Clerk's R. 206.

II. Course of Proceedings/Statement of Facts

This matter involves the City of Blackfoot's attempt to use the incidental seepage of water in Jensen's Grove pond to mitigate for new groundwater depletions under Application for Permit No. 27-12261. The Coalition[2] submits the following facts in support of this response brief.

A. Stipulations at the Hearing

Following the administrative hearing on this matter, few facts were in dispute. The parties stipulated to the elements of section 42-203A(5)(b)-(f). A.R. 207, ¶ 3. The parties also stipulated that the modeling[3] performed by the City's experts showed that groundwater recharge in Jensen's Grove could offset the impacts resulting from the new consumptive uses contemplated under this application. A.R. 203-04. That modeling showed a slight deficiency in the mitigation proposed, and the Coalition stipulated that leaving a small portion of additional water in the river would offset that mitigation deficiency. R. 204, ¶ 24

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[1] Citations to the Administration Record will be marked as either "A.R. ___" or "A.R. Ex. ___" or "Admin. Tr. ____." Citations to the Clerk's record on appeal will be marked as "Clerk's R. ___."

[2] 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.

[3] The Enhanced Snake Plain Aquifer Model ("ESPAM") is a calibrated regional ground water model anticipating impacts of groundwater pumping on the ESPA. It is the "best available scientific tool for predicting the effects of ground water pumping." *Rangen, Inc. v. IDWR*, 160 Idaho 119 (2016).

In light of these stipulations the only remaining issue, 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 incidentally 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 to the recreational storage beneficial use authorized under water right 01-181C. As confirmed by the City's representative testifying at hearing, that seepage supports and makes it possible for the City to use water right 01-181C for recreational purposes. *See generally* Admin. 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

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* Admin. Tr. at 9-11. From that point of injection the water was conveyed to certain private water users. A.R. Ex. 1; *see also Id.* at Att. #2 (providing list of water rights and identifying owners of those water rights). Sediment in the Blackfoot River has caused high operational and maintenance costs for the pump. *Id.* The City has determined that it will be more cost effective to divert groundwater instead.

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 in the Miner's Ditch. *See* A.R. Ex. 1, at

1.[4] Through the application, the City seeks to effectively change its point of diversion and water source from the river to a groundwater well. *See, generally* Admin. 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 requiring mitigation. Admin. Ex. 1. The dispute lies in the form of mitigation proposed by the City. 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,* A.R. Exs. 1 & 2.

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 right would have significant seepage losses. As a result the water right also includes the following 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.

[4] 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. Admin. Tr. 21-23.

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.*[5]

At hearing, Mayor Loomis testified that Jensen's Grove is very leaky. *See* Admin. 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 5 (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* A.R. 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 ("The water provided for Jensen Grove Lake under this transfer, should benefit the Snake Plain Aquifer and also benefits 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, it was a relic irrigation right located within the New Sweden Irrigation District boundaries. A.R. 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.*

[5] No evidence was presented that the water 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.

Originally, the City sought to transfer water right 01-181C for "Diversion to Recharge" and "Storage" – defined as including "Irrigation, Recreation, Fish & Wildlife, Aquifer Recharge & Aesthetics." *Id.* The Coalition protested the transfer application.[6]

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." A.R. Ex. 102 at 1 (emphasis added).

- "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.*

An agreement was reached to resolve the Coalition's protest and allow the transfer's approval. As relevant here, 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.

[6] The application further provided that the use would be "systematically non-consumptive" and that "recharge simply moves surface storage to groundwater storage." A.R. Ex. 100. In response to the Coalition's protest, the City again confirmed that the use proposed by the transfer (i.e. storage in Jensen's Grove) would be "non-consumptive." A.R. Ex. 101 at 2 ("The change proposed in this transfer is non-consumptive").

> 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.
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> ...
>
> 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.

A.R. Ex. 4.

The Settlement Agreement was submitted to the Department. A.R. Ex. 104. The Department then issued an initial draft of the proposed transfer, which included "Groundwater Recharge" and "Groundwater Recharge Storage" as purposes of use. A.R. 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 written consent and file the necessary applications with the Department in order to seek "recharge" as a purpose of use. A.R. Ex. 8. In that letter, the Coalition repeated its position on the issue of "recharge" with 01-181C:

> 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," A.R. Ex. 9, the Director's final transfer order removed any reference to "recharge," A.R. Ex. 105. The City did not appeal or seek any judicial review of the Department's final transfer order.

Finally, water right 01-181C was subsequently decreed in the Snake River Basin Adjudication ("SRBA") consistent with the transfer order – without any reference to "recharge" as an authorized beneficial use. A.R. Ex. 106. The partial decree represents a final judgment that, like the transfer order, was not appealed by the City.

ADDITIONAL ISSUES ON APPEAL

1. Whether the Court should enter an award of attorneys' fees to the Coalition pursuant to Idaho Code §§ 12-117 and/or 12-121?

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). A Court is charged with deferring to an agency's decision. *Mercy Medical Center v. Ada County,* 146 Idaho 220, 226 (2008).

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 and District Court have properly rejected the City's arguments. Each forum held that the City must file a transfer application to add "recharge" and/or "mitigation" as an authorized use of water right 01-181C. *See* A.R. 271 & Clerk's R. 206. Since the City refused to file such an application for transfer, its proposed mitigation failed and the new groundwater application was properly denied. The City complains that the Director and District Court erred because the Settlement Agreement effectively added "recharge" as an authorized use of water right 01-181C. The City's arguments are erroneous and without merit.

In order to prevail, the City must convince this Court that a private agreement, that does not include the Idaho 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"[7] even though that use is not identified on the face of the decree as an authorized purpose of use. *See generally City Br.* at 19-33. The City's arguments have been rejected in every forum and the City has provided no valid reason or new argument to suggest why it should prevail on appeal. Indeed, neither the law nor the facts support the City's arguments. Therefore, the Coalition respectfully requests that the Court affirm the Director's and District Court's decisions.

[7] 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 26. However, testimony at hearing confirmed the undisputed fact that water seeping in Jensen's Grove is incidental recharge. *See also* A.R. Ex. 8. Water must continually be diverted into Jensen's Grove in order to maintain the level sufficient for the desired recreational activities. *Supra.*

I. The Law Requires that a Transfer be Filed to Change the Use of a Water Right. The Private Settlement Agreement between the City and the Coalition Does not Expand the Authorized Uses of Water Right 01-181C.

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

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 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* A.R. Ex. 106 (identifying multiple authorized uses of water right 01-181C). For example, a water right with a use of "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 an additional use of "mitigation" or "groundwater recharge." Critically, these beneficial uses are not the same. *See* I.C. § 42-234 (identifying groundwater recharge as a beneficial use). A water right identifies the uses for which it may be used and the law prohibits unilateral changes to those uses.[8]

[8] 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 neither mitigation nor recharge are "listed elements of the water right"). When filing the transfer of water right 01-181C, the City specifically identified "recharge" as a separate and distinct use of the water right. A.R. Ex. 100. When the Department initially included "groundwater recharge" on the draft transfer approval order, A.R. Ex. 103, the Coalition challenged that decision explaining that any reference to "recharge" "should be removed" because the Settlement Agreement only recognized "incidental recharge." A.R. Ex. 8. In the final transfer order, all references to "recharge" use were removed from the water right. A.R. Ex. 105; *see also* A.R. Ex. 106 (SRBA Decree). The City never appealed the agency's final decision or the

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

> Any person ... 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."[9] 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.[10]

Both the transfer decision and SRBA decree include a section identifying the "Purpose and Period of Use" for water right 01-181C. A.R. Exs. 105 & 106. Recharge is not listed as an authorized use. Idaho law is clear. Any attempt to change this element requires an application for transfer.

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subsequent partial decree entered by the SRBA Court. *See* Admin. Tr. 44-45 (Former Mayor Reese testifying that the uses for the water right are recreation storage and irrigation).

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

[10] 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.

B. The Settlement Agreement's Terms and Conditions Have Not been Incorporated into Water Right 01-181C and Cannot Change the Authorized Uses of a Water Right.

Since "recharge" is not listed as an authorized use of water right 01-181C, the City is forced to point to a *private* settlement agreement to justify its arguments. It is left to contend that the Settlement Agreement obviates the law – arguing that a *private* agreement, between two *private* parties has the effect of altering the uses authorized under the water right by the Department and the SRBA Court. *City Br.* at 28-33.

The City's brief marches through much of Idaho's statutory provisions addressing the elements and conditions on the use of water rights. *City Br.* at 13-19. It asserts "any element of a water right may be stated anywhere in the decree." *Id.* at 29. Therefore, according to the City, since a condition has been placed on the water right that provides "the diversion and use of water under this transfer is subject to additional conditions and limitations contained in a Settlement Agreement," the Director and District Court must consider that agreement as though it were spelled out specifically on the face of the water right. *Id.* at 13-19. In ruling otherwise, the City contends, the Director and District Court "exalted form over substance." *Id.* at 17.

The City provides no legal authority for the premise that a private settlement agreement will become binding on the Department if a condition is placed on the water right referencing that agreement. Its reliance on the law of mergers in a divorce decree is inapposite and not persuasive. *Id.* at 15-16.

The condition on the water right 01-181C provides that the Settlement Agreement will be "enforceable by the parties thereto." A.R. Ex. 105. In other words, the Settlement Agreement is not enforceable by any other person or entity – only the Parties. Had the Department intended to be bound by the Settlement Agreement or enforce that agreement, it could have said so in the

condition. It did not. Rather, the Department recognized that the agreement is only binding on the parties and placed a limitation in the condition.

This is consistent with the divorce decree addressed in *Davidson v. Soelberg*, 154 Idaho 227 (Ct. App. 2013), upon which the City relies. 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. Based on that limiting language, the statutes for the enforcement of a child support provision in a divorce decree did not apply. *Id.*

In this case, limiting language was incorporated into the condition. Rather than fully merging the Settlement Agreement into the Water Right, the condition provided that the Settlement Agreement is only "enforceable by the parties thereto." A.R. Ex. 106. Contrary to the City's contention, the Settlement Agreement was not "incorporated" into water right 01-181C such that it would compel certain actions or determinations by the Department.

Allowing the mere reference of *private* settlement agreements to dictate the Department's obligations with regards to the administration of a water right would lead to absurd results. Indeed, it would allow any water user to simply agree to change the elements of his rights without involving the Department in any way.[11]

Policy arguments further support rejecting the City's argument. By referencing a private settlement agreement on the face of a water right, the Department and Parties have a convenient method of apprising all water users – even future water users – of the potential limitations on the use of a particular water right. As a successor may acquire the water right in the future, he or she

[11] The City even made this argument before the District Court, when it asserted that the City and the Coalition 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. A.R. 70. The City has abandoned that argument before this Court.

would have notice that a private settlement agreement may include additional limitations on the use of that water. The condition ensures that any future water user is properly informed about additional restrictions on the water right. Any ruling that the Department is somehow bound by a private settlement agreement merely because it is referenced on the water right will prevent the Department from making such references in the future and will increase the likelihood that future water users will be unaware of settlement agreement limitations.

Apart from this reason, 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 as between the parties thereto. A.R. Ex. 106. These facts, however, do not mean that the private Settlement Agreement alters the authorized uses of water right 01-181C or somehow require that the Director recognize "incidental recharge" as mitigation for a new groundwater right. This is particularly 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.* Former Mayor Reese 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." Admin. Tr. at 44-45. The Director properly rejected the City' attempt to shoehorn a changed use for water right 01-181C through an erroneous interpretation of the Settlement Agreement. A.R. 272 ("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.").[12]

[12] Confusingly, the City asserts that the Director made this decision without any "arguments advocated by the Coalition." *City Br.* at 21. This assertion is wrong. *See* A.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 de-

In affirming the Director's decision, the District Court identified at least three errors in the City's argument. First, a condition on a water right provides information to "define, clarify or administer" the water right. Clerk's R. 212. "It cannot enlarge the purpose of use elements of a water right by authorizing additional uses of water not identified therein." *Id.* "For instance, the other provisions element cannot authorize the use of a larger quantity of water." *Id.* The City's argument that the reference to the Settlement Agreement added an additional use of "recharge" to water right 01-181C "fundamentally changes how water under the right may be used." *Id.*

Second, the approved transfer, A.R. Ex. 105, and partial decree, A.R. Ex. 106, each identify five purposes of use – of which "recharge" is not included. Clerk's R. 212. "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." *Id.* at 213.

Finally, had "recharge" been an approved use under the right, then Idaho law mandates that a period of use be identified for that "recharge." *Id.*; *see* I.C. § 42-1411(2)(f) & (g) (a purpose of use must be identified as well as "the period of the year when water is used for such purposes"). However, water right 01-181C does not identify any period of use for "recharge." Clerk's R. 213.[13] The District Court's sound reasoning on these points should be accepted.

Without any supporting legal theory the City merely asserts that the District Court exalted "form over substance." *City Br.* at 27. The City does not respond to the District Court's findings

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creed elements of a water right). That notwithstanding, this contention 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").

[13] In fact, even the Settlement Agreement is silent as to the period of use for any "recharge" that may be contemplated therein. A.R. Ex. 4. This is further indication that, at the time the agreement was executed, the parties did not intend that "recharge" would be an automatically authorized use under the right, but would require further analysis through an "appropriate" application.

that water right 01-181C lacks an identified period of use. Rather, the City contends that elements may be mixed and matched throughout the face of the water right. *City Br.* 13-19. The District Court property rejected this argument. Clerk's R. 211-13. The City's "mix and match" argument – which would allow additional purposes of use to be included in a separate private agreement – would only create ambiguities and disputes over the use of water.

The City's attempt to change the purpose of use of water right 01-181C without a transfer has been rejected on three separate occasions. *See* A.R. 200 (Hearing Officer rejected the City's attempt to change the purpose of use of the water right without a transfer application); A.R. 271 (*Final Order* rejecting City's attempt to change the purpose of use without a transfer application); Clerk's R. 206 (District Court affirmed Director's decision to require a transfer to change the purpose of use for water right 01-181C). There is nothing in the City's briefing – which is essentially identical to its prior briefing – that would warrant a different decision the fourth time around. The District Court's and Director's decisions are supported by Idaho Law and should be affirmed on appeal.

II. Even if the Settlement Agreement is Considered an Element of Water Right 01-181C, the City's Appeal Still Fails.

A. The Settlement Agreement Does not Guaranty that the City Will Be Able to Use Water Right 01-181C for Groundwater Recharge or Mitigation.

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 19-28. It further claims that the Settlement Agreement "specifically states that the City can use the mitigation benefits as long as it submits the appropriate application for permit and/or transfer." *City Br.* at 24. This argument flies in the face of the plain language of the Settlement Agreement.

First, Paragraph 1.b specifically identifies the agreed upon purposes of use for the water right. It states that "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***." A.R. Ex. 4, at 1. This language is plain and unambiguous. *See* A.R. Ex. 8 (Coalition letter to Department challenging "recharge" as a use on the draft transfer order and confirming that "the Agreement is specific about the transferred purpose of use (irrigation and recreation)"). The purposes of use authorized under the 01-181C are consistent with these uses. *See* A.R. Ex. 106.

Paragraph 1.e does not change this analysis or enlarge these uses. In pertinent part, it reads:

> 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.[14]

A.R. Ex. 4. Ignoring the specific purpose of use language in paragraph 1.b, the City latches onto this language and asserts that the Settlement Agreement "specifically states that the City can use the mitigation benefits as long as it submits the appropriate application for permit and/or transfer." *City Br.* at 24. It contends that an application for permit is sufficient to authorize groundwater recharge under 01-181C. The City's argument fails.

The City's invitation to interpret Paragraph 1.e, without consideration of the specific purpose of use limitations in Paragraph 1.b is not permitted under the law of contract interpretation. *See, e.g., Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354 (2003) ("In determining the intent of the parties, this Court must view the contract as a whole"); *Bybee v. Isaac*, 145 Idaho 251, 256 (2008) ("When interpreting the contract, we determine the intent of the contracting parties at

[14] 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. A.R. Ex. 4. The only issue here is whether the last sentence of section 1.e, quoted above, automatically authorized the City to claim credits for the incidental recharge in Jensen Grove.

the time the contract was entered into and do so by viewing the contract as a whole"). All provisions of the Settlement Agreement must be given meaning. *See Magic Valley Radiology Assoc., P.A. v. Professional Bus. Serv., Inc.*, 119 Idaho 558, 566 (1991) ("In construing a written instrument this Court must consider it as a whole and give meaning to all the provisions of the writing to the extent possible"). The City's effort to create an automatic right to groundwater recharge is inconsistent with the parties' understanding at the time the Settlement Agreement was executed. *See* A.R. Ex. 8 (Coalition letter to Department challenging "recharge" as a use on the draft transfer order and confirming that "the Agreement is specific about the transferred purpose of use (irrigation and recreation)"); *c.f. Shawver, supra* at 362 ("No covenant will be implied which is contrary to the terms of the contract negotiated and executed by the parties").

Furthermore, even under the most strained reading of the Settlement Agreement, there is no guaranty that the City can use water right 01-181C for mitigation. Quite the opposite. Paragraph 1.e provides that, if the City "proposes" to use the right for "groundwater recharge or mitigation purposes," an "appropriate application" must be filed. A.R. Ex. 104. Such an application – whether that be an application for permit or transfer – would then be reviewed by the Director and subject to protest under Idaho law. I.C. §§ 42-203A & 42-222. Following review under sections 42-203A (permit) or 42-222(1) (transfer), the application would then be (i) approved, (ii) approved with conditions/limitations, or (iii) denied by the Director. *Id.*

Nothing in this language "specifically states" that water right 01-181C could be used for groundwater recharge.[15] Just because the City "proposes" a use, does not guaranty that that use

[15] Although the water right identifies a volume of storage in Jensen's Grove as well as a volume of water for "seepage loss," A.R. Ex. 106, it ties that "seepage loss" to the "recreational storage" use. It does not provide that that "seepage loss" can be construed as "groundwater recharge" or "mitigation."

will be approved by the Department. In this case, the "proposed" use was rejected because the City failed to file the "appropriate" application. *See infra*, Argument Part II.B.

In the end, the City's argument that the Settlement Agreement authorizes the use of water right 01-181C as "mitigation" for a new groundwater right cannot stand. It is illogical 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 simultaneously enter into a Settlement Agreement automatically reinserting that use back onto the water right. Fortunately, the plain language of the Settlement Agreement confirms that water right 01-181C could only be used for "irrigation and recreation" purposes and that any change to those uses would require the Coalition's written consent. *See* A.R. Ex. 8.

B. The Application for Permit Filed by the City is not an "Appropriate" Application as Contemplated by the Settlement Agreement.

Although the City quotes the Settlement Agreement's requirement to file an "appropriate" application, it fails to understand that obligation. Instead, the City asserts that it can simply choose to file "(a) an appropriate application for permit, (b) and appropriate transfer, or (c) both." *City Br.* at 24; *id.* ("Based on the plain language of the Settlement Agreement, the City has the option of filing a permit application (and/or transfer)").

This case provides a prime example of the correct procedures when a water user seeks to use existing water rights to mitigate impacts of new consumptive uses. The ultimate process depends on whether the proposed mitigation involves the use or nonuse of an existing water right.

For mitigation contemplating the continued use of the existing water right, a transfer application is required. As discussed above, *supra*, Part I.A, the only lawful mechanism for changing the use of a water right is an application for transfer. I.C. § 42-222. There is no other method

and the City points to no other method to change the use of a water right. In other words, if a water user desires to continue using a water right – but desires to use it for a different purpose (i.e. mitigation or recharge) – then a transfer application must be filed. *Id.* at § 42-222(1) ("Any person ... 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***") (emphasis added).

Here, the City desires to continue using water right 01-181C in exactly the same manner as it has historically. A.R. Ex. 1. Nothing will change in the diversion of the water. *Id.* Rather, the City seeks to place a different title on the use (i.e. "groundwater recharge" as opposed to the "irrigation and recreation" uses contemplated in the Settlement Agreement and on the face of the water right). *Id.* Since the City will continue to use the water, a transfer application is the only "appropriate" application.

In the alternative, if the proposed mitigation contemplates the nonuse of an existing water right, then an application for permit is sufficient. The City admits that the "non-use of one water right can, without the filing of a transfer, mitigate for another water right." *City Br.* at 35.[16] The new right is conditioned upon the nonuse of an existing water right. In other words, the water user agrees not to use the existing water right as mitigation for a new consumptive use. In such instances, where the existing right will not be used, an application for permit is an "appropriate" application and a transfer application will not be required.[17] In this case, the parties stipulated to

[16] The City is familiar with this process. Indeed, it provided a lengthy example of mitigation through nonuse in its reply brief before the District Court. Clerk's R. 190-91 (discussing applications filed by "the Cooks" and the approvals of mitigation through the nonuse of water rights).

[17] As such, the City is only partially correct when it contends that "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." *City Br.* at 34. This is only true in scenarios where the water user proposes mitigation through the nonuse of the water right.

allow certain existing irrigation water rights to remain in the river unused as mitigation for a portion of 27-12261. A.R. 204, ¶ 25.[18] The parties agreed, as did the Department, that a transfer would not be required for this mitigation through nonuse. *Id.* ("The Coalition did not challenge the City's proposal to hold 6.2 acres of the existing Miner's Ditch Blackfoot River rights and CSDC shares unused").

The Director explained the use/nonuse distinction in the *Final Order*. A.R. 272 ("What the City ignores with this argument is mitigation through non-use of a water right is not the same as changing the beneficial use of a water right to provide mitigation"). The District Court agreed. Clerk's R. 215 ("A transfer is not required under Idaho Code § 42-222 to effectuate the non-use of an existing right"). The City, however, asserts that this distinction is "nuanced" and did not warrant a response. *City Br.* at 28 ("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)").

The City's refusal to accept this distinction in the consideration of mitigation does not change the law. Since the City seeks to continue using the same water in the same manner – desiring only to change the beneficial use recognized under the right – the only "appropriate" application is a transfer application. *See* I.C. § 42-222; Clerk's R. 215-16. Neither a private settlement agreement that is only "enforceable by the parties thereto," A.R. Ex. 106, nor a separate application for permit can alter the elements of water right 01-181C.

[18] This does not mean that the nonuse of water will always be appropriate mitigation. However, under the specific facts of this matter, the Coalition stipulated that nonuse was appropriate mitigation.

C. The City Must Obtain the Coalition's Written Consent Prior to Changing the Nature of Use of Water Right 01-181C.

The City glosses over the obligations in Paragraph 1.a and 1.b to obtain the Coalition's written consent prior to changing the use of water right 01-181C.[19] The City asserts that, since this is an application for permit and not a transfer application, "there is no legal limitation under these provisions that would prohibit the City from pursuing 12261 without obtaining written consent from the Coalition." *City Br.* at 22. This argument fails.

Paragraphs 1.a and 1. Of the Settlement Agreement provide:

> 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.

A.R. Ex. 4. Provision 1.b plainly provides that the water will be used "for irrigation and recreation purposes" and that written consent will be required if the City intends to "transfer the Water Right or change the nature of use or place of use of the Water Right." *Id.* This language is clear and unambiguous. It evidences an intent by the Parties to recognize a specific use of the water (i.e. "irrigation and recreation purposes") and provides that written consent must be obtained in order to change that use. The City recognizes this obligation. *See City Br.* at 33, n.5 (admitting that this provision would require written consent from the Coalition if it were to attempt to change the use back to "solely an irrigation right").

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[19] The City complains that any such attempt would be futile because the Coalition will not consent and that, as a result, the City will be held "hostage indefinitely." *City Br.* at 32-33. This is speculative hyperbole. There is no basis to assert that the Coalition will never agree to a transfer of water right 01-181C. Regardless, the City agreed to the terms of the Settlement Agreement, including that it would be required to obtain the written permission of the Coalition prior to filing a transfer. This was an important part of the consideration for the Coalition in accepting the Settlement Agreement. *See* A.R. Ex. 8.

The City clouds this matter, however, by conflating distinct issues. It asserts that written consent is not require here because "'transfer' or 'change in nature 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." *Id.* at 22. In other words, the City contends, since it chose to file an application for permit, the conditions of Paragraph 1.b do not apply. *Id.* ("Because 12261 is an application for permit, and not a transfer application, the provision of Paragraphs 1.a and 1.b do not require written consent from the Coalition"). This argument fails. Indeed, as discussed above, since the City intends to continue using water right 01-181C – as opposed to offering it as mitigation through nonuse – an application for permit is not an "appropriate" application.[20] The only "appropriate" application in this scenario is a transfer application – for which written consent is mandated.

The Coalition does not contend that the City must obtain written permission to pursue 27-12261. However, because the City seeks to mitigate through the use of water right 01-181C, the plain language of the Settlement Agreement mandates written consent.

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 25. Yet, that is exactly what the Settlement Agreement states! The Settlement Agreement provides that the City would "hold the Water Right in perpetuity ... for irrigation and recreation purposes." A.R. Ex. 4; *see also* Admin. Tr. at 44-45 (Mayor Reese testifying that the water rights are used for "irrigation" and "recreation"). It further

[20] In a patronizing argument, the City asserts that "in 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." *City Br.* at 22. Yet, as discussed above, since the City intends to continue using the water but desires for that use to be classified differently, a transfer must be filed. The Settlement Agreement clearly mandates written consent in this scenario.

provides that the City must 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. *Id.* This language could not be any clearer. In this case, there is no dispute that the City is attempting to use the water for a purpose other than "irrigation and recreation." As such, the City must obtain the Coalition's written consent.

The obligation to obtain written approval was important to the Coalition. As the historical record confirms, 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. A.R. 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." A.R. 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 attempt to use the water for uses other than "irrigation and recreation." A.R. Ex. 4. The City cannot circumvent the obligations of the Settlement Agreement by filing an application for permit rather than a transfer.

III. The City's Arguments are Barred by *Res Judicata.*

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 about the burdens of

multiple proceedings that could have been consolidated, *City Br.* at 31-33 – a burden brought about by its own attempt to avoid the obligations of the Settlement Agreement.

The City's attempt to rewrite the Settlement Agreement as "specifically" providing a right to use water right 01-181C for groundwater recharge or mitigation is barred by *res judicata*. *Res judicata* bars the relitigation of issues that should have been raised in prior proceedings. *Hindmarsh v. Mock*, 138 Idaho 92, 94 (2002). Here, the City is arguing that the Settlement Agreement allows the automatic and guaranteed right to groundwater recharge – an issue that should have been raised in the prior transfer proceedings. *See* Clerk's R. 213 (the District Court recognized that "this proceeding is not the proper time or place to raise" arguments that should have been raised in prior proceedings).

The original transfer application for water right 01-181C sought to include "groundwater recharge" as a permitted use. A.R. Ex. 100. The Coalition protested that use. When the draft transfer order was issued and identified "recharge" as an authorized use, A.R. Ex. 103, the Coalition challenged the inclusion of that use as contrary to the Settlement Agreement, A.R. Ex. 8. The City understood the Coalition's request and even responded to the Department, contending that that the Coalition's "proposed new changes are not consistent with our June agreement" and requesting that "the Director simply sign the transfer with the proposed conditions as originally drafted by IDWR." A.R. Ex. 9. After receiving both letters, the Department changed the final transfer decision by removing all references to "recharge" from the water right. A.R. Ex. 105. Notwithstanding its contention that removal of "recharge" was "not consistent" with the Settlement Agreement, the City did not challenge the final transfer. *Id.*; *see also* A.R. 214.

Subsequently, the SRBA Court entered a partial decree for water right 01-181C that did not include "recharge" or "mitigation" as an identified use on the face of the decree. A.R. Ex. 106. Again, the City did not challenge that decision. *See* Clerk's R. 214.

Based on this history, the District Court properly concluded that, "If the City believed the Court [or Department] erred in failing to identify recharge as an authorized purpose of use, it was required to timely appeal." Clerk's R. 214. "It is inappropriate to now argue, in the context of this judicial review proceedings, that the *Partial Decree* issued for 01-181C authorizes a use of water not identified in the purpose of use element of that *Decree*." *Id.*

The City dismisses these findings, concluding that it did not challenge these decisions because "the City believes that any element of a water right may be stated anywhere in the decree" and "the City considered that 181C already recognized and quantified the mitigation provided by seepage in Jensen's Gove." *City Br.* at 29-30. This argument, however, is inconsistent with the City's own belief, at the time, that removal of "recharge" from the face of the water right was "not consistent" with the Settlement Agreement. A.R. Ex. 8. Indeed, the City clearly understood that the issue of any "recharge" use was in dispute. *Compare* A.R. Ex. 8 (letter from the Coalition asserting that "recharge" should be removed from the draft transfer order because "irrigation and recreation" were the only recognized uses under the Settlement Agreement) *with* A.R. Ex. 9 (contending that the Coalition's request was "not consistent" with the Settlement Agreement).

Notwithstanding its recognition that there was a disagreement about the placement of "recharge" on the face of the water right, the City failed to take any action. I.C. § 42-222(5) ("any person or persons feeling themselves aggrieved by the determination of the department" may seek judicial review). The City cannot "wait in the weeds" and – over a decade later – claim that it remained silent because it didn't agree with the Coalition's interpretation of the Settlement

Agreement – an interpretation of which it was fully aware at the time of the administrative proceedings. *See supra* (discussion regarding the language in the Settlement Agreement, including the requirements that City "hold the Water Right ... for irrigation and recreation purposes").

The City is bound by these prior decisions and any attempt to relitigate issues that should have been addressed in prior proceedings are barred from further litigation by the doctrine of *res judicata*. *See Hindmarsh*, 138 Idaho at 94.

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

On April 30, 1993, the Director entered an *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.[21] 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 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 law is clear and its meaning is undisputed. *City Br.* at 34 ('the City agrees that ... incidental recharge cannot be used as the basis for an additional water right").

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

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 pond and that water must constantly be diverted into it in order to enjoy the recreational uses authorized under water right 01-181C. *Supra*. 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." A.R. Ex. 102 at 1. 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. Admin. Tr. 27-31 (Mayor Loomis Testimony). Even the water right itself provides 980 acre-feet for "seepage losses." A.R. Ex. 106. 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 this "seepage loss" cannot be considered "incidental recharge" because the Settlement Agreement "is an express condition of 181C." *City Br.* at 36. 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.*

Neither the law nor the facts support this argument. First, the "seepage loss" is specifically identified as "Recreational Storage" water. A.R. Ex. 106. The right authorizes a total diversion of "Recreational Storage" of 2,266.8 afa, which is comprised of "1100 acre feet" of "total capacity," plus "186 AFA to make up losses form evaporation and 980.8 afa for seepage losses." *Id.* This is

not an "express" recognition of groundwater recharge. *City Br.* at 36. To the contrary, it is an "express" recognition of the incidental recharge contemplated under the "Recreational Storage" use.

Second, as discussed in detail above, the only way to change the use of a water right is through a transfer process – not a private settlement agreement. Recharge is a statutorily recognized beneficial use of water in Idaho, I.C. § 42-234(2), and, as such, must be identified on the water right, I.C. §§ 42-1411(2)(f) & 42-1412(6). In this case, it is undisputable that recharge is not identified as a use on the face of the water right and that the Settlement Agreement limits the agreed uses to "irrigation and recharge purposes."

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 36. This argument suffers from the same legal errors identified above. Further, it is common for water rights to include – whether expressly stated or not – an amount necessary to allow the water user to enjoy the use of the water. Such rights include a sufficient quantity to divert water from the river to the headgate – i.e. the "carriage" water. This carriage water is incidental recharge that cannot be used for the development of a new water right. I.C. § 42-234(5). In fact, the City recognized incidental recharge when it submitted its application for permit. A.R. Ex. 1 (discussing that the diversion rate sought under 27-12261 included "bed loss").

Simply because the quantity of "seepage loss" is identified with a fixed volume on a water right – such as water right 01-181C – does not transmute those "seepage losses" into anything other than incidental recharge under the identified "Recreational Storage" use. 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. The City's attempt to circumvent the law should be rejected.

V. The Court Should Award the Coalition Attorneys' Fees on Appeal.

As discussed above, the law governing the issues presented in this appeal is clear and well-established. Three separate decisions have been issued affirming what Idaho law plainly requires. However, the City ignores the plain language of the law and continues to advance the same, unpersuasive argument that it is not bound by the law. *See* A.R. 220 (exceptions brief); Clerk's R. 50; *City Br.* Although the Coalition has prevailed at each level, the City continues to force this matter by appealing and then making the same failed arguments. The continued pursuit of this matter is unreasonable, particularly in light of the District Court's decision on judicial review. As such, fees should be awarded on appeal. *See* I.A.R. 41.

Idaho Code § 12-117(1) provides the following:

> Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency ... and a person ... the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees ... if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

In *Rangen, Inc. v. IDWR*, 367 P.3d 193 (Idaho 2016), this Court addressed the reasonableness standard of section 42-117(1) as follows:

> In an appeal where the prevailing party sought attorney fees under section 12–117, the Court granted fees where the nonprevailing party
>
> > ***continued to rely on the same arguments used in front of the district court, without providing any additional persuasive law or bringing into doubt the existing law on which the district court based its decision***. Although the [nonprevailing parties] may have had a good faith basis to bring the original suit based on their interpretation of Idaho law, [they] were very clearly aware of the statutory procedures, failed to appeal separate appraisals when they had a right to appeal, and were clearly advised on the applicable law in an articulate and well reasoned written decision from the district court. ***Nevertheless, [they] chose to further appeal that decision to this Court, even though they failed to add any new analysis or authority to the issues raised below. Accordingly, it was frivolous and unreasonable to make a continued argument, and [the prevailing party] is awarded its reasonable attorney fees***.

(Emphasis added).

In *Rangen*, the Department prevailed on appeal. There, Rangen had challenged decisions before the Department (through a petition for reconsideration before the Director), before the District Court (through a petition for judicial review of the Director's decision) and before this Court on appeal. *See* 367 P.3d at 198. Rangen did not prevail in any of those challenges. *Id.* In granting the Department's request for fees, this Court determined: "Rangen asserted substantially the same arguments on appeal as it did before the district court on judicial review and failed to add significant new analysis or authority to support its arguments." *Id.* at 207.

The same analysis applies here and compels an award of attorneys' fees. Indeed, a review of the briefing shows that the City has advanced the same, failed arguments at every turn. *See* A.R. 220 (exceptions brief); Clerk's R. 50; *City Br.* The City has not added any "significant new analysis or authority to support its arguments" – rather, it relies on the same cases and arguments as in prior briefing. The City has failed to show how the Director or District Court erred in the legal analysis in their decisions. Since the City has not advanced any new arguments or analysis, the Court should award the Coalition attorneys fees on appeal under Idaho Code § 12-117.

In addition, section 12-121 further provides the judiciary with discretion to "award reasonable attorney's fees to the prevailing party or parties." Like the situation in *Rangen*, here the City is simply asking the Court to improperly "second-guess" the District Court and its well-reasoned analysis. The Court recently rebuked such an attempt in *Frantz v. Hawley Troxell Ennis & Hawley, LLP*, 2016 No. 120 (Idaho Nov. 2, 2016) and found that attorneys fees were warranted under section 12-121.

In *Frantz*, the Court noted:

> Section 12-121 allows an award of attorney fees to a prevailing party where "the action was pursued, defended, or brought frivolously, unreasonably, or without

> foundation." *Idaho Military Historical Soc'y v. Maslem*, 156 Idaho 624, 633, 329 P.3d 1072, 1081 (2014). "Such circumstances exist when an appellant has only asked the appellate court to second-guess the trial court by reweighing the evidence or has failed to show that the district court incorrectly applied well-established law." *Snider v. Arnold*, 153 Idaho 641, 645-646, 289 P.3d 43, 47-48 (2012). Further attorney fees on appeal have been awarded under Section 12-121 when appellants "'failed to add any new analysis or authority to the issues raised below' that were resolved by the district court's well-reasoned authority." *Wagner v. Wagner*, 160 Idaho 294, 302, 371 P.3d 807, 815 (2016) (quoting *Castrigno v. McQuade*, 141 Idaho 93, 98, 106 P.3d 419, 424 (2005)).

Frantz, 2016 No. 120, p. 9.

Like the appellant in *Frantz*, the City has failed to show that the District Court incorrectly applied well-established law. Further, the City has not added "any new analysis or authority" to issues that were raised before the District Court and resolved by its well-reasoned authority. The circumstances further warrant an award of fees to the Coalition under section 12-121.

In sum, the City's continued appeal is unreasonable and without a legal foundation. The District Court applied well-established law and analysis in its decision. The Court should enter an order awarding attorneys' fees to the Coalition under either sections 12-117 or 121.

CONCLUSION

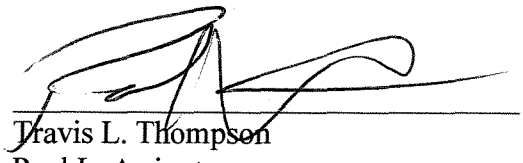
Any change to the purpose or nature of use of a water right can only be accomplished through the transfer process. Yet, the City failed to file any such transfer. The Director's order requiring a transfer of water right 01-181C, therefore, should be upheld. Furthermore, nothing in the Settlement Agreement 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.

Furthermore, since the City's appeal and arguments are unreasonable, an award of fees is warranted.

///

DATED this 3rd day of November, 2016.

BARKER ROSHOLT & SIMPSON LLP



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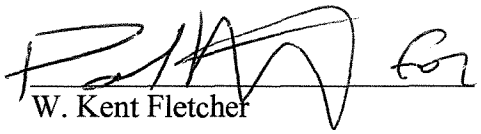

W. Kent Fletcher

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

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic brief, *Surface Water Coalition's Joint Response Brief*, submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email addresses:

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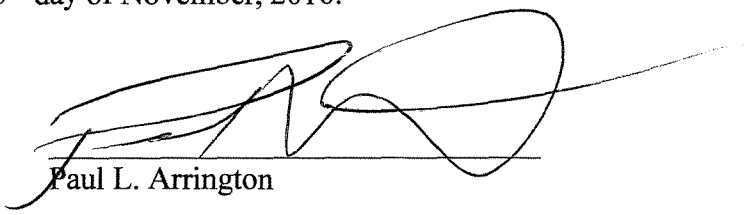
Dated and certified this 3rd day of November, 2016.



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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November, 2016, I caused to be served a true and correct copy of the foregoing upon the following by the method indicated:

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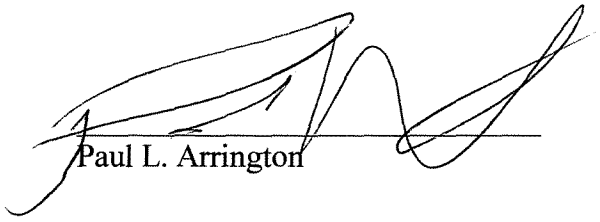

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