11-25-2016

City of Blackfoot v. Spackman Appellant's Reply 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 REPLY 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, 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 Reply Brief.*[1]

I. INTRODUCTION.

While the facts of this case have generally been adequately presented by the parties, one factual issue deserves to be re-emphasized. In this contested case, the Coalition "stipulated to the elements of [Idaho Code] section 42-203A(5)(b)-(f). The parties also stipulated that the modeling performed by the City's experts showed that groundwater recharge in Jensen's Grove [under 181C] could offset the impacts resulting from the new consumptive uses contemplated under this application." *Surface Water Coalition's Joint Response Brief* ("*Coalition's Response Brief*"), p. 1 (footnote and citations to the record omitted). Despite this admitted fact, both the Coalition and the Department argue that, as a legal matter, 181C cannot provide mitigation for 12261.

The Department focuses on "the face of the [*Partial Decree*]" in support of its position, largely ignoring the *Settlement Agreement*, and "conclude[s] the City may not use [181C] for mitigation or recharge." *IDWR Respondents' Brief*, p. 14. Thus, without taking the *Settlement Agreement* into account at all, the Department argues that any reference to seepage on the face of the water right is not indicative of a right to claim the mitigative benefits of 181C and, thus argues that the City is wrongly collaterally attacking 181C to get it to say something it does not mean. *IDWR Respondents' Brief*, pp. 14-17. Correspondingly, the Department maintains that the City

[1] For the sake of brevity, the City will use terms in *Appellant's Reply Brief* as those terms were defined in *Appellant's Brief.*

must file a transfer to add recharge or mitigation as a beneficial use of 181C on the face of the water right. *IDWR Respondents' Brief*, pp. 17-18. Only after all of this argumentation does the Department substantively consider and assert an interpretation of the *Settlement Agreement*, although its single page of argument only re-emphasizes the Department's position that the City must file a transfer, merely because doing so is one possibility under the *Settlement Agreement*. *IDWR Respondents' Brief*, pp. 18-19.

The Coalition provides similar arguments. After briefly arguing that the City must file a transfer because the *Settlement Agreement* was not incorporated into 181C, the Coalition provides more analysis of the incorporated text of the *Settlement Agreement*. *Coalition's Response Brief*, pp. 9-23. However, the crux of the Coalition's argument is that even under the plain language of the *Settlement Agreement*, the City must file a transfer application. *Coalition's Response Brief*, pp. 18-23. The Coalition also argues generally that *res judicata* precludes the City's arguments and that the seepage occurring under 181C is only incidental recharge under Idaho Code § 42-234(5), and therefore cannot be used for mitigation. *Coalition's Response Brief*, pp. 23-28. Finally, the Coalition contends that it is entitled to attorney fees on appeal because the City makes the same arguments on appeal that the Department and District Court below rejected. *Coalition's Response Brief*, pp. 29-31.

The only factor at issue in this contested case, per the Coalition's stipulation, is Idaho Code § 42-203A(5)(a), specifically: whether 12261 "will reduce the quantity of water under existing water rights." Undisputed facts demonstrate that 181C provides mitigation for 12261. The *Settlement Agreement*, which is specifically incorporated by reference into 181C, only requires

that the City "file the appropriate application for permit and/or transfer" in order to claim the mitigative benefits of 181C's recharge for the City itself. A.R., Hrg. Exh. List, Exhibit 4, p. 20 (Paragraph 1.e.). The *Settlement Agreement* only requires that the City obtain the Coalition's consent if it decided to file a transfer application, not an application for permit. The City decided to file an application for permit, 12261, rather than a transfer application, as contemplated and allowed under the plain language of the *Settlement Agreement*. Unfortunately, after the City decided to exercise the rights afforded in the *Settlement Agreement* to finally pursue formal recognition of the benefits of recharge occurring under 181C, the Department and the District Court below exalted form over substance and, rather than looking at the whole of 181C (including the incorporated *Settlement Agreement*), found that the omission of a specific reference to ground water recharge under one specific heading in the water right was determinative of the matter. This was reversible error that prejudiced the City's substantial rights, which necessitated this appeal. Idaho Code § 67-5279(3)–(4).

II. ARGUMENT.

A. The *Settlement Agreement* is an incorporated element of 181C and has legal significance to the interpretation and administration of 181C. Reference to an agreement in a water right is not exclusively done as a matter of courtesy.

The City asserts that the Director and the District Court erred by not analyzing whether the *Settlement Agreement* was incorporated as an element of 181C. A.R., Hrg. Exh. List, Exhibits 105 and 106; A.R., pp. 210-211. In their responses to this appeal, both the Department and the Coalition assert that reference to the *Settlement Agreement* in 181C has no legal significance to defining the elements of 181C, and instead assert that it is only a "private agreement" and reference

to it was only done "as a courtesy to the parties and their successors-in-interest." *IDWR Respondents' Brief*, p. 11 (citation and internal quotation marks omitted); *Coalition's Response Brief*, pp. 11-13 (both arguing that the *Partial Decree* only references the *Settlement Agreement*). The Coalition further asserts that the "[t]he 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." *Coalition's Response Brief*, p. 11. Essentially, the Department and Coalition assert that all references to settlement agreements are informational only and do not implicate the Department in any way because the Department is not a party to the *Settlement Agreement*. In support of this argument, Respondents rely on the words of the transfer approval and the *Partial Decree* to surmise that "enforcement of the agreement is limited to the parties to the agreement." Clerk's R., p. 117; *see also IDWR Respondents' Brief*, p. 11; *Coalition's Response Brief*, pp. 11-12.

The Department's and Coalition's arguments are misplaced. In support of its position, the Department cites to an SRBA decision, attached to *IDWR Respondents' Brief* as Addendum C, to support its contention that references to settlement agreements in the "Other Provisions Necessary" section of partial decrees is only ever done as a courtesy to the parties. *IDWR Respondents' Brief*, p. 11, n. 7. In that particular SRBA decision, the provision at issue was a remark making it clear that any issues pertaining to access easement rights associated with delivery of water under the water right at issue were vested in another jurisdiction. On many different occasions—most recently in 2011—this Court has been quite clear that easement matters and water rights matters are independent from one another: "In Idaho, ditch rights and water rights are separate and

independent from one another." *Zingiber Inv., LLC v. Hagerman Highway Dist.*, 150 Idaho 675, 249 P.3d 868 (2011); *see also Beach Lateral Water Users Ass'n v. Harrison*, 142 Idaho 600, 130 P.3d 1138 (2006) ("Although a ditch easement typically concerns the conveyance of water, it is 'a property right apart from and independent of questions of water rights'" (quoting *Savage Lateral Ditch Water Users' Ass'n. v. Pulley*, 125 Idaho 237, 242, 869 P.2d 554, 559 (1993)). Thus, the "right for the conveyance of water is recognized as a property right apart from and independent of the right to the use of the water conveyed therein" and "[e]ach may be owned, held and conveyed independently of the other." *Simonson v. Moon*, 72 Idaho 39, 47, 237 P.2d 93, 98 (1951). Accordingly, the particular reference made in the memorandum decision for Subcase No. 02-2318A may have only been included as a courtesy in that particular case because the matter referenced in the remark addressed a matter independent from other elements of the water right at issue. However, there is nothing in the case suggesting that all remarks or statements under the "remarks" and "other provisions necessary" portions of a water right are **only** made for the courtesy of the parties. Accordingly, the Department's reliance on this single SRBA decision is not persuasive authority for its asserted position.

Furthermore, the fact that the *Settlement Agreement* "is enforceable by the parties thereto," A.R., Hrg. Exh. List, Exhibit 106, p. 93 (capitalization modified), is not surprising. Any judgment, decree, or order from any court is not self-effectuating. Its enforcement is dependent on the interested parties. An agreement (whether incorporated into a court order or not) must be enforced either by a signatory, a party in privity with a signatory, or another plaintiff who can establish standing.

However, while the Department may not be a **party** to a settlement agreement referenced in a water right, it necessarily becomes a **participant** in a water right settlement agreement containing additional provisions and/or limitations on the exercise of the right because of the Department's statutory duty to administer each water right consistent with its elements under Chapter 6 of Title 42. In nearly all cases, the very reason a water right involves a settlement agreement is that it resolved a dispute over either the adjudication of a water right or it outlined other limitations of the water right to resolve injury concerns and/or protests raised in an administrative action involving a water right (such as an application for permit for a transfer application). Settlement both in the SRBA and in administrative proceedings was and is actively encouraged by the SRBA Court and the Department. In fact, the proceedings involving 12261 illustrate this encouragement from the Department.

Immediately after 12261 was protested on October 6, 2014, A.R., pp. 66-68, the Department sent two letters, each dated October 20, 2014, to the City and to the Coalition, as the protestants. A.R., pp. 69-72, 73-76 (respectively). The letter to the City outlines three options available for resolution of the contested application, and all three include some component of settlement encouragement and one even specifically references "a mediated agreement" (each of which is emphasized below):

> ***-Direct contact with the protestant(s) to determine the nature of the protests(s) and to attempt to resolve the protest. Sincere conversation between the parties prior to initiation of formal proceedings can often resolve protest(s).***
>
> -Formal proceedings administered by the department pursuant to the Department's Rule of Procedure (IDAPA 37.01.01). ***A pre-hearing conference identifies the protestant's concerns and reviews the resolution***

> ***possibilities with the parties.*** If the concerns cannot be resolved, a formal hearing will be scheduled.
>
> ***-Mediation through a certified professional mediator can reduce costs and time that are associated with formal proceedings, present the opportunity to address non-water concerns, provide influence over a final settlement, and fast track the processing of the application if a mediated settlement agreement is reached. If you are interested in this option, please contact our office for details.***

A.R., p. 69 (emphasis added). The Department's letter to the Coalition contains the exact same language actively encouraging the parties to settle their concerns. A.R., p. 73.

Most protestants raise injury arguments, and those issues are resolved either through a settlement agreement that resolves those concerns, or the issue is resolved after an administrative hearing on the issue. Based on counsel's experience, settlement of contested cases to avoid an administrative hearing is never accomplished without some sort of written settlement document. And even after an administrative hearing, the hearing officer will often include conditions to address injury concerns (which he can do under Idaho Code § 42-203A(5) and IDAPA 37.03.08.045.01.a.iv. (providing 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")). No matter how the conditions get incorporated into a water right, they are often included to address some form of injury, and the conditions may not fit neatly or easily into one of what the Respondents would call the "explicit" elements of a water right.[2] Three examples are worth noting.

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[2] Clerk's R., p. 113 ("[t]he beneficial uses of 'recharge' and 'mitigation' are not explicitly authorized under water right 01-181C").

First, a water right permit for ground water recharge (no. 1-10625) was approved after a stipulation was entered into between the applicant, Peoples Canal & Irrigating Co., and the Coalition, IDFG, BLM, and the Idaho Power Company. A copy of this stipulation is included at Addendum A.[3] The issued permit included stipulated conditions that further limit the exercise of 1-10625, a copy of which is included at Addendum B.[4] This is an example of a water right permit which includes conditions agreed to by the parties.

Second, after a contested case involving Karl and Jeffrey Cook and their application for permit no. 35-14402—which SRBA Judge Wildman ruled on after appeal in his *Memorandum Decision and Order*, CV-42-2015-2452 (filed December 14, 2015)[5]—the hearing officer imposed a condition that neither the applicants nor the Coalition agreed to by limiting the exercise of 35-14402 and six other base rights to a diversion volume of 1,221 acre-feet. This was done to ensure no use of water beyond a determined historical use (had the applicant been held to the diversion rate of their base rights) after an analysis by the hearing officer. In other words, it was included by the hearing officer to prevent injury to the Coalition, but it was not agreed to by the Coalition or the Cooks.

The third example involves 181C itself. While the period of use for "diversion to storage" under 181C in authorized between "04-01 to 10-31", A.R., Hrg. Exh. List, Exhibit 106, p. 93, paragraph 1.d of the *Settlement Agreement* provides that the City cannot divert into Jensen's Grove

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[3] This document is available at http://www.idwr.idaho.gov/apps/ExtSearch/RelatedDocs.asp?Basin=1&Sequence=10625&SplitSuffix=.

[4] A copy of the permit is available at http://www.idwr.idaho.gov/apps/ExtSearch/ DocsImages/lz1g01_.PDF.

[5] A copy of this decision is included at Addendum C.

until June 1st if the water supply conditions are such that the Bureau of Reclamation "would not be granted the opportunity to lease water from the local rental pool for flow augmentation below Milner Dam." A.R., Hrg. Exh. List, Exhibit 4, pp. 19-20.

Importantly, in these instances where conditions were included in a water right, the Department was not a party to the settlement agreement or contested case proceeding that led to the condition being included in the water right. But the Department does not have to be a party to a settlement agreement to be impacted or bound by the conditions. The Department is not bound ***by contract*** to a settlement agreement, but it is necessarily a participant to ***by statute*** because of the Director's statutory obligation to distribute water according to water rights. The Director's obligation to distribute water according to water rights was well explained by Judge Wildman:

> The IDWR has a statutory duty to allocate water. The Idaho legislature gave the IDWR's Director the power to make appropriation decisions in Idaho Code section 42–602: "[t]he director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the ... facilities diverting therefrom." The Director also "shall distribute water in water districts in accordance with the prior appropriation doctrine." *Id.* ***This means that the Director cannot distribute water however he pleases at any time in any way; he must follow the law.***
>
> Idaho Code section 42–602 gives the Director broad powers to direct and control distribution of water from all natural water sources within water districts. *In re Idaho Dep't of Water Res. Amended Final Order Creating Water Dist. No. 170,* 148 Idaho 200, 211, 220 P.3d 318, 329 (2009). That statute gives the Director a "clear legal duty" to distribute water. *Musser v. Higginson,* 125 Idaho 392, 395, 871 P.2d 809, 812 (1994) (*abrogated on other grounds by Rincover v. State Dep't of Fin.,*132 Idaho 547, 976 P.2d 473 (1999)). However, "the details of the performance of the duty are left to the director's discretion." *Id.* ***Therefore, from the statute's plain language, as long as the Director distributes water in accordance with prior appropriation, he meets his clear legal duty. Details are left to the Director.***

. . .

> Similarly, this Court has stated that the Director "is charged with the duty of direction and control of distribution of the waters from the streams to the ditches and canals." *DeRousse v. Higginson,* 95 Idaho 173, 179, 505 P.2d 321, 327 (1973). More recently, this Court further articulated the Director's discretion: "Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director." *AFRD#2,* 143 Idaho at 880, 154 P.3d at 451. Thus, the Director's clear duty to act means that the Director uses his information and discretion to provide each user the water it is decreed. And implicit in providing each user its decreed water would be determining when the decree is filled or satisfied.

In re SRBA, Case No. 39576, Subcase 00-91017 (Basin-Wide Issue 17—Does Idaho Law Require a Remark Authorizing Storage Rights to 'Refill', Under Priority, Space Vacated for Flood Control), 157 Idaho 385, 393-94, 336 P.3d 792, 800-01 (2014).

In short, it is a red herring to argue that because the Director is not a party to a settlement agreement, he is not bound to honor it and distribute water diverted under the conditioned water right accordingly.[6] He certainly is bound by such conditions as he exercises his statutory duties to distribute water, even if such conditions do not "explicitly" fit into one of the standard elements of a water right. To use the real world examples discussed above, if the City diverted water into Jensen's Grove under 181C on April 1st in a year where the Bureau of Reclamation "would not be granted the opportunity to lease water from the local rental pool for flow augmentation below Milner Dam[]"—which would violate paragraph 1.d of the *Settlement Agreement*—the

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

Department would surely be called upon by the Coalition to curtail the City's diversions into Jensen's Grove. As further described below, the Coalition certainly could not assume the role of the Department and itself perform watermaster functions to curtail the City's use.

Continuing with actual examples, IDFG would certainly object if Peoples diverted water under 1-10625 in an amount that reduced flows in the Snake River below 2,070 cfs measured in the Snake River at Blackfoot U.S.G.S. Gage No. 13062500 and the Director did nothing to enforce this provision against Peoples or otherwise initiated an enforcement action under Idaho Code § 42-1701B. Permit No. 1-10625 (at Addendum B) (Condition No. 4). And the Coalition would certainly object if water was diverted under 1-10625 if less than 2,700 cfs was flowing past Minidoka Dam and the Director did nothing to enforce this provision against Peoples or otherwise initiated an enforcement action under Idaho Code § 42-1701B. *Id.* (Condition No. 5). These conditions were included to protect against local public interest impacts and injury to an existing unsubordinated hydropower water right.

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

> The Director has the authority and discretion to determine how water from a natural water source is distributed to storage water rights pursuant to accounting methodologies he employs. ***The Director's discretion in this respect is not unbridled, but rather is subject to state law and oversight by the courts***. See *American Falls Reservoir Dist. No. 2*, 143 Idaho at 880,

> 154 P.3d at 451 (addressing court oversight on a properly developed record). When review of the Director's discretion is this respect is brought before the courts in an appropriate proceeding, and upon a properly developed record, the courts can determine whether the Director has properly exercised his discretion regarding accounting methodologies.

Memorandum Decision, Basin Wide Issue 17, Subcase No. 00-91017 at *11-12 (filed March 20, 2013), *vacated in part and aff'd in part* 157 Idaho 385, 393-94, 336 P.3d 792, 800-01 (2014) (hereinafter cited to as "*BW 17*" and included at Addendum D) (emphasis added). The protestants could sue privately for damages for the non-compliance, Idaho Code § 42-1701B(7), but would have no ability to assume the role of the Director in water distribution. The protestants could only challenge the exercise of his discretion. This further supports the City's position that the Director is a participant in the *Settlement Agreement* because he is duty-bound to ensure compliance with any limitations in the water right, even though he is not a party to the *Settlement Agreement*. All water users should expect that the Director will honor all provisions of a water right, including incorporated documents, and ensure compliance with the elements of a water right because the Director "cannot distribute water however he pleases at any time in any way; he must follow the law." *In re SRBA*, 157 Idaho at 393, 336 P.3d at 800.

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

Furthermore, the conditions on 72385, which transferred 181C to Jensen's Grove, provide more than mere "notice" of the *Settlement Agreement*. The language in the transfer approval and the partial decree for 01-181C states that the terms of the *Settlement Agreement* provides

"conditions and limitations" for the exercise of 181C. This is a textbook case of incorporation, which is explicitly authorized by Idaho Code § 42-1412(6). Thus, the arguments attempting to re-characterize the *Settlement Agreement*[7] as only a "private" agreement paints an incomplete picture of the mechanics of how water right elements are incorporated into a water right and are later enforced or administered by the Department.

Additionally, the Coalition contends that a settlement agreement may create "additional limitations" to a water right, but cannot alter or expand the purposes of any water right. *See Coalition's Response Brief*, p. 13. We agree with this statement as a general matter, but as to the specific case before this Court, it fails to address the issue raised by the City on this appeal, which is that there is a ground water recharge purpose included within the parameters of 181C, and 12261—a new application for water right permit—points back to that ground water recharge as its mitigative source of water.

We agree that a private agreement, on its own, may further limit a water right beyond what is provided in the water right. And we agree that it may not expand any element of the water right. The provisions of a settlement agreement between two parties could not place a water user in a better position than he would be as against other water right holders. On the other hand, a document that has been **incorporated** into the water right's decree can do anything a decree can do, because it is **part of the decree**. *See* Idaho Code § 42-1412(6) (a water right "decree shall

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[7] These include the repeated categorization of the *Settlement Agreement* as a "private" agreement, *see, e.g., IDWR Respondents' Brief*, p. 11; *Coalition's Response Brief*, p. 12, and the Department's arguments about the *Partial Decree* describing the *Settlement Agreement* as "entered into by and between" certain parties (including the City and the Coalition, but not the Department), IDWR Respondent's Brief, pp. 11-12.

contain or incorporate a statement of each element of a water right"). Correctly considered, a document such as the *Settlement Agreement*, which is incorporated into the water right decree, does not alter or expand the water right—it is part of the affirmative definition of the water right. Thus, here, the *Settlement Agreement* does not impermissibly expand 181C; rather, the *Settlement Agreement* is part of the definition of 181C and, as described below, *see* Section II.B., *infra*, describes and provides for the recharge the City now seeks to claim credit for and use as mitigation.

Finally, both the Department and the Coalition make similar arguments against incorporation; wherein the Coalition argues that "absurd results" occur with incorporation, *Coalition's Response Brief*, p. 12, while the Department echoes the District Court's concern that incorporation "fundamentally changes" 181C, *IDWR Respondents' Brief*, p. 12 (quoting the District Court's opinion). The simple response to both of these arguments is that the *Partial Decree* incorporated the *Settlement Agreement* by the language chosen by the Department (in the approval of 72385, A.R., Hrg. Exh. List, Exhibit 105, p. 90 (Condition 9)) and utilized by the SRBA Court (A.R., Hrg. Exh. List, Exhibit 106, p. 93). The *Partial Decree* says what it says and incorporates what it incorporates. The alleged "absurd results" asserted, specifically, that allowing incorporation "would allow any water user to simply agree to change the elements of his rights without involving the Department in any way" conflates the facts of this case and ignores Idaho law.

Again, Idaho Code § 42-1412(6) specifically allows for incorporation and the language in the *Partial Decree* incorporates the *Settlement Agreement*. Obeying Idaho Code § 42-1412(6) and allowing incorporation will not open the door for every water user in Idaho to unilaterally alter

water rights; rather, water rights will be construed according to the language that created them first (by examining the elements of the water right (including "other provisions necessary") as contained on the water right or incorporated through other documents) and then the determination must be made as to whether a transfer application under Idaho Code § 42-222 is necessary. In this case, the exercise of 181C **must** take the *Settlement Agreement* into account because the *Partial Decree* incorporates the *Settlement Agreement* and the terms of the *Partial Decree* define 181C. Thus, the *Settlement Agreement*, by definition, cannot "fundamentally change[]" 181C because the *Settlement Agreement* is part of the definition of 181C.

B. The *Settlement Agreement*, as part of 181C, demonstrates that 12261 can be approved with mitigative reference to the recharge actually provided by 181C because such recharge is not "incidental recharge" as described in Idaho Code § 42-234(5).

In order to fully address the contents of the Coalition's and Department's legal arguments asserting that (1) it is necessary for the City to amend 181C through a transfer before it can be used for mitigation purposes, (2) that seepage under 181C does not authorize the City to use the right for recharge, and (3) that recharge under 181C is "incidental recharge," it is necessary to explain as straightforwardly and simply as possible the mechanics of what the City proposed with 12261.

Applications for new water right permits for non-domestic irrigation purposes require mitigation. Mitigation is not explicitly defined or described by statute, but use of mitigation associated with water in order to issue a new permit for non-domestic irrigation purposes is implied from the Department's ability to approve any application "upon conditions." Idaho Code § 42-203A(5). Those conditions can take many forms, but the overall purpose of mitigation is ensuring that the evidence supports a determination that negative impacts from actions undertaken under

the new permit will be offset by other positive impacts undertaken by the permit applicant. Through this mitigation concept, in this case, 12261 attempts to refer back to the recharge occurring under 181C. The City believes it is appropriate to call the seepage referred to both on the face of 181C (Condition No. 5)[8] and in the *Settlement Agreement* as recharge because both seepage and recharge are synonymous—they both describe water entering the aquifer.

Therefore, it is the City's position that it is not necessary for the City to amend 181C with a transfer application because when 181C was converted from an irrigation water right, what made it through the transfer process was outlined on the face of the water right, including the provisions of the *Settlement Agreement* that allowed the recharge benefits to be utilized if the City did one of two specific things in the future: (1) file a transfer to amend 181C, which required Coalition consent, or (2) file an application for permit, which did not require Coalition consent.

With specific regard to ground water recharge, we do not view the legal significance of the Travis Thompson letter,[9] A.R., Hrg. Exh. List, Exhibit 8, pp. 46-47, or the subsequent removal of explicit reference to "ground water recharge" on the transfer approval the same way as the Coalition or the Department. They assert that ground water recharge did not make it through the conversion of 181C, and a result, the City is bound by law to again amend 181C to list ground water expressly. *IDWR Respondents' Brief*, p. 16; *Coalition's Response Brief*, p. 13.

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[8] "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 (emphasis added).

[9] The City maintains that this letter is parol evidence as described in the City's opening brief, but nevertheless, has addressed it previously and addresses it here in the event this Court does not believe it is parol evidence.

The City views these facts very differently and actually as supportive of what it is attempting to do with 12261. As emphasized many times by the Coalition, the City's original transfer application expressly requested ground water recharge as an express nature of use. *Coalition's Response Brief*, p. 24. Indeed, the Department's own analysis—as discussed by the Coalition in its briefing—was that Jensen's Grove loses water to the aquifer, which later returns to the Snake River to benefit surface water users (such as the Coalition) below Blackfoot, and that the moment water is recharged it is non-consumptive. *Coalition's Response Brief*, p. 5. The Coalition evidently did not want recharge expressly listed on 181C because it would permit the City to engage in ground water recharge under 181C for any purpose and for any entity the City wanted to assign those ground water recharge benefits to. As a result, the parties agreed to a possible future use of the recharge occurring under 181C, but only for the City. Note the bolded portions of Paragraph 1.e in the *Settlement Agreement*, where reference to the Water Right is a reference to 181C and the mitigation and recharge benefits specifically occurring under 181C:

> 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, p. 20.

The Department evidently interpreted the *Settlement Agreement* provisions in a manner where ground water recharge should be expressly listed because it issued the draft approval accordingly. The Coalition disagreed as to the Department's form of documenting what was agreed to in the *Settlement Agreement* as described in the Travis Thompson letter. A.R., Hrg. Exh. List, Exhibit 8, pp. 46-47. But the Travis Thompson letter did not purport to amend the *Settlement Agreement*. Accordingly, the City was not necessarily concerned about the form of what right to recharge made it through the transfer for 181C, only that it was there—and it was there in the form of Paragraph 1.e incorporated into the elements of 181C. A.R., Hrg. Exh. List, Exhibit 9, p. 48. This is evidently why the City did not object to the removal of ground water recharge as an express beneficial use, Admin. Tr., p. 39, l. 22–p. 40, l. 14 (Testimony of Mayor Scott Reese), and it is this lack of action that the District Court, the Coalition, and the Department have all seized upon in an effort to stop the City from finally capitalizing on the recharge it is indisputably performing. But neither the District Court, Department, nor particularly the Coalition have attempted to answer this uncomfortable question: If recharge was not an authorized use that made it through the conversion of 181C from an irrigation right to what it is described as now, why does the *Settlement Agreement* specifically provide that the City (and only the City) can seek recognition of the recharge benefits under 181C through filing an application for permit? *See* A.R., Hrg. Exh. List, Exhibit 4, p. 20 (Paragraph 1.e.).

It is precisely because the *Settlement Agreement* required **subsequent action** by the City (such as through the filing of a permit application) that it was more appropriate not to include ground water recharge an as an express beneficial use. Otherwise, it could have led to a dispute

over whether the City could recharge **without restriction** by only looking at the face of the water right itself when the benefits from the ground water recharge were so severely restricted under the *Settlement Agreement*. As with any contractual dispute, with the benefit of hindsight and now knowing the position asserted by the Coalition to continually seek to prevent the City from benefitting from the recharge is admits is there, perhaps it would have been best to formally raise the issue at that time. However, the provisions of Paragraph 1.e. certainly provided the City with a reasonable basis to presume that it had reserved its ability to later file an application for permit and claim the recharge benefits. And given the provisions of Paragraph 1.e, the City has certainly asserted a reasonable basis upon which to submit an appeal to this Court and seek relief from this Court.

Overall, the City now wants to finally claim the benefits of its recharge—something everyone admits is actually occurring and is a positive thing. The mechanics of how the City is proposing to do that is by filing an application for permit that points back to the ground water recharge under 181C as its mitigative source. The application for water right permit, numbered as 12261, specifies the conditions under which the new water right can be used, and those new uses must be fully mitigated by the mitigative sources it points to.

The Department also argues that neither recharge nor mitigation could be contemplated by the *Settlement Agreement* because it does not describe either the "period of year" or "quantity of water that may be used." *IDWR Respondents' Brief*, p. 12; *see also Coalition's Response Brief*, p. 14 (citing the District Court and making a similar argument). The City would point out that it was the Department itself (in the approval of 72385) and, later, the SRBA Court (in the *Partial Decree*,

following 72385) that chose to incorporate the *Settlement Agreement*, rather than re-write the required conditions, terms, and elements into 181C itself in the form (now) preferred by the Department. Accordingly, the Coalition's and Department's arguments that there is no season of use for the ground water recharge is easily answered by looking at what is proposed under 12261, and perhaps unsurprisingly, the season of use for 12261 is the typical irrigation season of use (4/1 to 10/31) when the water seeps into the aquifer from Jensen's Grove when it is filled and used during the irrigation season. As to the amount of recharge water, that amount is also clear, 2,080.8 AF, and the Coalition stipulated to that amount as a proper representation of the recharge that was occurring and that should be modeled. And the end use of water under 12261—which recovers non-consumptive ground water recharge water for consumptive irrigation purposes—is consistent with Paragraph 1.b of the *Settlement Agreement* where water diverted under 181C is to be used for, among other uses, irrigation purposes. By filing 12261, the City will be prevented from using 2,080.8 AF of recharge water under 181C for other purposes that the City may desire to use it for. At the end of the day, even if 12261 is approved, 181C will remain as it is currently described on the records of the Department—12261 will simply refer to 181C as its mitigative source. Thus, despite the Coalition's and Department's lengthy arguments otherwise, simply put, there is no need to amend 181C through a transfer application because there is nothing in 181C that is in need of amending when the mechanics of how the City is seeking to recognize the recharge benefits occurring under 181C through the filing of 12261.

Additionally, the City has asserted that pointing to the recharge under 181C is "non-use" of that portion of 181C because it will not change how and where the recharge water is recharged

under 181C, and as a result, this does not require a transfer application. The Coalition contends otherwise. *Coalition's Response Brief*, p. 19-20. Under either view of how to properly view the recharge under 181C, the real question is whether 12661's pointing back to 181C's recharge that is already occurring (and will not change) is appropriate under Idaho Code § 42-203A(5) and IDAPA 37.03.08.045.01.a.iv. This Court can make that determination.

What is very candidly so troubling to the City is that the Coalition repeatedly states that since nothing will change with how 181C is diverted into Jensen's Grove, the City cannot now claim its recharge benefits when the benefits of diverting 181C have accrued to the aquifer for the benefit of other water users, such as the Coalition, for over a decade. No transfer should be required for the City to point to a use of water that is expressly contained in the *Settlement Agreement*. Indeed, the City's fear in filing such a transfer application is that neither the Department or the Coalition will agree to acknowledge the seepage as actual recharge, which may force the City to sacrifice some of the remaining consumptive uses authorized under 181C—such as the recreational use or the irrigation component for the adjacent park area—in order to finally get some recognition for recharge. [10] Consider the Director's statement in his *Final Order* wherein he states that a transfer is necessary for 181C: "The analysis of how much water is being

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[10] In such a context, the separate enforceability of the *Settlement Agreement* may become important. For instance, despite its incorporation into the *Partial Decree*, the covenant of good faith and fair dealing—inherent in the *Settlement Agreement*, as in every contract, *Federal Nat. Mortg. Ass'n v. Hafer*, 158 Idaho 694, 699, 351 P.3d 622, 627 (2015)—provides legal recourse only available in a court and not through the Department. The Coalition has argued that the City's concern of being held hostage indefinitely because the Coalition will not agree to a transfer proposed by the City is "speculative hyperbole." *Coalition's Response Brief*, p. 21, n. 19. However, the City has proposed such a transfer to the Coalition but received no authorization from the Coalition. When the City asked for information about what in the transfer was objectionable to the Coalition, the Coalition did not respond and, as a result, the City had to continue pursuit of this appeal.

consumptively used, what water is available for mitigation credit, and other information regarding the mitigation plan should not be deferred to future proceedings." A.R., p. 273. It is possible, and indeed highly likely, that the Director will determine that the current seepage loss in Jensen's Grove under 181C is not being consumptively used, and as a result, such seepage water will not be available to be converted to an express listing of ground water recharge as mitigation through a transfer. If the City can never claim the benefits of that recharge, the City has no other choice but to seek relief from this Court before engaging in further proceedings before the Department with unknown and unpredictable results.

It is also evident that the Coalition will assert in a future transfer application—as it has in this appeal—that seepage under 181C is incidental recharge under Idaho Code § 42-234(5). Water that is properly identified as "incidental recharge," by statute, cannot be used as mitigation for a new water right. In the context of 181C, we do not agree that the recharge occurring under 181C is "incidental recharge" under Idaho Code § 42-234(5). As to the Coalition's arguments on appeal that 181C's recharge is "incidental recharge," consideration of additional authority from the SRBA on the issue of what constitutes "incidental recharge" under § 42-234(5) is helpful.

The Court is urged to carefully review the *Memorandum Decision and Order On Challenge*, Subcase Nos. 01-23B, 01-297, 35-2543 and 35-4246 (Aberdeen-Springfield Canal Co.) (dated April 4, 2011), a copy of which is included on Addendum E attached hereto (hereinafter "*ASCC Decision*"). This decision was issued in conjunction with Aberdeen-Springfield Canal Company's ("ASCC") attempt to include "recharge for irrigation" as a beneficial use on its water rights in the SRBA. The Department recommended inclusion of this beneficial use under the so-

called "accomplished transfer statute" found at Idaho Code § 42-1425, and the Coalition timely filed objections to these recommendations. *ASCC Decision* at 3. The Coalition filed a notice of challenge to a decision of the special master which addressed a number of issues, including whether the surface water lost through the ASCC system was "recharge for irrigation" or "incidental recharge" under Idaho Code § 42-234(5).

On appeal to the SRBA Presiding Judge, Judge Wildman held that there were issues of material fact as to whether recharge claimed by ASCC, prior to November 19, 1987, was incidental to its operations, or diverted and used with an express intent to perform ground water recharge as a new use. Judge Wildman concluded that an SRBA claimant could establish facts to support a recharge purpose of use but that "such a claim would require a showing establishing the benefit to the appropriator derived from use of the recharge. Put differently, the claimant must demonstrate an identifiable useful or beneficial purpose to the appropriator for the recharge **at the time of appropriation**. . . . Groundwater recharge presents a unique set of circumstances because recharge can exist without the appropriator or anyone else actually making further use of or benefitting from the recharged groundwater." *ASCC Decision* at 19 (emphasis added).

Judge Wildman considered the situation where "aquifer recharge is purely an incidental result associated with the beneficial use of an existing right," such as when carriage water is diverted and used in conjunction with water that is actually delivered to a field for irrigation purposes. He concluded that "[s]uch use is considered a complement to the existing irrigation right **as opposed to a new or additional use**. In the event the appropriator does not recapture or reuse the water, the result is that the water seeps into and recharges the aquifer." *Id.* at 20

(emphasis added). Judge Wildman concluded that for purposes of applying the accomplished transfer statute—a statute that allowed new beneficial uses to be added to a water right **without** going through the formal transfer process of Idaho Code § 42-222—some evidence of intent other than simply diversions for irrigation purposes had to be demonstrated. The matter was ultimately remanded for further proceedings, and ultimately ASCC's water rights were not decreed with a "recharge for irrigation" beneficial use added to their water rights as ASCC did not elect to pursue the matter further.

The *ASCC Decision* therefore describes that some intent to divert and use water for a new or additional use was needed under the accomplished transfer statute (Idaho Code § 42-1425). The intent to divert and use water for a new or additional use can be shown in water right documents; in ASCC's case, Judge Wildman stated that—as to what was described in the ground water rights of ASCC shareholders—the "licenses have legal significance" in determining the water users' intent and evidently no provision or evidence of tying those rights to ASCC's diversion of surface water was present. *ASCC Decision* at 23.

The principles from the *ASCC Decision* apply to 181C. First, the City went through the **formal** transfer process to amend 181C, as opposed to proving historical use under the accomplished transfer statute. In the formal transfer process, as described above, what made it through the formal process is evidence of intent by the City to use 181C for recharge or mitigation purposes expressly found in Paragraph 1.e of the *Settlement Agreement*. This express, not implied, use for 181C is not incidental because incidental use is use that is not expressly listed or described in the water right. The City's position is that 181C's seepage is not incidental recharge, even if

these losses require the City to continue to divert water to maintain water levels in Jensen's Grove. If 181C said nothing about seepage, or the *Settlement Agreement* did not contain Paragraph 1.e, then such seepage would more appropriately be categorized as "incidental recharge." Otherwise, if the *Settlement Agreement* was actually referring to "incidental recharge" under Idaho Code § 42-234(5), then there was no legal way for the City to later claim the benefits of that "incidental recharge,"[11] and, as the Department suggests in its briefing, the *Settlement Agreement* would therefore be void and unenforceable. *IDWR Respondents' Brief* at 12 (citing to *Jensen v. Boise-Kuna Irr. Dist.*, 75 Idaho 133, 142, 269 P.2d 755, 760 (1954) (A contract that is contrary to law is ultra vires and void.).[12]

Accordingly, the City urges the Court to determine that when 181C was converted to different beneficial uses from an irrigation-only water right, the different beneficial uses authorized in the formal transfer process included ground water recharge. If it did, then what is express cannot be implied, and the City should be permitted to now claim the benefits of its 181C recharge for 12661 and not be prohibited from doing so by Idaho Code § 42-234(5) (the incidental recharge statute).

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[11] The *Settlement Agreement* was signed in 2006, and Idaho Code § 42-234, complete with the incidental recharge language, was part of Idaho law in 2006. The amendments to Idaho Code § 42-234 in 2009 did not amend the incidental recharge language. *See* 2009 Idaho Sess. Laws, ch. 242, § 1, p. 743.

[12] The City is not asking this Court to determine whether the *Settlement Agreement* is void and unenforceable in this proceeding. If the City does not prevail on this appeal, a determination that the *Settlement Agreement* is void and unenforceable may be pursued in a subsequent legal action.

C. A transfer of 181C is not necessary in order for the ground water recharge portion of 181C to mitigate for 12261, and therefore, the City does not need the Coalition's authorization to file an application such as 12261.

As described above, because the *Settlement Agreement* is incorporated into 181C, it must be construed in order to properly interpret 181C. The Department, Coalition, and District Court all view 181C as separate from the *Settlement Agreement*. Taken from that point of view, it is understandable to conclude that the *Settlement Agreement* could limit, but not enlarge or alter, the water right, and therefore a transfer application would be required. *See Coalition's Response Brief*, p. 14; *IDWR Respondents' Brief*, p. 12.

However, this view is flawed from the outset. The *Settlement Agreement* is not considered **in addition to** 181C or the *Partial Decree*—rather, as an incorporated document, the *Settlement Agreement* must be considered **as part of** 181C and the *Partial Decree*. Thus, any contention that 181C does not list recharge as a purpose of use must, of necessity, utilize the over-formalistic analysis that separates the *Settlement Agreement* from the *Partial Decree* and requires a water right's elements to be listed only in certain places in order to be valid. In contrast, while the City acknowledges that such an orderly, well-formed water right decree may be desirable, it is not the only form mandated by law, which specifically contemplates the ability to incorporate documents into a water right decree. *See* Idaho Code § 42-1412(6).

In their respective briefs, both the Department and the Coalition emphasize Paragraph 1.b. of the *Settlement Agreement*, in an effort to argue that even with the *Settlement Agreement*, the City can only use 181C for irrigation and recreation. *Coalition's Response Brief*, p. 16; *Coalition's Response Brief*, p. 16. That paragraph provides:

> The CITY and [New Sweden Irrigation District] agree that the following terms and conditions be included in the Water Right ("Conditions") after transfer: ....
>
> (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., Hrg. Exh. List, Exhibit 4, p. 19 (capitalization in original). As an initial matter, the predicate of this provision reaffirms the incorporation and intent to incorporate the *Settlement Agreement* into 181C as "terms and conditions" of 181C.

Secondly, the inference drawn by the Department and Coalition conflicts with the very interpretation of the *Partial Decree* posited by the Department and Coalition. The Department and Coalition infer from Paragraph 1.b. that 181C was **only** meant to allow the use of water "for irrigation and recreation purposes." *See IDWR Respondents' Brief*, p. 18; *see also Coalition's Response Brief*, p. 16. However, once again, this interpretation of 181C is much too narrow and ignores construing 181C as a whole. In contrast to this interpretation, the City contends that the words "irrigation and recreation purposes" generally describe the primary uses of 181C, rather than being an exhaustive list. Instead of construing a single portion of Paragraph 1.b. of the *Settlement Agreement* out of context, the City proposes to interpret the *Settlement Agreement* and the *Partial Decree* as a whole—particularly the provisions of Paragraph 1.e—in accordance with Idaho law. *City of Meridian v. Petra Inc.*, 154 Idaho 425, 435, 299 P.3d 232, 242 (2013); *see also Kepler–Fleenor v. Fremont Cnty.*, 152 Idaho 207, 211, 268 P.3d 1159, 1163 (2012). Additionally, it is important to note that the end use of water under 12261—which recovers non-consumptive

ground water recharge water for consumptive irrigation purposes—is consistent with Paragraph 1.b of the *Settlement Agreement* as asserted by the Coalition and the Department, where water diverted under 181C is to be used for irrigation purposes.

The Coalition asserts that the City cannot "transfer [181C], or any portion thereof, without" the Coalition's consent. A.R., Hrg. Exh. List, Exhibit 4, p. 19 (Paragraph 1.a.). The City must also "hold [181C] in perpetuity ... and ... not transfer [181C] or change the nature of use or place of use of [181C]" without the Coalition's consent. A.R., Hrg. Exh. List, Exhibit 4, p. 19 (Paragraph 1.b.). The City also may "not lease, sell, transfer, grant, or assign to any other person or entity" and may "not request or receive ... on behalf of any other person or entity" the mitigative effects of the recharge occurring under 181C. A.R., Hrg. Exh. List, Exhibit 4, p. 20 (Paragraph 1.e.). However, if there was no recharge occurring under 181C that could provide mitigation in the future, it makes no sense for the *Settlement Agreement* to carve out all of these details, yet allow the City itself to use 181C for mitigation with just the filing of "the appropriate application," A.R., Hrg. Exh. List, Exhibit 4, p. 20 (Paragraph 1.e.), instead of just stating that no mitigation could ever be claimed by anyone, anywhere, at any time. Such use of a scalpel, rather than a cleaver, in the *Settlement Agreement* indicates that this issue is more nuanced than the Department or the Coalition care to admit.

If the City itself intended "to utilize [181C] for groundwater recharge **or mitigation** purposes associated with existing or future groundwater rights," the City was required to "file **the appropriate application for permit and/or transfer**." A.R., Hrg. Exh. List, Exhibit 4, p. 20 (Paragraph 1.e.) (emphasis added). In contrast to all the prior provisions—which either require

the Coalition's consent or just outright bar certain actions to be taken—Paragraph 1.e. only requires that, in order for the City itself to claim the recharge occurring under 181C as mitigation, the City had to file an appropriate application.

The application for 12261 is an appropriate application for the City to realize the mitigative benefits provided by 181C. The *Settlement Agreement* provides, without further definition, that if the City itself wants to claim the mitigative benefits of the recharge provided by 181C "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, p. 20 (Paragraph 1.e.). 12261 is a "future groundwater right[]" seeking to claim the mitigation benefits of 181C, as contemplated in this provision.[13] The application for permit 12261 is an "appropriate application for permit and/or transfer" in accordance with the *Settlement Agreement*, because the mitigation provided by 181C is already specified in the *Settlement Agreement* and 12261 can be granted with reference to 181C, which is an administrative procedure frequently undertaken by the Department.

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[13] Footnote 20 of the *Coalition's Response Brief* asserts that it was a "patronizing argument" for the City to assert that the Coalition is very familiar with Idaho water law and understood the terms of art associated with filing of a transfer application or an application for permit when interpreting Paragraphs 1.a or 1.b of the *Settlement Agreement*. The City's argument is not patronizing. Contractual interpretation law considers the context of how and when an agreement was entered into, including the sophistication of the parties to the agreement. The Coalition is very involved in water matters, in many forums, and therefore, the City asserts that the terms used in the *Settlement Agreement* should be interpreted consistent with water law terms of art. In Paragraph 1.a. and 1.b, both paragraphs 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" 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. Because 27-12261 is an application for permit, and not a transfer application, the plain language of the provisions of Paragraphs 1.a and 1.b do not require written consent from the Coalition.

The Coalition has stipulated that only Idaho Code § 42-203A(5)(a) remains contested. *Coalition's Response Brief*, p. 1. This limits the contested issues to just whether 12261 "will reduce the quantity of water under existing water rights." Idaho Code § 42-203A(5)(a). The Coalition has "also stipulated that the modeling 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 [12261]." *Coalition's Response Brief*, p. 1 (footnote and citation to the record omitted). In short, the Coalition has agreed that the modeling of the annual recharge of 2,080.8 AF into the ESPA from Jensen's Grove (together with the other mitigation proposed by the City) will—in reality—sufficiently mitigate for 12261, which resolves the issue under Idaho Code § 42-203A(5)(a).

"There is nothing improper about mitigation as a beneficial use." *North Snake Ground Water Dist. v. Idaho Dep't of Water Res.*, 160 Idaho 518, _____, 376 P.3d 722, 731 (2016). By the same token, that mitigation does not have to be listed as a beneficial use for a water right to be used as mitigation. 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. Here, it is uncontested that the actual utilization of 181C provides mitigation for the use proposed by 12261.

The Coalition proposes to draw a bright-line distinction between mitigation by non-use (which the Coalition concedes does not require any transfer application) and mitigation through use (which the Coalition argues must always be listed as a beneficial use). *Coalition's Response Brief*, p. 22. This proposed bright-line rule has the appeal of all such rules—it is clear cut and definitive. However, it is not the state of the law in Idaho, and should not be adopted by this Court for two reasons. First, the *Settlement Agreement* recognizes the recharge occurring under 181C, with the numerous, involved conditions described above and, because the *Settlement Agreement* is incorporated into the *Partial Decree*, the City is not changing the nature of use of 181C. This renders the Coalition's argument in this regard moot, or at least beyond the scope of this case. Second, considering the mitigation of 181C separately from the recharge specified in the *Settlement Agreement*, there is no reason to require the creation of a duplicitous transfer proceeding, even if it could be combined with a permit proceeding. Doing so would not improve the notice to interested parties, nor would it make the administration of water rights by the Department any clearer. Mandating such repetition would only increase the difficulty and complexity for every applicant as well as the Department, without adding anything.

D. The matters raised in this appeal are not barred by *Res Judicata*, nor does it present an impermissible collateral attack on 181C.

The Coalition claims that the "City's arguments are barred by *res judicata*." *Coalition's Response Brief*, p. 23 (capitalization modified, emphasis omitted, italics in original). However, the doctrine of *res judicata* "is comprised of claim preclusion (true *res judicata*) and issue

preclusion (collateral estoppel)." *Hindmarsh v. Mock*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002). The Coalition does not distinguish between these two subsets of *res judicata* nor does the coalition describe the elements necessary for either kind of preclusion to apply, except to describe *res judicata* in the most general terms. *See Coalition's Response Brief*, pp. 23-26.

The matter before this Court is a contractual interpretation case, both as to the elements and provisions of 181C (a water right, which as described above, is interpreted under principles of contractual interpretation) and the *Settlement Agreement* that the City asserts is part of the water right. These issues have not been adjudicated by a court previous to the action now before this Court.

The Coalition seizes on two letters in the record relating to the approval of 72385 in an attempt to show that the City has already had its day in court on the issue of recharge under 181C. *See Coalition's Response Brief*, p. 25 (citing A.R., Hrg. Exh. List, Exhibits 8 and 9). However, neither letter provides a legal argument on contractual interpretation. Further, there is nothing in the record showing any adjudication—other than inferences drawn from changes in the approval of 72385 from the proposed form of the approval. Nothing shows that a hearing occurred, that the parties briefed the issue, or that a decision was issued. The law—regardless of the forum—cannot operate merely by letter. Thus, there is no decision that would preclude or bar the City's arguments raised in this appeal.

In a similar vein, the Department argues that the City's position "constitutes an impermissible collateral attack on the [*Partial Decree*]" because the Department characterizes the City's argument as asking this Court to "interpret the [*Partial Decree*] ... inconsistent with the

plain language of the purpose of use element" of 181C. *IDWR Respondents' Brief*, p. 15. The implicit assumption in the Department's argument is that only the face of the *Partial Decree* is valid. What the Department means by the "purpose of use element," *IDWR Respondents' Brief*, p. 15, is just that portion of the *Partial Decree* under the heading "PURPOSE AND PERIOD OF USE." A.R., Hrg. Exh. List, Exhibit 106, p. 92. Based on this position, the Department largely continues to refuse to consider the *Settlement Agreement*.

The City's position is that the *Settlement Agreement* is incorporated into the *Partial Decree*. The Department and the District Court both erred by denying acknowledgement of that incorporation. The City is contending that 181C provides sufficient mitigation for 12261 because (1) the *Settlement Agreement* is incorporated, (2) any element of a water right can be listed and/or further described or limited anywhere in the decree (even not under the heading of the form decree) and is of equal importance, and (3) the *Settlement Agreement* specifically provides for recharge and/or mitigation with some specific limitations. This case is not a collateral attack on the *Partial Decree*—rather, it is the City's effort to recognize the mitigative benefits specified in the *Settlement Agreement* and the recognition of seepage on the face of 181C, which are inextricable parts of 181C. While an interpretation inconsistent with a decree's plain language may constitute an impermissible collateral attack, here the Department and the District Court below refused to consider all of the plain language, and erred by using just a portion of the *Partial Decree*—particularly by failing to acknowledge the *Settlement Agreement*—to determine the merits of the City's argument.

E. The Coalition is not entitled to an award of attorney fees.

The Coalition argues that it should be awarded attorney fees under Idaho Code § 12-117. *Coalition's Response Brief*, pp. 29-31. The Department has not asserted a claim for fees. The core of the Coalition's argument is that the City has lost in three separate forums, and has continued to raise the same arguments and, therefore, the Coalition should be awarded attorney fees on appeal. *Coalition's Response Brief*, pp. 30-31.

The Coalition's argument wrongfully attempts to place the City on the horns of a dilemma. On the one hand, the Coalition points out that it is improper to merely ask this Court to "'second-guess' the District Court," and the Coalition also contends that "the City has advanced the same ... arguments at every turn." *Coalition's Response Brief*, p. 30. On the other hand, what the Coalition fails to acknowledge is that "[t]his Court has repeatedly held: To properly raise an issue on appeal there must either be an adverse ruling by the court below or the issue must have been raised in the court below, an issue cannot be raised for the first time on appeal." *Skinner v. U.S. Bank Home Mortg.*, 159 Idaho 642, 650, 365 P.3d 398, 406 (2016) (citations and internal quotation marks omitted).

The resolution to these principles lies in the "good faith basis" to appeal. *Coalition's Response Brief*, p. 29 (quoting *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, _____, 367 P.3d 193, 207 (2016)). Where an appellant has "brought the appeal in good faith" and raised a "genuine issue of law" an award of attorney fees is inappropriate. *Ada Cnty. v. City of Garden City ex rel. Garden City Council*, 155 Idaho 914, 919, 318 P.3d 904, 909 (2014) (citation omitted). The City has a good faith basis to believe that the Department and the District Court erred by

refusing to consider the *Settlement Agreement* by exalting form over substance in determining that elements must be listed only on the face of a decree under a certain heading. The City has continued to refine its arguments to convey its position in this matter, and has not raised all of the exact same arguments to this Court that were previously made below. The issue of incorporation in water right decrees in general, as well as in this particular *Partial Decree*, required the clarification of this Court. The City could not simply walk away from a *Settlement Agreement* in believed preserved a critical component for its future growth—ground water recharge occurring at Jensen's Grove—against the other party to that contract (the Coalition). This is especially the case given the plain reading of Paragraph 1.e of the *Settlement Agreement*.

Finally, even though the City and Coalition may disagree as to how the *Settlement Agreement* should be interpreted, it cannot be said that the positions asserted by the City are unreasonable. It is not unreasonable for the City to seek a proper interpretation of 181C and the *Settlement Agreement*. Thus, even were the Coalition to prevail on appeal (which it should not), the Coalition should not be awarded attorney fees. The City has pursued the appeal in good faith.

III. CONCLUSION.

The uncontroverted facts show that 12261 will not reduce the amount of water available to other water rights because of the mitigative benefits provided by 181C. Each year, 2,080.8 AF enters the ESPA from Jensen's Grove on account of diversions under 181C. The *Settlement Agreement*—which was incorporated into the *Partial Decree*—allows the City, itself, to claim credit for these mitigative benefits if it files "the appropriate application for permit and/or transfer." A.R., Hrg. Exh. List, Exhibit 4, p. 20 (Paragraph 1.e.). The City has done just that by filing 12261.

The Department and District Court below erred by refusing to consider the *Settlement Agreement*, despite its incorporation into the *Partial Decree*; exalting form over substance by requiring all of a specific element to be in one, and only one, location on the *Partial Decree*; and by requiring the City to file a transfer in addition to the current application to add a use to 181C that is already contemplated in the *Settlement Agreement*. *See* Idaho Code § 67-5279(3). These errors violate the statutory provisions allowing a water right decree to incorporate elements, Idaho Code § 42-1412(6); specifying that an (entire) decree defines a water right, *id.*; and allowing the City to file an application for permit, Idaho Code § 42-203A. These errors were also made in excess of the statutory authority of the Department, which has no authority to ignore incorporated portions of water rights. Further, these errors were made upon an unlawful procedure, wherein the Department refused to consider the *Settlement Agreement*, which explicitly provides for recharge/mitigation, despite its being incorporated into the *Partial Decree*. The Department's decision is not supported by substantial evidence because, instead of considering the plain language of the *Partial Decree* and the *Settlement Agreement*, the Department improperly considered extrinsic evidence and only certain portions of the *Partial Decree*. Finally, this decision is arbitrary, capricious, and an abuse of discretion because the Department frequently issues new permits that reference mitigation provided by another water right without requiring a transfer be filed on the mitigating water right.

These errors have prejudiced the City's substantial rights, which include an interest in the correct adjudication of its water right and the full consideration of the complete *Partial Decree*,

which included the *Settlement Agreement*. Idaho Code § 67-5279(4). For these reasons, the Department's decision below should be reversed.

Dated this 23rd day of November, 2016.

Robert L. Harris

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

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Addendum A

to the

Appellant's Reply Brief

Stipulations for Withdrawal of
Protest to Permit No. 1-10625

Holden Kidwell
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L A W O F F I C E S

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June 13, 2014

James Cefalo
Hearing Officer
Idaho Department of Water Resources
900 N. Skyline Drive, Suite A
Idaho Falls, ID 83402-1718

RE: Executed Stipulations for Withdrawal of Protest for Application for Permit Nos. 01-10625 and 01-10626 in the Name of Peoples Canal and Irrigation Company and Snake River Valley Irrigation District, Respectively, and the Idaho Department of Fish & Game.

Dear James:

Enclosed are two *Stipulations for Withdrawal of Protest* entered into between the Peoples Canal and Irrigation Company and the Snake River Valley Irrigation District and the Idaho Department of Fish & Game with regards to the above-referenced applications for permit. The stipulations provide for certain conditions to be included in the permits for these applications and their eventual licenses should they be licensed. As provided in paragraph 2, with these stipulations and others, we propose that they be incorporated and then circulated amongst the parties as a proposed order. The parties will then be able to review the language in the permits to ensure that their conditions are there.

If you have any questions or concerns, please let me know.

Best Regards,

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

Enclosures

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Attorneys for Peoples Canal & Irrigation Co.

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT NO. 01-10625 IN THE NAME OF PEOPLES CANAL & IRRIGATION CO.	**STIPULATION FOR WITHDRAWAL OF PROTESTS**

THIS STIPULATION FOR WITHDRAWAL OF PROTESTS (this "Stipulation") is made and entered into as of the 12th day of June, 2014, by and between **Peoples Canal & Irrigation Company** (hereinafter, "Peoples"), and the **Idaho Department of Fish and Game** ("IDFG"). Peoples and the IDFG may hereinafter collectively be referred to as the "Parties."

RECITALS:

A. Application for Permit No. 01-10625 (hereinafter, simply "01-10625") seeks a water right from the Idaho Department of Water Resources ("IDWR") for 350 cfs with a

priority date of June 19, 2013 for ground water recharge purposes in Bingham County, Idaho.

B. On September 24, 2012, after 01-10625 was advertised pursuant to Idaho law, it was protested on various grounds by the IDFG. 01-10625 was also protested by the United States Department of the Interior, Bureau of Land Management (hereinafter, "BLM"), the Surface Water Coalition (the "SWC"), and the Idaho Power Company ("IPCO").

C. Peoples desires to conduct managed ground water recharge both within the Peoples Canal and at off-canal sites with recharge water delivered through the Peoples Canal. In both instances, it is proposed that the ground water recharge will be measured and monitored on a continuous basis. A map of the proposed recharge place of use primarily within the Peoples Canal is attached hereto as **Exhibit 1**.

D. Pursuant to Idaho Code § 42-602 *et seq.*, the State of Idaho, acting through IDWR, is charged with the orderly distribution of water consistent with the prior appropriation doctrine within the State of Idaho. Idaho Water District #1 ("Water District #1") is the instrumentality by which IDWR administers water rights in the Upper Snake River Basin.

E. Idaho Code § 42-234 vests IDWR with the authority to grant permits and licenses for ground water recharge subject to later control from the director:

> (4) The director of the department of water resources may regulate the amount of water which may be diverted for recharge purposes and may reduce such amount, even though there is sufficient water to supply the entire amount originally authorized by permit or license. To facilitate necessary financing of an aquifer recharge project, the director may fix a term of years in the permit or license during which the amount of water authorized to be diverted shall not be reduced by the director under the provisions of this subsection.
>
> (5) To ensure that other water rights are not injured by the operations of an aquifer recharge project, the director of the department of water resources shall have the authority to approve, disapprove or require alterations in the methods employed to achieve ground water recharge. In the event that the director determines that the methods of operation are adversely affecting existing water rights or are creating conditions adverse to the beneficial use of water under existing water rights, the director shall order the cessation of operations until such alterations as may be ordered by the director have been accomplished or such adverse effects otherwise have been corrected.

Idaho Code § 42-234(4)-(5).

F. Idaho Code § 42-1737(a) requires the approval of ground water recharge projects by the

Idaho Water Resource Board for project proposals that seek "the diversion of natural flow water appropriated pursuant to section 42-234, Idaho Code, for a managed recharge project in excess of ten thousand (10,000) acre-feet on an average annual basis . . ."

G. In lieu of participating in administrative hearings concerning 01-10625, as provided for under Idaho law, the Parties hereby agree as set forth below, the result of which is withdrawal of the Protestants' protests and issuance of a permit for development of 01-10625.

AGREEMENTS:

1. **Conditions To Be Included On Permit for 01-10625.** IDWR shall include the following conditions, in addition to any others that may be included by IDWR or otherwise agreed to with the other protestants (provided they do not conflict with the following conditions) in the final order issuing Permit No. 01-10625:

    a. "Water may only be diverted under this right in an amount that does not reduce flows in the Snake River below 2,070 cfs measured in the Snake River at Blackfoot U.S.G.S. Gage No. 13062500."

    b. "Absent engineering controls to prevent fish entrainment into recharge facilities, when any amount of water is available for diversion under this right, and after consultation by the right holder with the Idaho Department of Fish and Game, the amount of water diverted under this right from the river will be adjusted up and down at a rate which minimizes the possibility of fish entrainment in the recharge facilities. Provided, however, that flows diverted into recharge facilities may be adjusted, without consultation, by Water District No. 1 personnel consistent with its statutory duties to regulate and adjust diversions when all or a portion of this right is no longer in priority."

    c. "Diversions off of the right holder's private canals to designated off-canal recharge sites shall be designed and constructed as necessary to minimize negative impacts to fish. The right holder shall provide information concerning the design of such diversion structures to the Idaho Department of Fish and Game for review and comment prior to construction."

    d. "Upon a good faith request from the Idaho Department of Fish and Game, the right holder shall meet to discuss and attempt to resolve in good faith any concerns associated with the exercise of this right and potential negative effects on fish and wildlife resources."

1. **No Requirement for Screening of Peoples Canal Heading.** To ensure there is no confusion with the interpretation of paragraph 1.c. above, the Parties agree that nothing in this Stipulation shall require Peoples to install fish screens or other equipment at the

Peoples Canal diversion heading on the Snake River.[1] Paragraph 1.c. only requires installation of such equipment for the diversion structures associated with off-canal recharge sites that divert from the Peoples Canal or a lateral canal or ditch that diverts from the Peoples Canal. Notwithstanding the above, nothing herein shall prevent the Parties from agreeing in the future to the installation of fish screens or other equipment at the diversion heading pursuant to terms and conditions agreed to by the Parties.

2. **Issuance of Proposed Order and Subsequent Withdrawal of Protests.** The Parties shall instruct IDWR to issue a proposed order including the conditions set forth in Paragraph 1 as set forth herein. The Parties shall have fourteen (14) days thereafter to object to the language in the proposed order by filing notice of such objection with IDWR if the conditions set forth in Paragraph 1 are not included. If no objections are received within the fourteen (14) day time period, the protests of the Protestants shall be deemed withdrawn, and IDWR shall thereafter issue a final order approving 01-10625 consistent with this Agreement. Peoples may submit a copy of this executed Stipulation to IDWR and notify IDWR of this procedure and withdrawal of protests. If IDWR does not include the conditions agreed to in Paragraph 1, this stipulation shall be deemed null and void and the Parties will retain their respective rights in this contested case, unless the Parties otherwise agree to IDWR's conditions.

3. **Reservation of Rights.** The Parties agree and acknowledge that this Stipulation only resolves the protests to 01-10625, and that the Protestants reserve all rights to protest other applications for ground water recharge permits, transfers, and any other proceedings. The Parties shall not use this Stipulation in any other administrative or judicial proceedings for any purpose, other than an action to enforce its terms as provided in paragraph 8 below.

4. **Reliance Upon Statements/Integration and Merger.** The Parties hereto specifically acknowledge that they were represented by counsel in this matter, and agree that other than as is set forth herein, they have executed this Stipulation without relying upon any statements or representations written or oral, as to any statement of law or fact made by any other party or attorney. The Parties to this Stipulation have read and understand the Stipulation, and warrant and represent that this Agreement is executed voluntarily and without duress or undue influence on the part of or on behalf of any party. This Agreement represents the sole entire and integrated Stipulation by and between the parties hereto, and supersedes any and all prior understandings or agreements whether written or oral except as specifically provided herein.

5. **Successors and Assigns.** This Agreement shall be binding upon and shall inure to the benefit of each Parties' officers, directors, shareholders, heirs, successors and assigns, and shall be specifically enforceable.

---

[1] The legal description for the Peoples Canal diversion is the NWSENE of Section 26, Township 1S, Range 36E.

6. **Waiver and Modification.** No provision of this Agreement may be waived, modified, or amended except by written agreement executed by all of the Parties hereto.

7. **Enforcement and Interpretation.** This Stipulation is a valid and binding obligation of the parties, and their successors or assigns. It shall be admissible and enforceable according to its terms, and venue in any subsequent action shall rest within the State of Idaho. This Stipulation is subject to interpretation in accordance with the laws of the State of Idaho.

8. **Counterparts.** This Stipulation may be executed in counterparts, each of which is deemed an original but all of which constitute one and the same instrument. The signature pages may be detached from each counterpart and combined into one instrument.

PEOPLES CANAL & IRRIGATION CO.

By: Jerry R. Rigby, of the firm Rigby, Andrus & Rigby Law, P.L.L.C.
Attorneys for Peoples Canal & Irrigation Co.

IDAHO DEPARTMENT OF FISH AND GAME

By: W. Dallas Burkhalter, of the Idaho Attorney General's Office
Attorneys for the Idaho Department of Fish and Game

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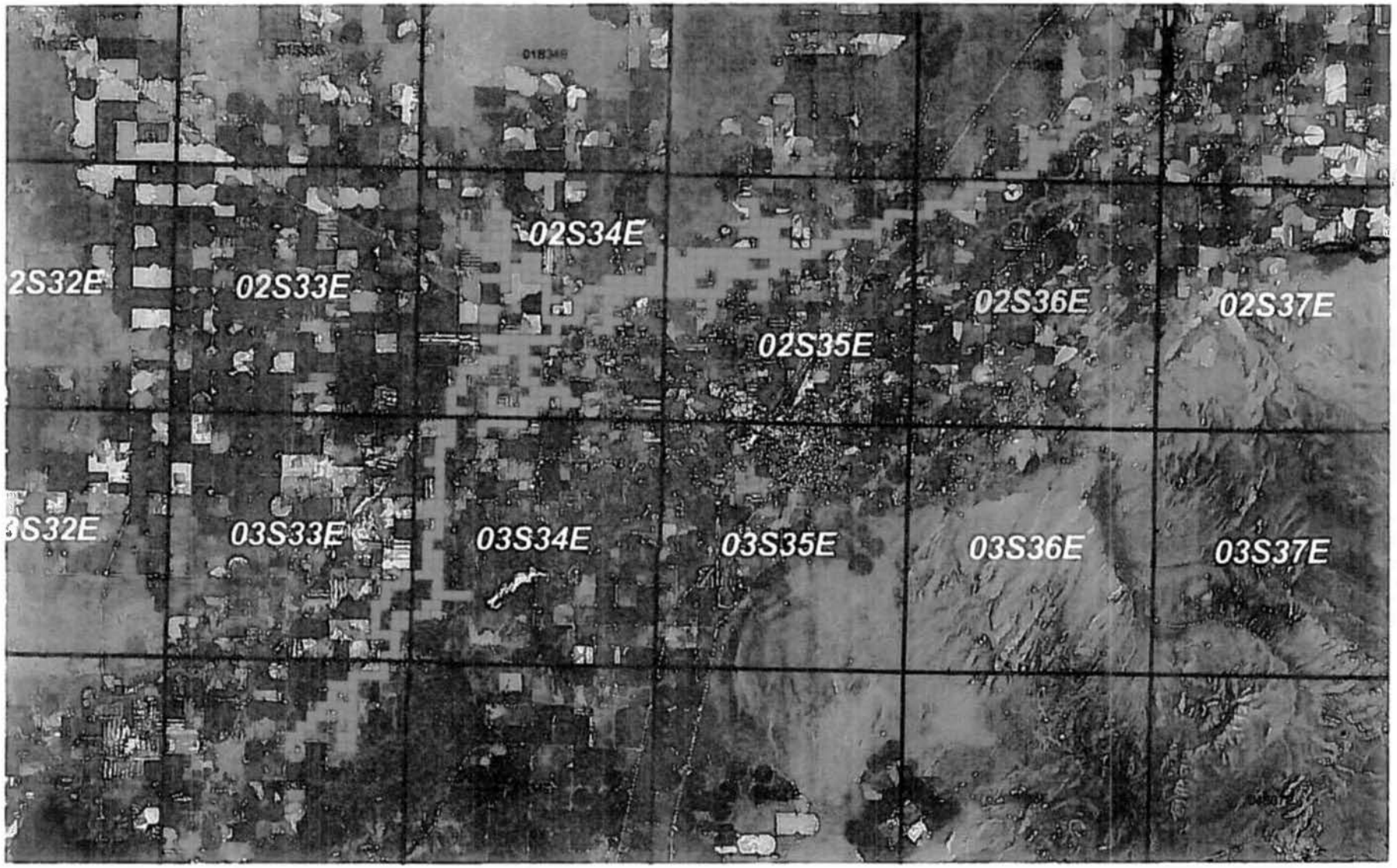
EXHIBIT 1

Proposed Place of Use



01-10625

Addendum B

to the

Appellant's Reply Brief

Issued Permit No. 1-10625

State of Idaho
Department of Water Resources

Permit to Appropriate Water

NO. 1-10625

Priority: June 19, 2013 Maximum Diversion Rate: 350.00 CFS

This is to certify, that PEOPLES CANAL & IRRIGATION CO
1050 W HWY 39
BLACKFOOT ID 83221

has applied for a permit to appropriate water from:

Source: SNAKE RIVER **Tributary:** COLUMBIA RIVER

and a permit is APPROVED for development of water as follows:

BENEFICIAL USE	PERIOD OF USE	RATE OF DIVERSION
GROUND WATER RECHARGE	01/01 to 12/31	350.00 CFS

LOCATION OF POINT(S) OF DIVERSION:

SNAKE RIVER L1 (NW¼SE¼NE¼) Sec. 26 Twp 01S Rge 36E, B.M. BINGHAM County

State of Idaho
Department of Water Resources

Permit to Appropriate Water

NO. 1-10625

PLACE OF USE: GROUND WATER RECHARGE

Twp Rge Sec	NE				NW				SW				SE				Totals
	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
01S 36E 26			X L 17					X L 3 L17	X L 4	X L 4							
01S 36E 27													X		X L 2 L 4	X L 1	
01S 36E 28																X	
01S 36E 33	X			X							X	X	X		X	X	
01S 36E 34		X L 10			X L 1	X	X			X L 3							
02S 34E 5																X	
02S 34E 8	X						X		X	X		X	X		X	X	
02S 34E 9						X	X			X	X						
02S 34E 12																X L 4	
02S 34E 13	X L 1		X	X L 2					X	X	X	X	X L 3	X	X	X L 4	
02S 34E 14											X	X	X	X	X	X	
02S 34E 15										X	X						
02S 34E 16	X	X	X	X		X	X	X		X	X		X	X			
02S 34E 17	X	X											X	X			
02S 34E 20			X	X									X	X			
02S 34E 22	X			X	X	X	X		X	X		X	X	X			
02S 34E 23	X	X	X			X						X	X	X	X		
02S 34E 27					X	X											
02S 34E 28	X	X	X		X	X	X	X		X			X	X	X		
02S 34E 29	X	X									X	X	X	X	X		
02S 34E 31				X									X			X L 1	
02S 34E 32				X		X	X				X L 4		X			X L 1	
02S 34E 33	X	X		X							X L 4	X L 3	X	X	X L 2	X L 1	
02S 34E 34			X				X	X		X			X	X			
02S 35E 1												X			X	X	
02S 35E 4										X	X						
02S 35E 5													X				
02S 35E 7											X L 4				X	X	

State of Idaho
Department of Water Resources

Permit to Appropriate Water

NO. 1-10625

02S 35E	8				X							X	X			X	X		
02S 35E	9	X	X	X		X	X	X	X	X		X	X	X	X	X	X		
02S 35E	10											X	X	X	X	X			
02S 35E	11			X	X			X	X		X								
02S 35E	12					X	X	X											
02S 35E	15						X												
02S 35E	16	X	X	X				X	X	X		X	X						
02S 35E	17	X	X	X	X	X	X		X	X		X	X						
02S 35E	18	X	X	X	X	X	X L1	X L2	X	X	X L3	X L4	X		X	X	X		
02S 35E	20						X	X											
02S 36E	4						X L3												
02S 36E	5	X L1	X L2			X L3		X	X		X								
02S 36E	6									X		X L7	X	X	X				
03S 33E	24																X		
03S 33E	25	X	X			X			X	X	X	X				X	X		
03S 33E	36	X	X	X			X	X	X				X		X	X			
03S 34E	4		X L2			X L3	X L4												
03S 34E	5	X L1	X L2	X															
03S 34E	6	X L1			X									X	X	X			
03S 34E	7		X	X		X									X	X			
03S 34E	18		X	X		X			X				X		X	X			
03S 34E	19			X		X			X	X		X L4	X		X	X			
03S 34E	29							X	X L2										
03S 34E	30		X	X	X					X		X L4	X		X				
04S 33E	1					X L3		X	X										
04S 33E	2			X	X					X	X	X			X	X			
04S 33E	10	X		X	X					X		X	X		X				
04S 33E	11		X	X		X	X		X				X		X	X			
04S 33E	14			X L1		X													
04S 33E	15						X												

State of Idaho
Department of Water Resources

Permit to Appropriate Water

NO. 1-10625

CONDITIONS OF APPROVAL

1. Proof of application of water to beneficial use shall be submitted on or before **November 01, 2019.**
2. Subject to all prior water rights.
3. Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 01.
4. Water may only be diverted under this right in an amount that does not reduce flows in the Snake River below 2,070 cfs measured in the Snake River at Blackfoot U.S.G.S. Gage No. 13062500.
5. Water may only be diverted for recharge under this right when 2,700 cfs or more is flowing past Minidoka Dam.
6. The diversion of water under this right shall not exceed ten thousand (10,000) acre-feet on an average annual basis.
7. Absent engineering controls to prevent fish entrainment into recharge facilities, when any amount of water is available for diversion under this right, and after consultation by the right holder with the Idaho Department of Fish and Game, the amount of water diverted under this right from the river will be adjusted up and down at a rate which minimizes the possibility of fish entrainment in the recharge facilities. Provided, however, that flows diverted into recharge facilities may be adjusted, without consultation, by Water District No. 1 personnel consistent with its statutory duties to regulate and adjust diversions when all or a portion of this right is no longer in priority.
8. Diversions off of the right holder's private canals to designated off-canal recharge sites shall be designed and constructed as necessary to minimize negative impacts to fish. The right holder shall provide information concerning the design of such diversion structures to the Idaho Department of Fish and Game for review and comment prior to construction.
9. Upon a good faith request from the Idaho Department of Fish and Game, the right holder shall meet to discuss and attempt to resolve in good faith any concerns associated with the exercise of this right and potential negative effects on fish and wildlife resources.
10. This right is subject to all applicable provisions of Section 42-234, Idaho Code.
11. During the development period of this permit, the permit holder agrees to obtain all right-of-way authorizations that may be required, if any, by the United States Department of the Interior, Bureau of Land Management under Title V of the Federal Land Policy and Management Act of 1976 as amended (43 U.S.C. 1761) and the regulations found in 43 CFR 2800, in order to transport water diverted under this right across BLM land.
12. Pursuant to Section 42-234(4), Idaho Code, to ensure that other water rights are not injured by the operations of the recharge project authorized by this right, the Director has authority to approve, disapprove, or require alterations in the methods employed to achieve ground water recharge.
13. Pursuant to Section 42-234(3), Idaho Code, the Director may reduce the amount of water that may be diverted for recharge purposes under this right even though there is sufficient water to supply the entire amount authorized for appropriation under this right.
14. Approval of this permit does not constitute approval by the Idaho Water Resource Board as may be required pursuant to Section 42-1737, Idaho Code.

State of Idaho
Department of Water Resources

Permit to Appropriate Water

NO. 1-10625

15. The right holder shall record the daily quantity of water diverted for ground water recharge and shall report the diversion data for the prior calendar year to the Department by February 1 each year. Reporting shall occur in the manner specified by the Department, consistent with Section 42-701, Idaho Code. To facilitate this reporting requirement, the right holder shall install and maintain a totalizing measuring device approved by the Department at each point of diversion and at each point where water is delivered from the conveyance system into a designated recharge site.
16. Consistent with Section 42-234(5), Idaho Code, seepage from canals incidental to delivery of irrigation water shall not be considered ground water recharge under this right. Canal seepage will be considered to be ground water recharge only when the canals are not conveying water for irrigation or other beneficial uses.
17. Prior to the diversion and use of water under this approval, the right holder shall comply with applicable water quality permitting requirements administered by the Department of Environmental Quality or the Department of Agriculture.
18. This right does not grant any right-of-way or easement across the land of another.
19. Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which the permit holder had no control.

This permit is issued pursuant to the provisions of Section 42-204, Idaho Code. Witness the signature of the Director, affixed at Boise, this 6th day of October, 2014.

for GARY SPACKMAN
Director

Addendum C

to the

Appellant's Reply Brief

Memorandum Decision and Order
in re: Permit No. 35-14402
(Karl and Jeffrey Cook)

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

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, Petitioners, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES, Respondent, and KARL T. COOK and JEFFREY M. COOK, Intervenors. IN THE MATTER OF APPLICATION FOR PERMIT NO. 35-14402 In the name of Jeffrey M. Cook	Case No. CV-42-2015-2452 **MEMORANDUM DECISION AND ORDER**

I.

STATEMENT OF THE CASE

A. Nature of the case.

This case originated when the Coalition filed a *Petition* seeking judicial review of a final order of the Director of the Idaho Department of Water Resources ("IDWR" or "Department").[1] The order under review is the *Preliminary Order Issuing Permit* entered on May 15, 2015. The *Preliminary Order* approves application for permit number 35-14402 in the names of Karl and Jeffrey Cook (collectively "the Cooks"). The Coalition asserts that the *Preliminary Order* is contrary to law and requests that this Court set it aside and remand for further proceedings.

B. Course of proceedings and statement of facts.

This matter concerns an application to appropriate water filed by the Cooks. R., pp.1-5. The application was filed on August 29, 2014. *Id.* It seeks to appropriate 3.07 cfs of ground water for the irrigation of 560 acres in Jefferson County.[2] *Id.* The proposed point of diversion is a pre-existing ground water well that services the Cooks' property. *Id.* at 1. Aside from the application, the Cooks hold six other ground water rights for the irrigation of the same 560 acres. *Id.* at 3; Ex. 103-108. Those rights are diverted via the Cooks' well and cumulatively permit them to withdraw ground water at rate of diversion of 5.13 cfs up to a maximum diversion volume of 2,187.8 acre-feet annually. *Id.* The intent of the application, as stated therein, is to authorize the withdrawal of water via the well at a higher rate of diversion "with ***NO INCREASE*** in the decreed Diversion Volume . . . ." R., p.3. In other words, the Cooks' application seeks an additional water right to withdraw ground water at a higher rate of diversion on the representation that they will not increase their total annual diversion volume as a result of the new appropriation. *Id.*

The Cooks' application was protested by the Coalition. *Id.* at 10-12. Among other things, the Coalition asserted that the Cooks failed to establish the new appropriation will not

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

[2] Although the Cooks' application seeks to appropriate 5.0 cfs on its face, the Cooks clarified and confirmed at the administrative hearing that they intended only to seek the appropriation of 3.07 cfs. R., p.48. Ex.101, p.4.

reduce the quantity of water under existing water rights. *Id.* An administrative hearing was held before the Department on April 24, 2015. Tr., pp.1-202. Department employee James Cefalo acted as hearing officer. *Id.* at 5. On May 15, 2015, he issued his *Preliminary Order*, finding that the proposed appropriation will not reduce the quantity of water under existing water rights so long as it is appropriately conditioned. *Id.* at 53. To ensure no injury, the hearing officer held that "Permit 35-14402 and the existing ground water rights on the Cooks' property should be limited to a combined maximum annual diversion volume of 1,221 acre-feet." *Id.* at 56. The hearing officer proceeded to issue Permit to Appropriate Water No. 35-14402 in the names of Karl and Jeffrey Cook with the following conditions:

> 3. Rights 35-7280, 35-7281, 35-13241, 35-14334, 35-14335, 35-14336 and 35-14402 when combined shall not exceed a total diversion rate of 8.20 cfs, a total annual maximum diversion volume of 1,221 af at the field headgate, and the irrigation of 560 acres.
>
> 4. To mitigate for the depletion of water resulting from the use of water under this right and to prevent injury to senior water right holders, the right holder shall never exceed the combined annual volume limit included in the conditions for this right.
>
> 5. Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 120.
>
> 6. Prior to diversion of water under this right, the right holder shall install and maintain a totalizing measuring device of a type approved by the Department as a part of the diverting works.
> . . .
>
> 9. Noncompliance with any condition of this right, including the requirement for mitigation, is cause for the director to issue a notice of violation, cancel or revoke the right, or, if the right is included in a water district, request that the watermaster curtail diversion and use of water.

Id. at 57.

On June 25, 2015, the Coalition filed the instant *Petition for Judicial Review*, asserting that the hearing officer's *Preliminary Order* is not supported by substantial evidence in the record and is contrary to law. The case was reassigned by the clerk of the court to this Court on that same date. The parties subsequently briefed the issues raised on judicial review. On

October 26, 2015, the Court entered an *Order* permitting the Cooks to appear as intervenors. A hearing on the *Petition* was held before the Court on December 3, 2015. The parties did not request the opportunity to submit additional briefing and the Court does not require any. Therefore, this matter is deemed fully submitted for decision on the next business day or December 4, 2015.

II.
STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1). The court shall affirm the agency decision unless it finds that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). Further, the petitioner must show that one of its substantial rights has been prejudiced. I.C. § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record. *Barron v. IDWR,* 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

III.
ANALYSIS

A. The hearing officer's *Preliminary Order* is affirmed.

An application for permit to appropriate water is evaluated against the criteria set forth in Idaho Code § 42-203A. One criterion is whether the proposed appropriation "will reduce the

quantity of water under existing water rights."[3] I.C. § 42-203A(5). If so, the Department may deny the application. *Id.* However, an application that may 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.

The hearing officer recognized that the appropriation proposed by the Cooks constitutes a consumptive use of water. R., p.51. As such, without mitigation the appropriation will reduce the quantity of water available under existing water rights. *Id.* To prevent such a reduction, the hearing officer required mitigation from the Cooks in the form of a cutback in the annual diversion volume authorized under their other six water rights. *Id.* at 56. He ultimately determined that if the maximum diversion volume of the new appropriation and the other six water rights is limited to 1,221 acre-feet annually, the new appropriation will not reduce the quantity of water under existing water rights. *Id.*

To reach this determination the hearing officer engaged in the following analysis. First, he calculated that the Cooks are authorized to divert up to 2,187.7 acre-feet of water annually under their existing six water rights. *Id.* at 49. Next, recognizing that the Cooks have never diverted that full volume, the hearing officer computed the Cooks' actual authorized historical use under the existing rights. *Id.* at 51-553. He examined the record to find which year in the last fifteen the Cooks diverted the most water. *Id.* His examination revealed that the highest water use occurred in 2012. *Id.* at 49-50. He recognized, and it is undisputed in the record, that the Cooks have historically withdrawn ground water at a higher rate of diversion than that authorized under their existing rights.[4] *Id.* This made the hearing officer's task more difficult. However, the hearing officer took steps to account for the unauthorized diversion to make sure it did not work to the Cooks' advantage. *Id.* Importantly, he undertook the task of analyzing how much water the Cooks would have diverted in 2012 *had they been limited to their authorized diversion rate of 5.13 cfs.* *Id.* Had the Cooks been so limited, the hearing officer found they would have diverted 1,221 acre-feet of ground water in 2012. *Id.* at 53.

---

[3] The Coalition does not challenge the hearing officer's findings that the additional criteria set forth in Idaho Code 42-203A(5) have been satisfied.

[4] The evidence in the record establishes that the Cooks were unaware that their historic water use was not consistent with their water rights until Spring 2014. Tr., p.12. Once they were aware, the Cooks filed the instant application for permit in an attempt to address the issue.

Finally, the hearing officer determined that if the Cooks' new appropriation and existing water rights are limited to a combined annual diversion volume of 1,221 acre-feet, the new appropriation will be fully mitigated and will not reduce the quantity of water under existing water rights. *Id.* at 53. By so limiting the rights, he reasoned that "[t]he volume of water diverted under the proposed permit will be offset by a corresponding reduction in the volume pumped under the existing rights." *Id.* The Coalition argues that the hearing officer's findings in these respects are not supported by substantial evidence in the record and are contrary to law. Each will be addressed in turn.

i. The hearing officer's findings pertaining to whether the proposed appropriation will reduce the quantity of water under existing water rights is supported by substantial evidence in the record.

The Coalition argues that the findings pertaining to whether the proposed appropriation will reduce the quantity of water under existing water rights are not supported by substantial evidence in the record. It first asserts that the hearing officer's calculations of what the Cooks' water usage would have been in 2012 had they been limited to their authorized diversion rate are unsupported and must be disregarded. It asserts the data in the record only establishes the Cooks' historic water usage based on inflated and unauthorized diversion rates. This is true in a strict sense. The historic use data in the record reflects diversion rates by the Cooks that exceed that authorized under their rights. However, it is misplaced to insinuate that the hearing officer is incapable of evaluating the evidence and deducing, based on that evidence, what the Cooks' water usage would have been in 2012 had they been limited to their authorized diversion rate. The hearing officer, based on his experience and expertise, is certainly capable of engaging in such an undertaking.[5]

The Court finds that the hearing officer's calculations are supported by substantial evidence in the record. The record includes data of the Cooks' actual water usage and power usage in 2012. Ex. 1. This data was collected by the Department as part of its Water Management Information System. *Id.* It is the power usage data in which the hearing officer took particular interest. R., pp.52-53. From the data, he deduced that the Cooks used 1,466,800 kWh of power in 2012. *Id.* The hearing officer calculated that power usage equated to 108 days

[5] Likewise, the experts retained by the parties, one of whom is an engineer and the other a hydrologist, are qualified of engaging in such an undertaking.

of pumping that year. *Id.* at 52. Then, the hearing officer added twelve days of pumping to the equation based on the testimony of Jeffrey Cook, who testified as to how irrigation practices would have been altered had they been limited to their authorized diversion rate of 5.13 cfs,. *Id.* at 52-53. He made the factual finding that had the Cooks been so limited, they would have pumped water for 120 days in 2012. *Id.* Utilizing the following equation, the hearing officer computed that had the Cooks diverted water for 120 days in 2012 at their authorized diversion rate, they would have diverted 1,221 acre-feet of water that year: "120 days *5.13 cfs = 6.15.6 cfs-days * 1.9835 af/cfs-day = 1,221 acre-feet." *Id.* at 53. The Court finds the hearing officer's calculations to be supported by substantial evidence in the record. The evidence includes the record of the Cooks' preexisting water rights, historic water and power usage data collected via the Department's Water Management Information System, and the testimony of Jeffrey Cook. Ex. 103-108; Ex. 1; Tr., pp.22-27, 35-43, 132-140.

The Coalition next asserts that the hearing officer's finding that the appropriation will not reduce the quantity of water under existing rights is unsupported by substantial evidence. This Court disagrees. The new appropriation authorizes the Cooks to divert water via their well at a higher rate of diversion than previously. However, the record establishes that the annual withdrawal of ground water from the aquifer will not increase as a result of the new appropriation. That such is the case is evidenced by the conditions placed on the appropriation by the hearing officer. Those conditions limit the Cooks' use of water under the new appropriation and their existing rights to "a total annual maximum diversion volume of 1,221 af at the field headgate." R., at 57. Since 1,221 acre-feet is what the Cooks' would have diverted historically under their existing rights had they been limited to their authorized rate of diversion, the new appropriation will not result in any more water being withdrawn from the aquifer on an annual basis than that which was already occurring.

Notwithstanding, the Coalition argues that the new appropriation authorizes the Cooks to divert the volume of water authorized under their rights in a shorter amount of time, resulting in the reduction of the quantity of water under existing rights. This assertion is not supported by the record. As set forth above, substantial evidence supports the hearing officer's finding that the amount of water withdrawn from the aquifer on an annual basis will not increase as a result of the new appropriation. Ex. 103-108; Ex. 1; Tr., pp.22-27, 35-43, 132-140. With respect to the fact that the water may be withdrawn in a shorter amount of time, the Coalition's own expert

testified that the timing of withdrawal will not reduce the amount of water existing under the Coalition's water rights:

> Q. Okay. Back on IDWR Exhibit 1. Do you see that in 2012 [the Cooks] pumped 1522 acre-feet?
>
> A. Yes.
>
> Q. Okay. And do you think that that's a -- well, let me ask this way. If that amount was pumped out very quickly or over a drawn-out period, does that increase the impacts aquiferwide? Would it hurt your clients any more or less than whether it was diverted more quickly or less quickly?
>
> A. I would say no.

Tr., p.163.[6] Therefore, based on the foregoing, the Court finds the hearing officer's finding pertaining to whether the proposed appropriation will reduce the quantity of water under existing water rights to be supported by substantial evidence in the record.

ii. The *Preliminary Order* is not contrary to law and must be affirmed.

The Coalition argues that the *Preliminary Order* results in an enlarged diversion rate beyond the Cooks' existing water rights and therefore is contrary to law. As discussed above, an application for permit to appropriate water is evaluated against the criteria set forth in Idaho Code § 42-203A. The hearing officer found that the Cooks' application satisfied all of the criteria set forth in that statute. On judicial review, the Coalition challenges only the hearing officer's findings that the proposed appropriation will not reduce the quantity of water under existing water rights. Since the hearing officer's finding on this criterion is supported by substantial evidence in the record, for the reasons set forth above, it will not be disturbed. Since all of the statutory criteria set forth in Idaho Code § 42-203A have been satisfied, the hearing officer's *Preliminary Order* issuing the permit is not contrary to law, but rather consistent with it.

Notwithstanding, the Coalition argues that the *Preliminary Order* is inconsistent with prior precedent established by the Department *In the Matter of Application to Appropriate Water*

[6] As a general matter, withdrawing water at a faster rate without increasing the annual volume diverted has the potential to impact existing rights as a result of the expanded cone of depression. However, the record supports the hearing officer's finding that the Coalition's water rights would not be impacted. As concerns other existing rights, no other water right holders protested the application.

No. 27-12155 in the Name of the City of Shelley. In the City of Shelley matter, the City filed an application to appropriate ground water. Ex. 202, p.1. The Department found that without mitigation, the application would reduce the quantity of water under existing rights. *Id.* at 11. Among other forms of mitigation, the City proposed limiting the annual volume of water diverted under its existing rights and its new appropriation to that volume already authorized under its existing rights. *Id.* at 12-13. It is important to note that the City did not propose limiting the annual volume to that which it had actually diverted historically, but rather that total volume authorized under its existing rights. *Id.* The Department rejected the proposed mitigation on the grounds that new appropriation could still result in more water being diverted annually from the aquifer by the City than that which it has actually diverted historically.[7] *Id.*

The City of Shelley matter is distinguishable from the instant proceeding. In the City of Shelley matter, it was possible that the City could withdraw more water from the aquifer annually as a result of its proposed appropriation than it ever had historically. Such is not the case here. By placing appropriate limitations on his approval of the Cooks' application, the hearing officer assured that the Cooks' annual withdrawal of ground water from the aquifer as a result of the new appropriation will not exceed that which they have legally diverted historically.

Last, the Court notes that the Department has implemented a moratorium restricting the processing and approval of new application for permits to appropriate water from ground water sources within the Eastern Snake Plain Area. *Amended Moratorium Order* (April 30, 1993). However, by its express terms, the *Amended Moratorium Order* does not prevent the Director from reviewing an application for permit if:

> The Director determines that the development and use of the water pursuant to an application will have no effect on prior surface and ground water rights because of its location, insignificant consumption of water *or mitigation provided by the applicant to offset injury to other rights.*

Amended Moratorium Order, p.5. The hearing officer determined that if the Cooks' new appropriation and existing water rights are limited to a combined annual diversion volume of 1,221 acre-feet, the new appropriation will be fully mitigated and will not reduce the quantity of water under existing water rights. *Id.* at 53. That is, "[t]he volume of water diverted under the proposed permit will be offset by a corresponding reduction in the volume pumped under the

[7] The Department ultimately approved the City of Shelley's application for permit, albeit as a result of alternative forms of mitigation proposed by the City not discussed here.

existing rights." *Id.* For the reasons set forth above, the Court finds the hearing officer's finding in this respect to be supported by substantial evidence in the record and will not be disturbed.

In sum, the Court finds that the hearing officer's *Preliminary Order* is consistent with Idaho Code § 42-203A, the Department's decision in the City of Shelley matter, and the Department's *Amended Moratorium Order*. It follows that the Coalition's argument that the *Preliminary Order* is contrary to law is unavailing.

iii. The hearing officer's *Preliminary Order* is affirmed on the additional grounds that the Coalition has failed to establish its substantial rights have been prejudiced.

Under Idaho Code § 67-5279(4), a decision of the Department must be affirmed unless the petitioner can establish that its substantial rights have been prejudiced. In this case, it cannot be said that the *Preliminary Order* prejudices the Coalition's substantial rights. The Coalition holds senior natural flow and storage water rights on the Snake River. However, as set forth above, the evidence in the record establishes that the Cooks' annual withdrawal of ground water from the aquifer will not increase as a result of the new appropriation. Nor will the fact that the water may be withdrawn in a shorter amount of time impact the Coalition's rights. Tr., p.163. Therefore, the Coalition has failed to establish that its water rights are prejudiced by the *Final Order*.

B. The Cooks' argument that the Court lacks subject matter jurisdiction over the *Petition for Judicial Review* is inconsistent with IDAPA.

The Cooks' assert the Court lacks subject matter jurisdiction over the Coalition's *Petition for Judical Review* on the grounds that the Coalition failed to exhaust its administrative remedies. They argue the Coalition was required to motion the Director to review the hearing officer's *Preliminary Order* prior to seeking judicial review of that *Order*. This Court disagrees.

IDAPA provides that either an agency head, or someone other than the agency head (i.e., a hearing officer), may preside over a contested case proceeding before an agency. I.C. § 67-5242(2). Where someone other than the agency head acts as the presiding officer, he may issue one of two types of orders. I.C. § 67-5243. He may issue a recommended order, which becomes a final order of the agency *only* after review by the agency head. I.C. § 67-5243(1)(a). Or, he

may issue a preliminary order which becomes a final order of the agency *unless* the agency head, on its own motion or upon motion of a party, reviews it. I.C. §§ 67-5243(1)(b) & 67-5246(3). In this case, the hearing officer, who was not the agency head, issued a *Preliminary Order*. The record reflects that the Director did not review the *Preliminary Order* on his own motion, nor did any party timely motion him to so review the *Order*. Therefore, the *Preliminary Order* subsequently became a final order of the Department via operation of law. I.C. §§ 67-5243(1)(b) & 67-5246(3).

The Cooks' argument that the *Preliminary Order* is not subject to judicial review is inconsistent with IDAPA. Idaho Code § 67-5270 sets forth the requirement that an agency action must be "final" before judicial review is available. Idaho Code § 67-5271(1) sets forth the concomitant requirement that judicial review may not be sought by an individual until he "has exhausted all administrative remedies required in this chapter." I.C. § 67-5271(1). These two provisions go hand in hand. When read together they establish the general principle that a person may not seek judicial review of an agency action before the administrative process has finished. The agency process in this case finished once the hearing officer's *Preliminary Order* became a final order of the Department via operation of law. Hence, this is not a situation where the Coalition is attempting to seek judicial review prior to the agency completing its administrative process.

The Cooks' argument is also contrary to the plain language of Idaho Code § 67-5273(2). That statute provides that a petition for judicial review of "a preliminary order that has become final *when it was not reviewed by the agency head* . . . must be filed within twenty-eight (28) days of the . . . date when the preliminary order became final. . . ." I.C. § 67-5273(2) (emphasis added). Contrary to the Cooks' argument, the plain language of this statute expressly acknowledges that a party may seek judicial review of a preliminary order that has become final when it was not reviewed by the agency head. The Cooks' position renders the plain language of this statute meaningless and must be rejected. *See e.g., Brown v. Caldwell School Dist. No. 132*, 127 Idaho 112, 117, 88 P.2d 43, 48 (1995) (setting forth rule of statutory construction that a statute should be interpreted so as to give effect to all of its language, and that courts do not presume that the legislature performed an idle act by using meaningless statutory language).

IV.

ORDER

Therefore, based on the foregoing, IT IS ORDERED that the *Preliminary Order Issuing Permit* issued on May 15, 2015 **is hereby affirmed.**

Dated December 14, 2015

ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER was mailed on December 14, 2015, with sufficient first-class postage to the following:

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Addendum D

to the

Appellant's Reply Brief

"BW 17"
(Basin-Wide Issue 17)

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	**Basin-Wide Issue 17**
	)	**Subcase No.: 00-91017**
Case No. 39576	)	
	)	**MEMORANDUM DECISION**
	)	

Appearances:

David W. Gehlert, U.S. Department of Justice, Natural Resources Division, Denver, Colorado, attorney for the United States.

Michael C. Orr, Deputy Attorney General of the State of Idaho, Natural Resources Division, Boise, Idaho, attorney for the State of Idaho.

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James C. Tucker, Boise Idaho, attorney for the Idaho Power Company.

Travis L. Thompson, Barker Rosholt & Simpson, LLP, Twin Falls, Idaho, attorneys for A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company and Twin Falls Canal Company.

W. Kent Fletcher of Fletcher Law Office, Burley, Idaho, attorney for Minidoka Irrigation District.

C. Tom Arkoosh, Capital Law Group, PLLC, Boise, Idaho, attorneys for American Falls Reservoir District #2.

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Andrew J. Waldera, Moffatt, Thomas, Barrett, Rock & Fields, CHTD, Boise, Idaho, attorneys for Pioneer Irrigation District.

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S. Bryce Farris, Ringert Law CHTD, Boise, Idaho, attorneys for Ballentyne Ditch Company, Boise Valley Irrigation Ditch Company, Canyon County Water Company, Eureka Water Company, Farmers' Co-operative Ditch Company, Middleton Mill Ditch Company, Middleton Irrigation Association, Inc., Nampa & Meridian Irrigation District, New Dry Creek Ditch Company, Pioneer Ditch Company, Settlers Irrigation District, South Boise Water Company and Thurman Mill Ditch Company.

Michael P. Lawrence, Givens Pursley, LLP, Boise Idaho, attorneys for the United Water Idaho, Inc.

Candice M. McHugh of Racine Olson Nye Budge & Bailey, CHTD, Boise, Idaho, attorneys for the Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, North Snake Ground Water District and Aberdeen-Springfield Canal Company.

Chris M. Bromley, Deputy Attorney General of the State of Idaho, Idaho Department of Water Resources, Boise, Idaho, attorney for the Idaho Department of Water Resources.

I.

PROCEDURAL BACKGROUND

1. On June 8, 2012, the Black Canyon Irrigation District, New York Irrigation District, Pioneer Irrigation District, Nampa-Meridian Irrigation District and the Boise Project Board of Control filed a *Petition* pursuant to *SRBA Administrative Order 1, Rules of Procedure*, § 16, requesting that the Court designate the following issue as a basin-wide issue in the Snake River Basin Adjudication ("SRBA"): "Does Idaho law require a remark authorizing storage rights to 'refill' space vacated for flood control?"

2. Parties to the SRBA were provided notice of the *Petition* pursuant to Docket Sheet procedure and were given the opportunity to participate in the proceedings.

3. On September 21, 2012, following hearing, the Court entered an *Order* designating the following issue as Basin-Wide Issue 17: "Does Idaho law require a remark authorizing storage rights to 'refill,' under priority, space vacated for flood control." Thereafter, the parties to the proceeding were given the chance to submit briefing.

4. Opening briefs were filed by the following parties: (1) the Idaho Power Company; (2) the United States Bureau of Reclamation; (3) the State of Idaho; (4) the Pioneer Irrigation District; (5) the Boise Project Board of Control and New York Irrigation District (collectively, "Boise Project"); (6) the Fremont-Madison Irrigation District, Blackfoot Irrigation District and Idaho Irrigation District (collectively, "Upper Valley Water Users"); (7) the American Falls Reservoir District No. 2, A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company (collectively, "Surface Water Coalition"); and (8) the Ballentyne Ditch Company, Boise Valley Irrigation Ditch Company, Canyon County Water Company, Eureka Water Company, Farmers' Co-operative Ditch Company, Middleton Mill Ditch Company, Middleton Irrigation Association, Inc., Nampa & Meridian Irrigation District, New Dry Creek Ditch Company, Pioneer Ditch Company, Settlers Irrigation District, South Boise Water Company and Thurman Mill Ditch Company (collectively, "Ditch Companies").

5. Response briefs were filed by the following parties: (1) the Idaho Power Company; (2) the United States Bureau of Reclamation; (3) the State of Idaho; (4) the Pioneer Irrigation District; (5) the Boise Project; (6) the Surface Water Coalition; (7) the Ditch Companies; and (8) United Water Idaho, Inc.

6. Reply briefs were filed by the following parties: (1) the Idaho Power Company; (2) the State of Idaho; (3) the Pioneer Irrigation District; (4) the Boise Project; (5) the Surface Water Coalition; and (6) the Ditch Companies.

7. The City of Pocatello did not file briefing, but did file a *Statement* joining in the positions taken by the State of Idaho and the Upper Valley Water Users.

8. Oral argument on Basin-Wide Issue 17 was heard before this Court on February 12, 2013. The parties did not request additional briefing, nor does the Court require any. The matter is therefore deemed fully submitted the following business day, or February 13, 2013.

II.

ISSUE

Does Idaho law require a remark authorizing storage rights to "refill," under priority, space vacated for flood control?

III.

BACKGROUND BEHIND DESIGNATION OF BASIN-WIDE ISSUE 17

Basin-Wide Issue 17 arose out of two contested subcases in Basin 01: subcase nos. 01-2064 and 01-2086. Those subcases concern storage water rights claimed in the SRBA by the United States Bureau of Reclamation in American Falls and Palisades Reservoirs respectively. In his *Director's Report, Reporting Area Basin 01, IDWR Part 2*, filed on December 19, 2006, the Director recommended the water right claims in the name of the United States with the following elements:

Right	Source	Quantity	Priority	Purpose	Period of Use
01-2064	Snake River	1,672,590.00 afy	03/30/1921	Irrigation Storage (1,628,316.00 afy) Irrigation from Storage (1,628,316.00 afy) Power Storage (295,163.00 afy) Power from Storage (295,163.00 afy)	01/01 – 12/31 03/15 – 11/15 01/01 – 12/31 01/01 – 12/31
01-2068	Snake River	1,200,000.00 afy	07/28/1939	Irrigation Storage (1,200,000.00 afy) Irrigation from Storage (1,200,000.00 afy) Power Storage (1,200,000.00 afy) Power from Storage (1,200,000.00 afy)	01/01 – 12/31 03/15 – 11/15 01/01 – 12/31 01/01 – 12/31

The United States subsequently filed *Objections*, asserting that the Director's recommendations should be amended to include the following remark under the quantity element: "This water right includes the right to refill under the priority date of this water right to satisfy the United States' storage contracts." *United States' Standard Form 1 Objection*, Subcase Nos. 01-2064 & 01-2068 (April 19, 2007).

The State of Idaho, which filed *Responses* to the *Objections*, disagreed with the United States' proposed storage refill remark. It proffered the following alternative remark to be placed on the face of the two water rights, arguing that it more accurately reflects Idaho law on storage refill:

> This right is filled for a given irrigation season when the total quantity of water that has been accumulated to storage under this right equals the decreed quantity. Additional water may be stored under this right but such additional storage is incidental and subordinate to all existing and future water rights.

State's *Motion for Partial Summary Judgment*, Subcase Nos. 01-2064 & 01-2068 (January 25, 2012). As a result of the remarks proposed by the United States and the State, a dispute arose in subcase nos. 01-2064 and 01-2068 over the state of Idaho law regarding the ability of a storage

water right holder to refill, under priority, water diverted and stored pursuant to a valid storage water right but which was used by the reservoir operator for flood control purposes.

As the parties to subcase nos. 01-2064 and 01-2068 litigated the issue within the confines of those subcases, other parties in the SRBA who are storage water right holders and/or reservoir spaceholders began to take note of the Basin 01 proceedings. Concerned over the ramifications the two subcases might have on their respective storage water rights, a group of interested parties filed the *Petition to Designate Basin-Wide Issue* with this Court. The *Petition* argued that the state of Idaho law as it pertains to the ability to refill, under priority, stored reservoir water vacated for flood control purposes is an issue of basin-wide significance.[1] After the Court entered its *Order* designating Basin-Wide Issue 17, subcase nos. 01-2064 and 01-2068 were stayed by the Special Master as they pertained to the issue of fill and refill of storage water rights.

IV.
ANALYSIS

Whether Idaho law requires a remark authorizing storage rights to "refill," under priority, space vacated for flood control is an issue of first impression. Resolution of the issue requires an analysis of the nature of storage water rights under the doctrine of prior appropriation as established in Idaho.

A. Nature of storage water rights.

Idaho law recognizes and provides for the appropriation of storage water rights. I.C. § 42-202. A storage water right entitles the appropriator to divert, impound and control water from a natural watercourse by means of a diversion structure such as a dam. The purpose of use element of a storage water right generally contains at least two authorized purposes of use.[2] The

[1] The remarks proposed and arguments set forth by the parties in subcase nos. 01-2064 and 01-2068 are not relevant to the instant basin-wide proceeding. Nor are the records from those subcases pertinent to this proceeding. The summary provided in Section III is included merely for context.

[2] This is not always the case. For instance, water right 63-3618 (storage water right for Lucky Peak Reservoir) includes a purpose of use for "Recreation Storage" which authorizes water to be stored, but does not contain a second associated purpose of use that the stored water be put to an end use. *SRBA Subcase No. 63-3618, Partial Decree* (Dec. 18, 2008).

first authorizes the storage of water for a particular purpose (i.e., "irrigation storage," or "power storage"). The second authorizes the subsequent use of that stored water for an associated purpose, which is referred to herein as the "end use" (i.e., "irrigation from storage," or "power from storage"). Each purpose of use is assigned its own quantity and period of use, which may or may not differ from one another.[3] With respect to storage rights for irrigation, for example, it is typical for the "Irrigation Storage" purpose of use to be a year round use (01-01 to 12-31), and the "Irrigation from Storage" purpose of use to be limited to the irrigation season (e.g., 03-15 to 11-15).

Water diverted and stored pursuant to a storage water right need not be put to the end use immediately, but may be stored for a period of time prior to the end use:

> There is a fundamental difference with regard to the diversion and use of water from a flowing stream and a reservoir. In a stream if a user does not take out his water, it may be diverted by the other appropriators, because otherwise it flows on and is dissipated. But the very purpose of storage is to retain and hold for subsequent use, direct or augmentary, hence retention is not of itself illegal nor does it deprive the user of the right to continue to hold.

Rayl v. Salmon River Canal Co., 66 Idaho 199, 208, 157 P.2d 76, 80 (1945). Under certain circumstances, a storage water right holder may even carry over water diverted and stored in a given year into subsequent years before it is put to the end use. *See e.g., Id.* at 201, 157 P.2d at 77 (stating, the practice of holding storage water over from one season to the next "has become too well entrenched in the concept of our water law both by practice and prior and subsequent precept to be . . . denounced and forbidden"); IDAPA 37.03.11.042.01.g. (holder of a storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years).

Under Idaho law, "[o]ne may acquire storage water rights and receive a vested priority date and quantity, just as with any other water right." *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 878, 154 P.3d 433, 449 (2007); I.C. § 42-202. Therefore, storage water rights are integrated into Idaho's prior appropriation doctrine on the basis of relative priority the same as other water rights. Once water is diverted and stored in a reservoir pursuant to a storage water right, it is no longer subject to diversion and appropriation,

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[3] See e.g., the Director's recommended purpose of use element for storage water right claims 01-2064 and 01-2068, as set forth above in Section III.

but becomes property of the appropriators and owners of the reservoir. *Washington County Irr. Dist. v. Talboy*, 55 Idaho 382, 389, 43 P.2d 943, 945 (1935).[4] It follows that no one can make an appropriation from a reservoir "for the obvious reason that the waters so stored or conveyed are already diverted and appropriated. . . ." *Id.* at 389, 43 P.2d at 946.

Ownership of storage water rights has some unique characteristics. In some instances, the reservoir operator may own the storage water rights associated with a reservoir. In other instances, the reservoir operator may not. In the case of federal Reclamation Act reservoirs, the reservoir operator, the United States Bureau of Reclamation, holds the storage water rights associated with the reservoir in name, but title to the use of the water is held by the consumers or users of the water. *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007). However, for the purpose of this Court's "refill" analysis, the distinctions between who operates the reservoir and who holds the storage water rights associated with the reservoir are distinctions without a difference.

B. Under the doctrine of prior appropriation as established by Idaho law, a senior storage water right holder may not "refill" his storage water right under priority before affected junior appropriators satisfy their water rights once.

A conflict exists in many of the reservoirs represented in this proceeding between water used by a reservoir operator for flood control purposes and water diverted and stored by storage right holders for all other purposes. The parties assert and recognize circumstances where water that has been diverted and stored in a reservoir pursuant to a valid storage right is used by the reservoir operator for flood control purposes before it is put to the authorized end use by the right holder. This is particularly problematic in reservoirs where there is an absence of any water right identifying "flood control" as an authorized purpose of use.[5] In such instances, the entire storage capacity of the reservoir may be allocated via the issuance of storage water rights to water appropriated for other uses, such as "irrigation storage and irrigation from storage." When a reservoir operator uses stored water for flood control purposes in such a reservoir he is using

[4] A Storage right is still subject to other requirements of the prior appropriation doctrine. *American Falls Reservoir Dist. No. 2*, at 879, 154 P.3d at 450.

[5] A review of the water rights associated with the reservoirs represented in this proceeding reveal that it is most often the case, if not unanimously the case, that no water right exists associated with these reservoirs that identify "flood control" as an authorized purpose of use.

water that was stored by a storage water right holder under state law for some other authorized purpose. The question presented to this Court is whether Idaho law permits a storage water right holder to "refill" that water used for flood control purposes under the priority of his storage right. The significance of this issue is understood in the reality that such priority refill may necessitate delivery calls and the curtailment of junior appropriators. Also, the fill in the first place may have occurred at the expense of juniors (i.e., in the instance where juniors are not allowed to use their water rights while the senior storage right is filling).

The parties have coalesced into two groups based on how they answer the subject question. The first group, referred to herein collectively as the "Petitioners", includes the Idaho Power Company, the United States, the Boise Project, the Surface Water Coalition, and the Ditch Companies. The Petitioners assert that Idaho law permits a storage right holder to refill his storage right, under priority, when water diverted and stored under that right is used by the reservoir operator for flood control purposes. They assert the right to priority refill is inherent in the nature of a storage water right. Since they assert this is the state of Idaho law, it is their position that no remark is necessary on the face of a storage right to authorize such priority refill. The Petitioners contend that a storage right holder is entitled to put to the storage right's end use that volume of water set forth in the quantity element of the right. If water diverted and stored under a storage right is used for flood control purposes by the reservoir operator, then it is the Petitioners' position that the storage holder is entitled to refill that space, under priority, to ensure a sufficient quantity of storage water to complete the right's end use.

The second group, referred to herein collectively as the "Objectors," includes the State of Idaho, the Upper Valley Water Users, United Water Idaho, Inc., and the City of Pocatello. The Objectors assert that allowing a storage right holder to refill a storage water right under priority where water diverted and stored pursuant to that right is used by the reservoir operator for flood control purposes is contrary to Idaho's doctrine of prior appropriation. Specifically, they assert that priority refill would (1) unlawfully result in an un-quantified water right, (2) constitute an unlawful enlargement of the storage water right, and (3) conflict with the requirement of maximizing beneficial use and minimizing waste of water. Therefore, the Objectors contend that any remark that authorizes storage refill, under the priority of the storage right, in excess of the licensed or decreed quantity would be contrary to Idaho law.

The term "refill" is not a legal term of art under Idaho law, but its common meaning is "to fill again." *The American Heritage Dictionary of the English Language*, p.1467 (4th ed., 2000). The term "fill" means to "to satisfy or meet." *The American Heritage Dictionary of the English Language*, p.659 (4th ed., 2000). Thus, the question whether a storage water right may be "refilled" under priority necessarily assumes that the storage water right has already been "filled" or satisfied once under priority as determined by the Department. The Court notes that the term "fill" may be used to describe (1) a reservoir physically filling with water, or (2) the decreed volume of a storage water right being satisfied (i.e. when the total quantity that has been accounted to storage equals the decreed quantity). The distinction between the two uses of the term is significant, as there may be situations where the storage water rights associated with a particular reservoir are considered filled or satisfied even though the reservoir has not physically filled with water. Many of the reservoirs implicated in this proceeding are administered as a unified system where storage space can be exchanged between reservoirs within the system. For example, Palisades Reservoir can be holding and storing water that is decreed to American Falls Reservoir. As a result, the storage water rights in a reservoir may be considered filled or satisfied even though available space may exist in the reservoir to which the right was decreed. Further, many storage right holders also hold natural flow rights that are used in conjunction with their storage rights.[6] For the purposes of this opinion, the term "fill" or "filled" is used to describe the decreed volume of a storage water right being satisfied.

The assertion that a senior storage right holder can "fill," or "satisfy," his water right multiple times under priority before an affected junior water right is satisfied once is contrary to the prior appropriation doctrine as established under Idaho law. Idaho's prior appropriation doctrine provides protections to both senior and junior appropriators through a system of priority administration. A senior appropriator's water right is protected under the doctrine against interference from those whose rights are subsequent in priority. *See e.g.*, Idaho Const., Art XV, § 3 (providing "[p]riority of appropriations shall give the better right as between those using the water"); I.C. § 42-106 ("As between appropriators, the first in time is first in right"). At the same time, a junior appropriator's water right is protected against wrongful acts on the part of

[6] Accordingly, the Department utilizes an accounting methodology for the purpose of determining when a storage water right has been "filled." The methodologies employed by the Department for determining when a right has been filled are beyond the scope of these proceedings. In the *Order* designating the basin-wide issue this Court determined that the Department's accounting methodology is an administrative function which should be addressed on a case-by-case basis on a fully developed factual record and where the Department is a party to the proceeding.

senior appropriators that would disturb the junior's right to the use of water. *See e.g., Van Camp v. Emery*, 13 Idaho 202, 208, 89 P. 752, 754 (1907) (providing that a senior may divert the quantity to which he is entitled, but once he has done so he may not impede a junior from receiving the water to which the junior is entitled). One leading scholar sets forth the proposition in the following terms:

> The junior appropriator . . . is entitled to protection not only against those whose rights are subsequent to his, but also against wrongful acts on the part of earlier appropriators. That is to say, while an appropriator may divert the quantity of water to which he is entitled, when he has once done so he may not so impede the flow of the remaining stream as to prevent it from reaching the junior appropriator's headgate.

Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 50 (1968).

Storage water rights are integrated into Idaho's prior appropriation doctrine on the basis of relative priority the same as other water rights. *American Falls Reservoir Dist. No. 2,* 143 Idaho at 878, 154 P.3d at 449; I.C. § 42-202. As soon as a senior storage right is filled it is no longer in priority. Allowing a storage right holder to refill his right under priority after his right is filled, but before affected junior right holders are satisfied, is impermissible as it would wrongfully disturb the junior appropriators' rights to the use of water, *Van Camp v. Emery*, 13 Idaho at 208 89 P. at 754, and would diminish the junior right holders' priorities. *See e.g., Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (providing, "[p]riority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder"). Simply stated, under Idaho's doctrine of prior appropriation a senior storage holder may not fill or satisfy his water right multiple times, under priority, before rights held by affected junior appropriators are satisfied once. A remark authorizing such priority refill would be contrary to Idaho law. The fact that water diverted and stored pursuant to a valid storage water right is used by the reservoir operator for flood control purposes does not alter the above analysis, *assuming, as the term "refill" necessarily implies, the storage right has already been filled once during the period of use under priority.*[7]

[7] The Court notes that since this issue has arisen some reservoir storage right holders have filed motions to file late claims for separate beneficial use rights to address refill.

C. This basin-wide proceeding does not address the issue of when the quantity element of a storage water right is rightfully considered to be "filled" or "satisfied."

Approaching the issue from the perspective of priority refill of a storage water right, which assumes a priority fill of that right has already occurred, misses the mark. It is the quantity element of a water right that defines the duration of priority administration during its authorized period of use. Thus, the more important issue pertains to when the quantity element of a storage right is considered filled. Namely, is water that is diverted and stored under a storage right counted towards the quantity of that right if it is used by the reservoir operator for flood control purposes? That is an accounting issue which this basin-wide proceeding does not address.[8]

As explained in the *Order Designating Basin-Wide Issue*, the issue of when a storage water right is filled does not lend itself to a basin-wide proceeding, and is not before the Court here. As an initial matter, addressing the issue of fill may require factual inquiries, investigation and record development specific to a given reservoir and the water right or rights associated with the reservoir. Addressing the issue of fill will require a record as to how the Department accounts for fill in each individual reservoir under its accounting methodology. Such fact specific inquiries do not lend themselves to review in a basin-wide proceeding.

Furthermore, the authority and responsibility for measuring and distributing water to and among appropriators is statutorily conferred to, and vested in, the Idaho Department of Water Resources and its Director. Idaho Code § 42-103 provides that "it shall be the duty of the department of water resources to devise a simple, uniform system for the measurement and distribution of water." Chapter 6, Title 42 of the Idaho Code governs the "distribution of water among appropriators" and directs that the Director and the watermasters under his supervision are statutorily charged with distributing water to water rights. In particular, Idaho Code § 42-602 vests in the Director, the "direction and control of the distribution of water from all natural water sources within a water district to canals, ditches, pumps and other facilities diverting therefrom." Similarly, Idaho Code § 42-603 instructs that the Director is "authorized to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other

[8] The Court also notes that this basin-wide proceeding does not address claims (contractual, statutory, constitutional or otherwise), if any, a storage right holder or reservoir spaceholder may have against a reservoir operator where the reservoir operator uses water diverted and stored by that storage right holder or spaceholder for flood control purposes.

natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof."

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

D. This basin-wide proceeding does not address pursuant to what state law authority water that is diverted and stored pursuant to a valid storage water right is used for flood control purposes by the reservoir operator where no water right exists authorizing that use.

Idaho state law directs that "[n]o person shall divert any water from a natural watercourse or apply water to land without having obtained a valid water right to do so, *or apply it to purposes for which no valid water right exists*." I.C. § 42-201(2) (emphasis added). That statute recognizes only two exceptions to this rule: (1) water used to extinguish or prevent the spread of an existing fire, and (2) water used for forest practices as defined in section 38-1303(1), Idaho Code, and forest dust abatement. I.C. § 42-201(3). The statute does not create an exception for flood control purposes. To the contrary, Idaho law recognizes that an appropriator may file an application with the Department to "appropriate and store flood ... waters."[9] I.C. § 42-202(3). However, the parties to this subcase did not address pursuant to what state authority water that is diverted and stored pursuant to a valid storage water right is used for flood control purposes by the reservoir operator (in either a federal or non-federal reservoir) where no water right exists under state law authorizing such use. Therefore the Court does not reach that issue. Likewise, whether or not federal law authorizes the use of storage water for flood control purposes in

[9] The statute does not define "flood water." However, in the context of water law the term has been used interchangeably with "excess water" and used to describe the circumstance where water in the system at a given time exceeds the quantity necessary to satisfy existing non-flood rights on the system.

federal reservoirs without a valid state water right or otherwise supersedes state law for this particular purpose is beyond the scope of this basin-wide issue.[10]

E. The Petitioners' reliance on state law providing that there can be no forfeiture if a water right holder is prevented from exercising his right by circumstances over which he has no control is misplaced.

In support of the argument that state law allows a storage right holder to refill his storage right, under priority, when water diverted and stored under that right is used by the reservoir operator for flood control purposes, the Petitioners cite to Idaho Code § 42-223(6). That statute sets forth defenses to forfeiture and provides in part that "no portion of any water right shall be lost or forfeited for nonuse if the nonuse results from circumstances over which the water right owner has no control." I.C. § 42-223(6). The Petitioners assert that in a reservoir where the storage water right holder or spaceholder is not the reservoir operator, the storage right holder or spaceholder has no control over the reservoir operator's use of stored water for flood control. However, this basin-wide proceeding does not deal with the forfeiture of storage water rights, and no assertion has been made that storage water rights are forfeited when water diverted and stored under a storage right is used for flood control purposes. Rather this proceeding is limited to whether Idaho law requires a remark authorizing storage rights to "refill," under priority, space vacated for flood control. That issue is addressed by this *Order*. Therefore, the statute on which Petitioners' rely is not applicable here.

V.
CONCLUSION

The Court holds that under the prior appropriation doctrine as established under Idaho law, a senior storage water right holder may not refill his storage water right under priority before junior appropriators satisfy their water rights once. A remark authorizing such priority refill would be contrary to Idaho law. The fact that water diverted and stored pursuant to a valid storage water right is used by the reservoir operator for flood control purposes does not alter this analysis, *assuming, as the term "refill" necessarily implies, the storage right has been filled*

[10] With respect to federal reclamation act reservoirs, the Idaho Supreme Court has held that "federal law defers to state law in determining the rights to water in the reclamation projects," and that "the [Reclamation] Act clearly provided that state water law would control in the appropriation and later distribution of the water." *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 110, 157 P.3d 600, 604 (2007).

once during the period of use under priority. The Court does not address the issue of whether water that is diverted and stored under a storage right is rightfully accounted towards the quantity of that right if it is used by the reservoir operator for flood control purposes. That issue is beyond the scope of this basin-wide proceeding and not before the Court here.

IT IS SO ORDERED.

DATED: March 20, 2013

ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

RULE 54(b) CERTIFICATE

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

DATED: March 20, 2013

ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

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DOES IDAHO LAW REQUIRE A
REMARK AUTHORIZING STORAGE
RIGHTS TO REFILL SPACE VACATED
FOR FLOOD CONTROL

 Julie Murphy
Deputy Clerk

Addendum E

to the

Appellant's Reply Brief

"ASCC Decision"
(*Memorandum Decision and Order on Challenge*)

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

In Re SRBA	)	**Subcase Nos. 01-23B, 01-297, 35-2543 and 35-4246**
	)	**(Aberdeen-Springfield Canal Co.)**
Case No. 39576	)	
	)	**MEMORANDUM DECISION AND ORDER ON**
	)	**CHALLENGE**
	)	
_____	)	

Holding: Recommitted to Special Master for additional evidence and findings on basis of recharge.

Appearances:

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I.

PROCEDURAL BACKGROUND

1. This matter concerns certain water rights claimed in the Snake River Basin Adjudication ("SRBA") by the Aberdeen-Springfield Canal Company ("ASCC").

2. On June 23, 1999, the Director of the Idaho Department of Water Resources ("IDWR" or "Director") filed his *Director's Report for Irrigation and Other Uses, Reporting Area 5 (IDWR Basin 35)*, recommending water rights 35-2543 and 35-4246 in the name of the ASCC.

3. On May 15, 2006, IDWR filed its *Director's Report, Irrigation and Other Uses, IDWR Lower Basin 01*, recommending water rights 01-23B and 01-297 in the name of the ASCC.

4. The water rights were recommended by the Director with the following elements:

Right	Source	Purpose and Period of Use	Quantity	Priority	Place of Use
01-23B	Snake River	Irrigation (04/01 – 10/31) Recharge for irrigation (04/01 – 10/31)	1,172.10 cfs 501.80 cfs	02/06/1895	58,942 acres
01-297	Snake River	Irrigation (04/01 – 10/31) Recharge for irrigation (04/01 – 10/31)	230.00 cfs 230.00 cfs	04/01/1939	58,942 acres
35-2543	Groundwater	Irrigation (04/01 – 10/31)	6.00 cfs 2,400.00 afy	08/07/1958	37,798 acres
35-4246	Groundwater	Irrigation(04/01 – 10/31)	2.44 cfs 976.00 afy	10/15/1934	37,798 acres

5. The Director recommended that the following remark be included under the quantity and place of use elements of water rights 01-23B and 01-297: "Diversion of rights 01-23B and 01-297 for the purpose of recharge for irrigation is authorized for a maximum of 501.8 cfs / 21,094 acres."

6. Also with respect to water rights 01-23B and 01-297 the Director included a remark in the recommendation that stated: "Right includes accomplished change in purpose of use pursuant to Section 42-1425, Idaho Code."

7. Various *Objections* to the recommendations for the above-captioned water rights were subsequently filed. These initial *Objections* were subsequently resolved by the filing of a *Stipulation to Resolve Objection*.[1]

8. On June 21, 2007, the ASCC was granted leave to amend its claims for the above-captioned water rights "to more accurately [identify] the place of use resulting in a larger number of acres than originally claimed."

9. On March 25, 2008, IDWR filed *Amended Director's Reports* for the above-captioned claims in response to the amended claims. The above-captioned water rights were recommended by the Director in the *Amended Director's Reports* with the following elements:

Right	Source	Purpose and Period of Use	Quantity	Priority	Place of Use
01-23B	Snake River	Irrigation (04/01 – 10/31) Recharge for irrigation (04/01 – 10/31)	1,172.1 cfs 389.5 cfs	02/06/1895	61,772.6 acres
01-297	Snake River	Irrigation (04/01 – 10/31)	230.00 cfs	04/01/1939	61,772.6 acres
35-2543	Groundwater	Irrigation (04/01 – 10/31)	6.00 cfs 2,547.00 afy	08/07/1958	61,772.6 acres
35-4246	Groundwater	Irrigation(04/01 – 10/31)	2.44 cfs 155.00 afy	10/15/1934	61,772.6 acres

10. The Director recommended that the following remark be included under the place of use element of water right 01-23B: "Diversion of this right for the purpose of recharge for irrigation is authorized for a maximum of 17,161.6 acres."

11. Consistent with the original *Director's Reports*, the *Amended Director's Reports* for water rights 01-23B and 01-297 included a remark in the recommendation that stated: "Right includes accomplished change in purpose of use pursuant to Section 42-1425, Idaho Code."

12. On April 28, 2008, the A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, American Falls Reservoir District #2, Twin Falls Canal Company, and North Side Canal Company (collectively the "Surface Water Coalition" or "SWC") filed *Objections* to the Director's amended recommendations for water right claims 01-23B and 01-297, objecting to priority date, purpose of use, place of use and remarks.

[1] *Objections* to the initial recommendations were made by the United States Bureau of Reclamation and the United States Bureau of Land Management, objecting to the place of use element. A *Stipulation to Resolve Objection* was subsequently filed resolving these *Objections*.

13. Also on April 28, 2008, all the members of the SWC, less the Minidoka Irrigation District, filed *Objections* to the Director's amended recommendations for water right claims 35-2543 and 35-4246, objecting to place of use and remarks.

14. On July 16, 2008, the Special Master entered an *Order* permitting the State of Idaho to file *Late Reponses* to the *Objections* filed in each of the above-captioned subcases. The State of Idaho subsequently filed *Late Reponses* in all four subcases.

15. On March 26, 2009, the ASCC filed a *Motion for Summary Judgment* along with supporting documents in all four of the above-captioned subcases, requesting an order granting a partial decree for each water right be issued consistent with the recommendations in the *Amended Director's Reports*.

16. On March 27, 2009, the SWC filed a *Motion for Summary Judgment* along with supporting documents in subcase 01-23B. The SWC argued that water right 01-23B cannot include a "recharge for irrigation" purpose of use as a matter of law, and that the "recharge for irrigation" purpose of use should be dismissed.

17. The State of Idaho filed its *Brief in Response* to the *Summary Judgment Motions* in all four subcases on April 16, 2009. The State's brief identified the primary issue in the subcases as whether the Director's amended recommendation for water right 01-23B correctly included "recharge for irrigation" as a purpose of use.

18. The SWC filed its *Response* to the ASCC's *Motion for Summary Judgment* on April 16, 2009, and the ASCC filed its *Response Brief* on April 17, 2009 in subcase 01-23B. The SWC filed its *Reply* in subcase 01-23B on April 23, 2009. The ASCC filed its *Reply* on May 4, 2009.

19. On June 11, 2009, the Special Master entered an *Order Partially Granting Aberdeen-Springfield's Motion for Summary Judgment and Denying Surface Water Coalition's Motion for Summary Judgment and Motion to Strike Affidavits*, holding that ASCC is entitled to partial summary judgment as a matter of law in subcases 01-23B and 01-297. In that *Order*, the Special Master concluded that (1) recharge for irrigation was recognized as a beneficial use of water before the enactment of the groundwater recharge statute in 1978, and (2) a portion of the ASCC's diversion from the Snake River decreed "for irrigation and other purposes" in water right 01-23B was lawfully changed to "recharge for irrigation" with a priority date of February 6, 1895.

20. In addition, the Special Master found that remanding the matter to the IDWR Director under Idaho Code § 42-1425 would only serve to delay resolution of the claim because the Director has already filed his report with his findings and conclusions in the form of his *Amended Director's Report*. He further found that remand was unnecessary because the SWC offered no evidence of injury or enlargement of the diversion due to the transfer.

21. On January 8, 2010, the Special Master entered an *Order* denying a *Motion for Reconsideration* filed by the SWC. On August 31, 2010, the Special Master entered an *Order* denying a *Motion to Alter or Amend* filed by the SWC.

22. On April 23, 2010, the Special Master entered a *Special Master's Report* in subcases 01-23B and 01-297.

23. The SWC timely filed a *Notice of Challenge* with this Court, challenging the Special Master's *Special Master Report* and his *Order Denying Joint Motion to Alter or Amend*.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Argument was heard on January 18, 2011. The parties did not request additional briefing, nor does the Court require any. The matter is therefore deemed fully submitted the following business day, or January 19, 2011.

III.

STANDARD OF REVIEW

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

prevailing party. *SRBA Springs & Fountains Memorandum Decision & Order on Challenge*, Subcase No. 67-13701 (July 28, 2006), p. 18.

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

IV.
ISSUES RAISED ON CHALLENGE

1. Whether the Special Master erred in recommending a "recharge for irrigation" purpose of use which is contrary to the purpose of use previously decreed for the water right?

2. Whether the Special Master erred in recommending a purpose of use of "recharge for irrigation" with a priority of 1895 when "recharge" was not a statutorily recognized beneficial use in Idaho until at least 1978?

3. Whether there are sufficient facts in the record to support the finding that ASCC changed the nature of a portion of its diversion from "irrigation" to "recharge for irrigation" at a time prior to November 19, 1987, as required by Idaho Code § 42-1425, in order to avoid the requirements of Idaho Code § 42-222?

4. Whether the Special Master erred by declining to remand water right 01-23B to IDWR under Idaho Code § 42-1425?

V.
DISCUSSION

A. Factual Background.

The 01-23B claim is the only water right claim at issue in this case. Historical background surrounding the use of ASCC's rights is necessary for context. ASCC is a Carey Act canal company that provides water to 486 shareholders within its service area for the irrigation of 61,722.6 total acres. Water is delivered through water right 01-23B, 01-297, 35-2543 and 35-4246. Water right claim 01-23B is a surface right diverted from the Snake River. The right authorizes the diversion of 1,172.1 cfs and the place of use is the entire 61,722.6 acres. The right was originally decreed on December 19, 1910, (as part of a larger right) in the *Rexburg Irrigation Company et. al. v. Teton Irrigation Canal Company et. al.* ("*Rexburg Decree*") adjudication with a February 6, 1895, priority date and a purpose of use described as "irrigation and other purposes." The water right was reaffirmed in the *Aberdeen-Springfield Canal Company et. al. v. Henry Eagle* adjudication ("*Eagle Decree*") on March 12, 1969. Water right claim 01-297 is also a surface right diverted from the Snake River. The right is based on a prior decree with an "irrigation" purpose of use, and the place of use is appurtenant to the same 61,722.6 acres. The right authorizes the diversion of 230 cfs with an April 1, 1939, priority date. The combined quantity of ASCC's two surface rights is sufficient to irrigate the entire 61,722.6 acres. *Holliday Aff.*, p. 3.

Water right claims 35-4246 and 35-2543 are groundwater rights used in conjunction with the two surface rights on the same 61,772.6 acre place of use. Both have an "irrigation" purpose of use. Water right 35-4246 is based on beneficial use for 2.440 cfs with an October 15, 1934, priority date. Water right 35-2543 was previously licensed for a quantity of 6 cfs with an August 7, 1958, priority date and with the source described as "groundwater."[2] In addition, ASCC operates four "recovery wells" that pump directly into the canal system and are used to supplement the supply of water to shareholders located at the bottom third of the system when shortfalls occur. These wells

[2] The source is not described with any more particularity such as reclaimed water, reuse, wastewater, return flow, storage etc. nor does the license include any remarks more particularly defining the source.

are not licensed and operate as recovery wells authorized pursuant to Idaho Code § 42-228.[3]

Beginning in the 1950's and prior to November 19, 1987, individual ASCC shareholders drilled and licensed groundwater wells to supplement portions of the same 61,722.6 acres to which ASCC's shares are appurtenant.[4] The reason for drilling these supplemental wells was explained as follows:

> These claimants, who were also Company shareholders over a long period of time prior to 1987, converted in part or in full their lands covered by Company shares to ground water irrigation wells which were developed to supplement their surface rights delivered by the Company. This was accomplished by these claimants and shareholders to provide for irrigation efficiencies and/or because of difficulties experienced by the Company at times in delivering full supplies to their headgates due to their locations on the system, particularly at peak demand.

2nd Howser Aff. at 4. One hundred and twenty-six (126) of these wells were licensed. The licenses were issued in the name of the individual shareholders instead of in the name of ASCC. Nothing in the record suggests that the source for the rights, as originally licensed, was anything other than groundwater or subterranean water. Moreover nothing in the record identifies the source as derived from the same source as ASCC's surface rights.[5]

Despite the application of groundwater by shareholders to all or part of the same acreage previously irrigated with ASCC water shares, ASCC made no corresponding

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[3] Idaho Code § 42-228 exempts from the mandatory licensing process for establishing a water right through the drilling of wells and withdrawal of water "for the sole purpose of recovering ground water resulting from irrigation under such irrigation works for further use on or drainage of lands to which the established water rights of the parties constructing the wells are appurtenant . . . ." I.C. § 42-228.

[4] The record is not entirely clear as to the underlying basis for the water rights (i.e. license, prior decree or beneficial use), however, ASCC states in briefing that "all of the wells of ASCC shareholders in Consolidated Subcase 35-2315 were licensed with priority dates prior to 1987 as evidence by records of the Department." *Claimant's Brief in Response to Objector's Brief on Challenge* at 17. These groundwater rights are at issue in consolidated subcase 35-02315 which involves 126 similarly situated subcases where ASCC objected to the recommended source element.

[5] The sources were not described with any more particularity such as reclaimed water, reuse, wastewater, return flow, storage etc., nor do the licenses include any remarks more particularly defining the source. In fact, the 126 groundwater claims were recommended in the *Director's Report* with the source defined as "groundwater." ASCC filed objections to the 126 recommendations asserting that the source element should include a remark specifying that the source includes groundwater recovered from ASCC's surface irrigation works for use on land to which shares of ASCC are appurtenant and that the recovered water should be administered separately from all other rights in Basin 35 and the Snake River Basin.

reduction in the quantity of its surface diversion rights, including the 01-23B right, nor did it increase the number of irrigated acres of the place of use. *Dreher Aff.*, p. 2. Approximately 67% of the surface water now diverted and channeled through ASCC's conveyance canals eventually seeps into the groundwater system. This 67% averages about 180,000 AFA. *2nd Howser Aff.*, p. 5; *Olenichak Aff.*, p. 2., also *State of Idaho Aff.*, Ex. 1 (*Dreher Aff.*, p. 2) ("a portion of the diversion provides incidental recharge to the Eastern Snake Plain Aquifer"). The record does not reflect how much recharge seeped into the groundwater system prior to shareholders using groundwater.

ASCC filed its original *Notice of Claim* for water right 01-23B in the SRBA on May 8, 1990, claiming only "irrigation" as a purpose of use. The *Director's Report for Irrigation and Other Uses, Reporting Area 5 (IDWR Basin 35)* was filed June 13, 1999, which included recommendations for the 126 groundwater claims filed by ASCC's shareholders. The claims were recommended by IDWR with the source described as "groundwater." ASCC filed *Objections* to the Director's recommendations for the 126 claims on the basis that the recommendations should include a remark specifying that the source includes water recovered from ASCC's surface diversion works for use on land to which shares of ASCC are appurtenant. The *Objections* also asserted that the recovered water should be administered separately from all other rights in Basin 35 and the Snake River Basin.

On June 7, 2002, in resolution of ASCC's *Objections*, ASCC, IDWR and the State of Idaho entered into a *Settlement Agreement* agreeing that IDWR would recommend "recharge for irrigation" in the forthcoming *Director's Report* for Basin 01 as a purpose of use for ASCC's surface rights 01-23B and 01-297 in addition to "irrigation," pursuant to the accomplished transfer provisions of Idaho Code § 42-1425. *Thompson Aff.*, Ex. E. The *Settlement Agreement* provided that:

> Existing ground water rights used for irrigation within the service area of the Canal Company on lands paying assessments to the Canal Company and to which the Canal Company's surface rights have remained appurtenant will be given mitigation credit for the amount of water recharged against ground water depletions arising from the authorized diversion and use of ground water.

Id. at 4. The *Settlement Agreement* provided that once the SRBA Court issued partial decrees consistent with the *Agreement's* terms, ASCC would withdraw its objections. *Id.* at 5. The *Settlement Agreement* recognized that the recommendations "will not automatically result in approval by the SRBA District Court of IDWR's recommendation for the Canal Company's Basin 01 rights." *Id.* On May 15, 2006, IDWR filed the *Director's Report, Irrigation and Other Uses, IDWR Lower Basin 01*, recommending the additional purpose of use of "irrigation for recharge" with the following remark: "Diversion of rights 1-23B and 1-297 for the purpose of recharge for irrigation is authorized for a maximum of 501.8 cfs / 21,094 acres." On June 21, 2007, ASCC was granted leave to amend its claims in order to claim additional acres. Despite the *Settlement Agreement* and IDWR's prior recommendation, ASCC claimed only "irrigation" as a purpose of use in the amended claims. On March 25, 2008, IDWR filed *Amended Director's Reports* in response to the amended claims, which again included the "recharge for irrigation purpose of use." Thereafter, the members of the SWC filed *Objections*, contesting priority date, purpose of use, place of use and remarks.

B. The Special Master did not err in applying Idaho Code § 42-1425 by recommending a purpose of use not previously recognized by a prior decree or by statute.

The SWC argues the Special Master erred in applying the accomplished transfer provisions of Idaho Code § 42-1425 by recommending a "recharge for irrigation" purpose of use for water right claim 01-23B relating back to the original 1895 priority date when that specific purpose of use was not decreed in either the *Rexburg Decree* or the *Eagle Decree*. The SWC also argues the Special Master erred by recommending a "recharge for irrigation" purpose of use relating back to the original 1895 priority date when groundwater recharge was not authorized by statute as a beneficial use until at least 1978. This Court finds both arguments contrary to the express purpose of the accomplished transfer provisions of Idaho Code § 42-1425.

1. The purpose of Idaho Code § 42-1425 is to effectuate a change to an element of a water right.

The accomplished transfer provisions of Idaho Code § 42-1425 provide in relevant part as follows:

> 1) Legislative findings regarding accomplished transfers and the public interest.
>
> (a) The legislature finds and declares that prior to the commencement of the Snake River basin adjudication, and the northern Idaho adjudications, many persons entitled to the use of water or owning land to which water has been made appurtenant either by decree of the court or under provisions of the constitution and statutes of this state changed the place of use, point of diversion, nature or purpose of use, or period of use of their water rights without compliance with the transfer provisions of sections 42-108 and 42-222, Idaho Code.
>
> (b) The legislature finds that many of these changes occurred with the knowledge of other water users and that the water has been distributed to the right as changed. The legislature further finds and declares that the continuation of the historic water use patterns resulting from these changes is in the local public interest provided no other existing water right was injured at the time of the change. Denial of a claim based solely upon a failure to comply with sections 42-108 and 42-222, Idaho Code, where no injury or enlargement exists, would cause significant undue financial impact to a claimant and the local economy. Approval of the accomplished transfer through the procedure set forth in this section avoids the harsh economic impacts that would result from a denial of the claim.
>
> (c) The legislature further finds and declares that examination of these changes by the director through the procedures of section 42-222, Idaho Code, would be impractical and unduly burdensome. The more limited examination of these changes provided for in this section, constitutes a reasonable procedure for an expeditious review by the director while ensuring that the changes do not injure other existing water rights or constitute an enlargement of use of the original right.
>
> (2) Any change of place of use, point of diversion, nature or purpose of use or period of use of a water right by any person entitled to use of water or owning any land to which water has been made appurtenant either by decree of the court or under the provisions of the constitution and statutes of this state, prior to November 19, 1987, the date of commencement of the Snake River basin adjudication, and prior to January 1, 2006, for the northern Idaho adjudications authorized by section 42-1406B, Idaho Code, may be claimed in the applicable general adjudication even though the person has not complied with sections 42-108 and 42-222, Idaho Code, provided no other water rights existing on the date of the change were

injured and the change did not result in an enlargement of the original right.

The arguments raised by the SWC ignore the purpose of the accomplished transfer statute. The express purpose of the accomplished transfer statute is as a substitute for the transfer provisions of Idaho Code § 42-222. Idaho Code § 42-1425 authorizes a change to one or more elements of a water right and authorizes that the change retains the original priority date (as opposed to creating a new right with a date of change priority) provided the change does not enlarge the use of the right or result in injury to other water rights. For purposes of Idaho Code § 42-1425, the previously unauthorized change must have occurred at a point in time prior to the commencement of the SRBA in 1987.

The fact that a prior decree did not identify the claimed change is entirely predictable. The statute does not limit changes in water rights to those rights not previously decreed. The express purpose of the statute is to recognize changes to water rights previously established "by decree of the court or under provisions of the constitution and statutes of this state" and to allow changed rights to maintain the original priority date, provided no existing rights are injured. The application of the statute cannot be construed as a collateral attack on a prior decree or license because the purpose of the statute is to authorize a change to a previously decreed or licensed element of the right.[6] The statute expressly authorizes changes to an element of the right different from that previously licensed or decreed.

[6] In this case the prior decrees would not be conclusive as to the decreed purpose of use because the purpose of use for 1-23B right was previously decreed as "irrigation and other purposes." The "other purposes" language is common in older decrees. This Court has previously ruled that the use of the term "other purposes" is vague and therefore allowed the claimant to present evidence regarding the use of the right at the time the decree was entered. ***See Memorandum Decision and Order on Challenge; Order Granting State of Idaho's Motion for the Court to Take Judicial Notice of Adjudicative Facts; Order Of Recommitment with Instructions to Special Master Cushman***, Subcase Nos. 36-00003A *et. al.* (Nov. 23, 1999), pp. 43-47. In that case, a claim for fish propagation was based on a portion of right decreed (*New International Decree*) in 1932 with the purpose of use described as irrigation, domestic and "other purposes." The claimant was allowed to present evidence that the right was being used for fish propagation prior to the time the decree was entered.

Whether or not the use now being claimed was recognized as a beneficial use at the time the original right was established is not relevant to an accomplished transfer.[7] For purposes of applying Idaho Code § 42-1425, what is relevant is whether the accomplished change to the element of the water right occurred prior to November 19, 1987. The purpose of use need not be recognized as a beneficial use at the time the right was originally appropriated in order for the priority date to relate back. However, the use must be recognized as a beneficial use pursuant to state law at the time of the change. Therefore the key issue is whether a water right for groundwater recharge could be established without compliance with the groundwater recharge statutes.

2. A water right for groundwater recharge could be recognized as a beneficial use prior to the enactment of the recharge statutes provided there was an identifiable "beneficial use" to the appropriator.

The SWC argues that groundwater recharge was not recognized as a beneficial use of water prior to 1978 when legislation declared groundwater recharge as a beneficial use. This Court agrees in part, and disagrees in part. The Court holds that prior to the legislative declaration of recharge as a beneficial use, water rights for recharge purposes could be established would depending on the facts and circumstances surrounding the particular use of the right.

a. Legislative declaration that groundwater recharge is a beneficial use and authorization of groundwater recharge permits.

In 1978, the Idaho Legislature enacted Idaho Code § 42-234 recognizing ground water recharge as a beneficial use specifically in the vicinity of St. Anthony and Rexburg. The statute was enacted in conjunction with a groundwater recharge project. The statute authorized IDWR to issue a permit for the appropriation and underground storage of water for the purpose of recharging groundwater in furtherance of the pilot groundwater recharge project. 1978 Idaho Sess. Laws, ch. 366, p. 955 (codified as I.C. § 42-234). In 1982, the Legislature enacted Idaho Code § 42-4201A expanding the authorization of the beneficial use of groundwater recharge to aquifer recharge districts.

[7] The Court also fails to see how it would be relevant in a transfer pursuant to Idaho Code § 42-222 provided the sought after change to the water right would not result in injury to existing users.

> 42-4201A. RECHARGE OF GROUNDWATER BASINS – DIRECTOR'S AUTHORITY TO ISSUE PERMIT – LIMITATIONS
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> . . .
>
> (2) . . . [T]he legislature hereby declares that the appropriation and underground storage of water by an aquifer recharge district hereinafter created for purposes of groundwater recharge shall constitute a beneficial use and hereby authorizes the department of water resources to issue the aquifer recharge district a permit, pursuant to section 42-203, Idaho Code for the appropriation and underground storage of the unappropriated waters of the state.

1982 Idaho Sess. Laws, ch. 204, pp. 538-539 (codified as I.C. § 42-4201A). The authorization, however, was not without limitation or regulation:

> (3) The director . . . may regulate the amount of water which the aquifer recharge district may appropriate and may reduce such amount, even though there is sufficient water to supply the entire amount originally authorized.
>
> (4) To insure that other water rights are not injured by the operations of the aquifer recharge district, the director of the department of water resources shall have the authority to approve, disapprove, or require alterations in the methods employed by the district to achieve groundwater recharge. In the event that the district [sic] (should read director) determines that the district's methods of operation are adversely affecting existing water rights or are creating conditions adverse to the beneficial use of water under existing rights, the director shall order the cessation of operations until such alterations as may be ordered by the director have been accomplished or such effects otherwise have been corrected.

Id. at 539. In 1985, Idaho Code § 42-4201A was amended to include groundwater recharge projects operated by irrigation districts in addition to aquifer recharge districts. 1985 Idaho Sess. Laws, ch. 120, pp. 292-293. In 1994, Idaho Code § 42-4201A was amended to extend beyond water appropriations for proposed recharge projects to "certain water uses and proposed projects to recharge basins" as well as to apply to "any person, aquifer recharge district, irrigation district canal company or water district," subject to the same limitations and regulations. 1994 Idaho Sess. Laws, ch. 274, pp. 851-852.

In 1994, Idaho Code § 42-234 was also amended to expand recognition of groundwater recharge as a beneficial use beyond the vicinity of St. Anthony and Rexburg to recharge projects in groundwater basins throughout the rest of the state. 1994 Idaho Sess. Laws, ch. 433, p. 1397. The following amendment was also included recognizing "incidental" recharge as being in the public interest but subject to the limitation that such recharge is not the basis for a new or expanded right:

> The legislature further *recognizes* that incidental ground water recharge benefits are often obtained from 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 resources.

1994 Idaho Sess. Laws, ch. 433, p. 1397 (emphasis added). The impact of the amendment is recognition that there is a distinction in the law between the treatment of groundwater recharge that is purposeful, and recharge that is incidental as a result of a different beneficial use of water.[8] A plain reading of the amendment expressly prohibits the issuance of a separate water right or the expansion of an existing right for incidental recharge despite incidental recharge being in the public interest.

In 2009, the legislature amended Idaho Code § 42-234 expanding the recognition of groundwater recharge as a beneficial use of water beyond recharge projects and incorporating the same limitations and regulations included in Idaho Code § 42-4201A. The legislature also repealed Idaho Code § 42-4201A. 2009 Idaho Sess. Laws, ch. 242, p. 743.

b. Beneficial uses of water are not limited to those expressly enumerated in the Idaho Constitution, authorized by statute or authorized by the Idaho Supreme Court.

[8] The term "incidental" as commonly used in the context of water law means a use of water that is secondary to a primary use. For example, water in a ditch diverted for the primary purpose of irrigation may be used for the incidental watering of livestock. Incidental recharge distinguishes that which incidental or unintended from that which is conducted for a specific purpose.

Idaho Code § 42-104 provides that an appropriation of water must be for "some useful or beneficial purpose" but does not define what constitutes a beneficial purpose. The issue of whether beneficial uses for water rights are limited to those specifically enumerated in Article 15 § 3 of the Idaho Constitution[9] and those expressly added by statute and/or affirmed by the Idaho Supreme Court has already been addressed in the SRBA and remains law-of-the-case. In *Memorandum Decision and Order on Cross-Motions for Summary Judgment Re: Bureau of Reclamation Streamflow Maintenance Claim*, Subcase No. 63-03618 (Lucky Peak Reservoir) (Sept. 23, 2008) ("*Lucky Peak*"), this Court upheld a claim for stream flow maintenance based on a license that did not comply with the Idaho Minimum Stream Flow Act, I.C. § 42-1501 *et. seq.* ("Act"). The license did not comply with I.C. § 42-1501 because it was not issued in the name of the Idaho Water Resource Board. At issue in *Lucky Peak* was whether IDWR exceeded its authority by issuing the license. This Court upheld the license reasoning that the Act constituted the first legislative declaration of in-stream flows being a beneficial use of water. However, this Court emphasized that the Act was not the exclusive means by which such a right could be appropriated. *Id.* at 29-30. The *Lucky Peak* decision relied on *State of Idaho, Dep't of Parks v. Idaho Dep't of Water Admin.*, 96 Idaho 440, 530 P.2d 924 (1974) ("*Malad Canyon*"). In that case, Justice Bakes in a special concurrence stated: "I therefore conclude that the uses other than those enumerated in Article 15 § 3, can be beneficial uses." *Id.* at 29 (citing *Malad Canyon* at 447, 530 P.2d at 931 (Bakes special concurrence)). He also stated:

> With the exception of the uses implicitly declared to be beneficial by Article 15, § 3, there is always a possibility that other uses beneficial in one era will not be in another and *vice versa*. As stated in *Tulare Irrig. Dist. v. Lindsay-Stratmore Irrig. Dist.*, 3 Cal. 2d 489, 45 P.2d 972, 1007 (1935):
>
> > What is a beneficial use, of course depends upon the facts and circumstances of each case. What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one

[9] Article 15 § 3 of the Idaho Constitution recognizes the following purposes of use: domestic, agricultural, manufacturing, mining and milling connected with mining.

> time may, because of changed conditions, become a waste of water at a later time.

Id. at 29, fn. 5. (quoting *Malad Canyon* at 448-49, 530 P.2d at 932-33).

This Court reasoned that the Idaho Minimum Stream Flow Act waived the diversion requirement for establishing an in-stream flow water right. *Id.* at 30. *See also In Re: SRBA Case No 39576, Minidoka National Wildlife Refuge, State v. U.S.* 134 Idaho 106, 996 P.2d 806 (2000) ("*Smith Springs*") (defining the Idaho Minimum Stream Flow Act as one of the two exceptions to the diversion the requirement, the other being stock-watering). This Court ruled that the facts in *Lucky Peak* pertained to releases of impounded water from a dam and therefore the Idaho Minimum Stream Flow Act, I.C. § 42-1501, did not apply. *Id.* at 19.

Later this Court applied similar reasoning regarding claims for aesthetic, recreational and wildlife or "ARW" water rights where a diversion is involved. Although the ARW Basin-Wide Issue was ultimately decided pursuant to an agreement of the parties, the Court nonetheless made factual findings and legal conclusions in support of entry of the decree. *Consent Decree Re: Aesthetic, Recreation, and Wildlife (ARW) Purposes of Use*, Basin-Wide Issue No. 00-91014 (Feb 20, 2009). This Court held:

> Idaho Code § 42-104 provides that an appropriation must be for a beneficial purpose. However, the statute does not list or otherwise limit what constitutes a beneficial purpose, although there are other statutes which place limits on uses, such as for hydropower and minimum stream flows. The Idaho Supreme Court has held that the beneficial purposes of use listed in Article 15 § 3 are not exhaustive. State Dept of Parks at 444, 530 P.2d at 928. Against this background, it is reasonable (absent a provision of law to the contrary) to conclude that the list of what constitutes a beneficial use may be expanded via the administrative licensure process. The Director of IDWR is vested with the authority to review permit applications and approve licenses for new appropriations. This process provides other water users the opportunity to protest applications and seek judicial review. The process exists independently of any ongoing adjudication and will continue after the SRBA has concluded. Accordingly, it would seem that this is one manner in which the states develops a consensus on what constitutes a legally cognizable beneficial use.

Id. at 7-8. The legal conclusion was qualified as follows:

> This particular conclusion of law is intended for the purpose of showing there is an *arguable basis* in law which supports the issuance of the consent decree, and shall not be interpreted as a ruling by this Court that IDWR, through the licensure process, determines what constitutes beneficial use. The statement merely recognizes that there is a lengthy history of a significant number of licenses being issued for ARW purposes, whereby judicial review was not sought, and/or subsequent legislative or administrative actions were not taken.

Id. fn. 4.

Based on the *Malad Canyon* reasoning and its subsequent application in the SRBA, what qualifies as a beneficial use is not limited to those purposes enumerated in the constitution, by statute or affirmed by the Idaho Supreme Court. However, just because a particular use is now recognized as beneficial, does not mean that the use was always beneficial. Whether a particular use is beneficial depends on the particular facts and circumstances.

c. A water right for groundwater recharge may be established through means other than the groundwater recharge statutes.

Whether or not recharge qualifies as a beneficial use, outside the groundwater recharge statutes, depends on the facts and circumstances surrounding the purpose and use of the recharge. Prior to enactment of the groundwater recharge statutes, some irrigators historically engaged in and relied on the purposeful and deliberate recharging of groundwater tables as a component of their historical irrigation practice. These practices included recharging groundwater early in the season when sufficient water was available for the purpose of raising water table levels to supplement surface irrigation later in the season when less water was available, as well as for re-diversion and use at a later time in lieu of unavailable storage water. In some areas of the state, irrigation may not have been practical without the utilization of such recharge practices. Some of these uses of water have been approved by the Courts and the Department. *See Budge Aff.*, Exhibit 1 (license issued in 1954 for soil root zone storage with a 1949 priority); Exhibit 2 (SRBA partial decree issued for groundwater recharge with 1954 priority); Exhibit 3, pp. 36-37 (sub-irrigation of lands recognized in the *Rexburg Decree*). As early as 1951, the state

recognized the drilling of wells, without a permit for a water right, for recovering groundwater resulting from irrigation. The water was used on lands to which established rights were appurtenant. 1951 Idaho Sess. Laws Ch. 200, p.151 codified as I.C. § 42-228. A claimant may therefore establish facts supporting a finding of a recharge purpose of use based on beneficial use without a specific legislative statute. Whether or not the particular use is determined to be beneficial would depend on the particular facts and circumstances. This Court therefore concludes that a water right for groundwater recharge may under certain circumstances be established independent of the groundwater recharge statutes.

However, such a claim would require a showing establishing a benefit to the appropriator derived from use of the recharge. Put differently, the claimant must demonstrate an identifiable useful or beneficial purpose to the appropriator for the recharge at the time of the appropriation. The claimant could not rely on subsequent legislation to establish that a benefit occurred to the public at large. Thus the mere assertion that the deliberate discharge of water into the aquifer or the incidental seepage of water into the aquifer is now deemed to be in the public interest is not enough. The claimant would need to show that a tangible purpose and benefit to the appropriator was derived from the recharge. If the claim is not based on the "appropriator's" use of recharge, but relies entirely on a legislative declaration, the Court would conclude that the sole basis for the claim is the statute. Therefore the claim would be entirely subject to the statutory constraints and limitations. The circumstances that occurred in both *Lucky Peak* and the ARW highlight this distinction. In *Lucky Peak*, the claimant went through the permit and license process specifying the reason and purpose of use for the appropriation. Similarly, the ARW rights were based on information about how the claimants were specifically using the water. A significant number of the ARW claims were based on licenses where the claimant previously sought an appropriation with IDWR for a particular ARW use. The beneficial uses were established independent of reliance on a legislative declaration.

Groundwater recharge presents a unique set of circumstances because recharge can exist without the appropriator or anyone else actually making further use of or benefitting from the recharged groundwater. Suppose a claimant deliberately diverts

surface water into a fissure in the ground without further purpose, use or re-use of the water. The groundwater table may be rising, but there is no identifiable use or need for the recharged groundwater. Present day legislation may well recognize that conduct as being in the public interest because it now results in a benefit to the public at large. However, absent legislative authorization, this practice would likely not be considered beneficial.[10]

A claim for storage illustrates another example. Storage of water may certainly be a beneficial use. However, storage for the mere sake of storage, without an identifiable accompanying use or purpose, would call into question whether the "use" was beneficial. In such a case, the water is diverted and stored, but it is not put to use by the "appropriator." Similarly, recharging groundwater without an identifiable use or benefit to the appropriator fails to support a beneficial use in the absence of specific legislation.

Incidental recharge resulting from an existing beneficial use provides another such example. In many cases, aquifer recharge is purely an incidental result associated with the beneficial use of an existing right. The law allows the original appropriator under the existing irrigation right to recapture and reuse that water provided the use is consistent with the existing water right and does not expand the use of the existing right. *A & B Irr. Dist. v. Aberdeen-American Falls Ground Water District*, 141 Idaho 746, 752, 118 P.3d 78, 84 (2005). Such use is considered a complement to the existing irrigation right as opposed to a new or additional use. In the event the appropriator does not recapture and reuse the water, the result is that the water seeps into and recharges the aquifer. The Legislature has also now recognized incidental recharge as being in the public interest, albeit subject to constraints and limitations. Prior to such legislation, the excess water recharging the aquifer may well have been viewed as a diversion of too much water for the purpose of use of the existing irrigation right. *A & B Irr. Dist.* at 752, 118 P.3d at 84 ("[s]hould A & B find itself in the unique situation of having more excess drain and/or waste water than it can reuse on its appropriated properties, Idaho law requires the district to diminish its diversion").

[10] The Idaho Legislature has now determined that groundwater recharge without further use by the appropriator is a beneficial use, but for reasons discussed elsewhere in this opinion, that authorization likely came about as a result of changes in conditions which did not previously exist.

It is erroneous to assume that a legislative declaration of beneficial use always acknowledges a use of water that was previously overlooked as beneficial and therefore can be used to retroactively justify a use previously considered wasteful. Such legislative declarations can result in response to conditions which did not previously exist. What is considered waste in one generation can become a beneficial use for a later generation based on changed conditions. *Malad Canyon* at 448-49, 530 P.2d at 932-33. In this instance, the adoption and implementation of a comprehensive state water plan, the full development of the Eastern Snake Plain Aquifer (ESPA), a better understanding of the ESPA, and the implementation of conjunctive management of ground and surface water all arguably constituted changed conditions giving rise to a change in policy on groundwater recharge. Prior to the existence of these conditions and statutes recharge may have constituted waste absent a showing that the water was actually being put to use by the appropriator. Prior to the development and use of groundwater, the diversion of surface water to the detriment of a subsequent downstream appropriator would have been viewed quite differently.

In sum, this Court holds a claimant may establish a groundwater recharge right prior to the enactment of the recharge statutes. However, but such right requires a showing of beneficial use by the appropriator beyond mere reliance on a later legislative directive that the diversion is now considered a benefit to the public at large. If the statute is the sole justification for establishing beneficial use, then the claim is subject to the limitations and constraints of that legislation.

C. Genuine issues of material fact exist with respect to whether ASCC changed its purpose of use to include "recharge for irrigation" prior to the commencement of the SRBA on November 19, 1987, or whether recharge was merely incidental to its irrigation practices.

The SWC argues that the facts in the record are insufficient to support a finding that ASCC changed the purpose of use of the 01-23B right to include "recharge for irrigation" prior to November 19, 1987. For the reasons discussed below, this Court finds genuine issues of material fact exist with respect to whether ASCC conducted purposeful recharge prior to November 19, 1987, in conjunction with its irrigation delivery practices, or was instead merely incidental recharge. The facts of record are insufficient to

distinguish between the two. The distinction is significant because ASCC relies on the provisions of the accomplished transfer statute as the support for its "recharge for irrigation" purpose of use claim.

1. Genuine issues of material fact exist with respect to whether the recharge claimed by ASCC prior to November 19, 1987, was incidental to its operation.

The issues in this case were decided on summary judgment. ASCC and the SWC each moved for summary judgment on separate issues. Accordingly, all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. *Brown v. City of Pocatello*, 148 Idaho 802, 806, 229 P.3d 1164, 1168 (2010). The burden of proving the absence of material facts is on the moving party. *Id.* The party opposing summary judgment "must respond to the summary judgment with specific facts showing there is a genuine issue for trial." *Id.* (quoting *Baxter v. Craney*, 135 Idaho 166, 170, 16 P.3d 263, 267 (2000)). ASCC moved for summary judgment asserting partial decrees should be entered according to the elements recommended in the *Amended Director's Reports*. ASCC filed affidavits in support of its *Motion* and relied on the *prima facie* weight accorded the *Amended Director's Report*. The SWC moved for summary judgment asserting as a matter of law that ASCC's rights could not be decreed with a "recharge for irrigation" purpose of use with the priority date from two prior decrees that did not describe recharge as a purpose of use.

ASCC asserted its irrigation practices included diverting a portion of the 01-23B right for recharge in order to supply the groundwater source pumped by shareholders and applied to shareholder lands. However, the Court finds the facts to be inconclusive because conflicting inferences can be drawn from the facts. As noted previously, an appropriator is entitled to recapture and reapply water under its existing right. For purposes of establishing recharge ASCC may have been able to re-apply the water through the use of recovery wells authorized pursuant to Idaho Code § 42-228, as it was already operating four such wells. However, that is not what occurred with respect to the 126 shareholder wells.

For purposes of applying the accomplished transfer statute, there has been no showing of an actual physical change in the use of the 01-23B right by ASCC. The "change" that is alleged to have occurred is that the diversion of the full quantity of the surface right allegedly continued after the issuance of the groundwater licenses to ASCC's shareholders. The licenses were issued in the name of the shareholders instead of in the name of ASCC. Nothing in the record shows that the source for any of the rights, as originally licensed, was described as anything other than ground or subterranean water. The source was not identified as being related to the same source as ASCC's surface rights. That is the reason ASCC objected to the recommendations. Although ASCC objected to the source recommendation for the individual licensed rights in the SRBA, the record is not clear as to whether ASCC filed protests in the licensure proceedings on the same issue. The record does not show the issuance of the licenses was conditioned on ASCC continuing to divert the full quantity of its surface rights thereby acknowledging that the source of the groundwater rights was supplied in part or in whole by ASCC's surface rights through re-diversion. For purposes of the licensure proceedings, existing water users were put on notice that the water pumped from the individual wells would assume a date of permit priority date as opposed to a re-diversion of a portion of ASCC's surface right with an earlier priority. The licenses have legal significance.

ASCC now avers that it continued to divert the full quantity of the 01-23B right after the wells were drilled. However, ASCC also states that "water is diverted only at times when the Company's shareholders need the water for beneficial use." *Howser Aff.*, p. 2. Further, "At all times prior to and after November 19, 1987, the Company has diverted and delivered to the Company's shareholders as needed water available up to the authorized maximum quantity available. . . ." *2nd Howser Aff.*, p. 4. At times a portion of the surface right was placed in the Water Supply Bank as opposed to being used for recharge. *Olenciak Aff.*, p. 2. Therefore, one reasonable inference is that the water was managed to meet the demands of the shareholders irrigating with surface water and did not take into account depletions caused by groundwater pumping. When surface irrigators did not require water it was either not diverted or it was placed in the water bank.

ASCC does not specify exactly when the accomplished transfer from irrigation to recharge for irrigation is alleged to have occurred. Only that "At all times prior to and after November 19, 1987" the Company delivered as needed up to the maximum quantity of 1,172.1 cfs for irrigation purposes and 389.5 cfs for recharge for irrigation. A prior decree does not bar the application of the accomplished transfer statute because the alleged transfer can take place after the decree was entered but prior to November 19, 1987. However, a prior decree is nonetheless probative as to whether the recharge was purposeful or incidental to ASCC's operation. Shareholder wells were drilled as early as the 1950's, but ASCC did not seek to have any change in purpose of use identified in the *Eagle Decree* in 1969 after being put on notice that shareholder licenses did not identify the source as being a part of ASCC's surface right. The wells were drilled between 1950 and November 19, 1987, however, just because ASCC continued to deliver the shares instead of correspondingly reducing its surface diversions does not alone show the shares were diverted for recharge. An assumption that water was diverted for recharge is countered by common practices of carriage or head which is required to operate the delivery system. This is required whether or not all shareholders are diverting the surface water and applying it to their lands. In fact, Idaho Code § 42- 1201 requires that a water delivery entity keep its system charged. Thus one inference that can reasonably be drawn from the facts is that the claimed recharge resulting from the use of the 01-23B right is incidental recharge associated with ASCC's delivery practices.

The Director's recommendation in this case was based on a negotiated settlement with ASCC. The State of Idaho filed the *Affidavit of Karl J. Dreher*, then Director responsible for overseeing the preparation and submission of the recommendations to the Court. Director Dreher stated his basis for approving the settlement: "I concluded that the accomplished transfer was justified because ASCC shareholders continue to pay assessments and ASCC diverted the full amount of water authorized under water right number 1-23B in most years. *Thus a portion of the diversion provided incidental recharge to the Eastern Snake Plain Aquifer.* . . . The change from irrigation to recharge for irrigation took place prior to November 19, 1987." *Dreher Aff.*, p. 2 (emphasis added). It appears the Director's recommendation relied on the incidental recharge benefits associated with ASCC's delivery practices. ASCC's general manager

acknowledged in his affidavit that the diversion for recharge is derivative of ASCC's surface water irrigation diversions and is based on a formula developed by IDWR for calculating recharge. *Howser Aff.*, p. 2. ASCC does not offer any formula or methodology used to determine recharge benefits to its shareholders, nor does ASCC describe any efforts it undertook to facilitate recharge other than run water through its delivery system. There is no evidence of the implementation of a recharge program or project.

These facts are not conclusive. These facts do not show whether ASCC was purposefully engaged in recharging the groundwater for use by its shareholders or whether the recharge was merely incidental to its overall delivery operation. In construing all inferences in favor of the non-moving party, the Court finds there are genuine issues of material fact with respect to whether the recharge claimed by ASCC prior to November 19, 1987, was incidental.

2. Incidental recharge cannot be used under the provisions of the accomplished transfer statute to expand the purpose of use of a water right.

A determination that the claimed recharge is the result of incidental recharge is significant because incidental recharge cannot be used to expand an existing water right. ASCC's claim is not based on a beneficial use claim for recharge but rather on a transfer of an existing irrigation right to include the additional purpose of use of recharge for irrigation. The claim relies solely on the accomplished transfer provisions of Idaho Code § 42-1425 because a formal transfer was not sought in accordance with Idaho Code § 42-222. The 1994 amendment to I.C. § 42-234 expressly prohibits the issuance of a separate water right or the expansion of an existing right based on incidental recharge.

> The legislature further recognizes that incidental ground water recharge benefits are often obtained from 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 resources.

1994 Idaho Sess. Laws, ch. 433, p. 1397 (emphasis added).

The statute went into effect April 7, 1994, and was therefore in force at the time the provisions of the accomplished transfer statue on which ASCC relies went into effect on April 12, 1994. *See* 1994 Idaho Sess. Laws, ch. 455, p. 1478. Any claim based on the accomplished transfer provisions of Idaho Code § 42-1425 would be subject to the limitations and constraints imposed by Idaho Code § 42-234. As such, the accomplished transfer provisions of Idaho Code § 42-1425 cannot be used as the basis to expand an existing right based on incidental recharge. Accordingly, if ASCC's claim is determined to be based on incidental recharge then such a transfer would not be authorized by statute.

The record is insufficient to determine whether the recharge was incidental. Accordingly, the case is therefore remanded to the Special Master for further development of a factual record surrounding the development of the recharge and a determination on the basis for the recharge. The Court notes the motions for summary judgment were filed after the discovery deadline had expired, and neither party had conducted any timely discovery. Because this case raises issues of first impression a more complete record is desirable. The issues in this case need to be decided on a more complete record. The Court therefore leaves it to the discretion of the Special Master to determine the scope and timing of additional limited discovery.

D. The Special Master erred by refusing to remand water right 01-23B to IDWR under the particular circumstances of this case.

For the reason discussed below this Court concludes that the Special Master erred by not remanding to IDWR. However, at the time the Special Master did not have the benefit of this Court's ruling regarding the scope and purpose of the remand. Under ordinary circumstances, the Special Master's refusal to remand would be appropriate since the request for remand occurred well after discovery and the period for filing dispositive motions had closed. The request was made approximately a month before trial. Ordinarily, such late timing of a remand request would properly result in a denial by the Special Master on the grounds that the remand would delay the trial. As explained below, the remand hearing is not the first examination of injury or enlargement conducted by IDWR. As is explained below, the purpose of the remand hearing is not to serve as a

process for IDWR's initial inquiry into injury or enlargement. In this case, however, certain procedural nuances require this Court to allow the opportunity for a remand.

1. The nature of the objection must relate to alleged injury or enlargement as a result of the accomplished transfer in order to trigger an automatic remand.

The SWC argues Idaho Code § 42-1425 mandates a remand to IDWR whenever an objection is filed to a recommendation for place of use, point of diversion, nature or purpose of use or period of use that is based on an accomplished transfer. The surface water coalition argues a mere objection is the sole triggering requirement for the remand. This Court disagrees and holds that given the limited purpose of the hearing, the objection must relate to injury or enlargement to trigger the remand under Idaho Code § 42-1425.

The statute provides in relevant part:

> Except for the consent requirements of section 42-108, Idaho Code, all requirements of section 42-108 and section 42-222, Idaho Code, are hereby waived in accordance with the following procedures:
>
> (a) If an objection is filed to a recommendation for accomplished change of place of use, point of diversion, nature or purpose of use or period of use, *the district court shall remand* the water right to the director for further hearing *to determine whether the change injured a water right existing on the date of the change or constituted an enlargement of the original right.* After a hearing, the director shall submit a supplemental report to the district court setting forth his findings and conclusions. If the claimant or any person who filed an objection to the accomplished transfer is aggrieved by the director's determination, they may seek review before the district court. If the change is disallowed, the claimant shall be entitled to resume use of the original water right, provided such resumption of use will not cause injury or can be mitigated to prevent injury to existing water rights. The unapproved change shall not be deemed a forfeiture or abandonment of the original water right.
>
> (b) This section is not applicable to any claim based upon an enlargement of use.

I.C. § 42-1425 (emphasis added).

The statute must be considered as a whole. *Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 311 (2009). The purpose of the remand is limited to a determination as to

"whether the change injured a water right existing on the date of the change or constituted an enlargement of the original right." The statute thus provides for a hearing of limited scope. Clearly, unless the objection alleges that the claimed transfer results in injury or enlargement, there is no purpose for a remand. It follows that the statute limits the remand requirement to circumstances where the objection asserts that the accomplished transfer results in injury or enlargement as opposed to an objection on a basis other than injury or enlargement. A mere objection is not enough to trigger a remand. An objection to one of the elements may be for any number of reasons. An objection to the place of use could be based on an incorrect legal description or encroachment on the land of another. An objection to the purpose of use could be that the right is not being used in conjunction with the purpose as claimed. Such objections do not trigger a remand. One of the issues in this case is whether or not as a matter of law groundwater recharge right can be established outside the groundwater recharge statutes. The SRBA utilizes a simplified "check the box" notice pleading. ***See SRBA Administrative Order 1, Rules of Procedure ("AO1")****, Standard Form 1 Objection.* Therefore it may not be readily ascertainable from the face of the pleading whether it raises issues of injury or enlargement. In a recent subcase, the Special Master required that the party seeking a remand file a more definite statement "as to the exact nature of the injury or enlargement alleged to have occurred, and also a statement as to how said injury arises from the change in point of diversion for these rights." ***Memorandum Decision and Order on Motions for Summary Judgment: Order Requiring Pioneer to File a Statement Regarding Injury or Enlargement; Order Setting Status Conference***, Subcase 63-00166A *et. al.* (Oct. 22, 2010). The Special Master required an additional statement regarding injury or enlargement:

> Pioneer asserts that the procedures set forth in I.C. § 42-1425 are to be automatically implemented by the SRBA District Court whenever an objection is filed to a water right recommendation that is based on an accomplished transfer. Pioneer's argument overlooks that in these particular subcases the Court's file lacked sufficient information to determine whether these subcases should be remanded to IDWR for a hearing pursuant to I.C. § 42-1425. . . . Pioneer's objection does not specify the nature of its objection to the claimed point of diversion. Pioneer did not fill out the line on the objection form where it asks what Pioneer assert[s] the point of diversion "Should be." In other words, the

> objection filed by Pioneer gives no indication that the reason it is objecting to Franklin and Mason's claimed point of diversion is injury or enlargement occasioned by an unauthorized change; as opposed to perhaps an allegation that the point of diversion was simply described in the wrong quarter quarter.
>
> Under I.C. § 42-1425, the purposes for which a water right claim is to be remanded to IDWR for further proceedings are very limited – to determine whether the change resulted in injury or enlargement. Prior to Pioneer's request for remand, the Court could not have simply guessed or presupposed that Pioneer was asserting that unauthorized change in point of diversion has resulted in injury or enlargement.

Id. at 10-11. This Court concurs with the reasoning. The objections in this case are similarly vague as to injury or enlargement. More importantly, however, in an attempt to clarify the basis for the objections the SWC filed a *Notice of Filing Initial Reasons Supporting Objections* but did not identify injury or enlargement as a basis its objections nor did it request a remand for further inquiry by IDWR. *Budge Aff.* Exhibit C. The Special Master would not have known that injury or enlargement were even at issue.

The SWC argues that it is not incumbent on the party opposing the accomplished transfer to conduct extensive discovery to determine whether the claim for an accomplished transfer results in injury or enlargement but rather that is the responsibility of IDWR to investigate both issues. The SWC argues therefore that the remand is automatic. The argument ignores that Idaho Code § 42-1425 requires that the Court remand if an objection is filed to a "*recommendation*" for a change in the place of use, point of diversion, purpose of use or period of use. (emphasis added). The statute uses the term "*recommendation*" as opposed to the term "*claim.*"[11] The distinction is significant. Where a "recommendation" is filed, IDWR has conducted an independent review of the claim and recommended the elements based on that review. In contrast, the use of the term "claim" implies no such independent review was conducted. This distinction is exemplified in the SRBA with respect to claims established under federal law and those based on state law. IDWR does not conduct an independent review of

[11] The original version of the statute used the term "claim." The statute was amended in 2006 and replaced the term "claim" with the term "recommendation." 2006 Idaho Sess. Laws, ch. 222, p. 663. The amendment, however, did not change how IDWR reported accomplished transfers but rather the change reflected the practice that was already in place. In this case the SWC filed its objections in 2008 after the amendment of the statute.

claims based on federal law. As such, no director's report recommendation is prepared. The objection is then filed to the "claim." I.C. § 42-1411A (8). The claim carries no *prima facie* weight. I.C. § 42-1411A(12). By comparison, objections to claims based on state law, where IDWR has conducted an independent review, are filed to the recommendation in the director's report. I.C. § 42-1412. Unlike a federal claim, the director's report carries *prima facie* weight. Idaho Code § 42-1425 acknowledges this distinction. The statute recognizes that when a claim is filed based on an accomplished transfer, IDWR reviews the claim to determine whether or not the transfer will result in injury to existing rights or an enlargement of the original right. The accomplished transfer may be recommended disallowed or may be allowed with such restrictions as to avoid injury to existing users. Simply put, a claim for an accomplished transfer is not "rubberstamped" by IDWR even before a third party files an objection. It follows then that the purpose of the remand is not to provide IDWR with the first opportunity to examine injury or enlargement because IDWR has already examined the claim for injury or enlargement. The purpose of the remand is for IDWR to examine the objection to injury or enlargement and to consider additional information relating to these assertions.

In construing the statute as a whole, this Court considered the limited purpose of the remand hearing, and the fact that IDWR considers injury and enlargement prior to filing the Director's Report. It is clear that the objection to the accomplished transfer must allege potential injury or enlargement as one of the bases for the objection otherwise the Court finds there would be no apparent basis for the Special Master to automatically remand the matter to IDWR for "further hearing."[12] The Special Master is not precluded however, from *sua sponte* remanding the matter for further inquiry on injury and enlargement, nor is a party precluded from requesting remand for further inquiry into these issues.[13]

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[12] As a matter of course in the SRBA, the Special Master would not automatically remand to IDWR without first hearing from the parties on whether or not to remand. In many cases parties prefer to address injury or enlargement in the proceedings before the Special Master or just request a supplemental director's report and the opportunity to submit any additional information to IDWR.

[13] However, as explained elsewhere in this opinion any such requests for remand should be timely made.

2. The "further hearing" contemplated by I.C. § 42-1425 is not a separate formal administrative proceeding but rather the opportunity to submit information and/or argument to the Director that may have not been otherwise considered in preparing the Director's Report.

a. The remand procedure contemplated by Idaho Code § 42-1425 is not a separate formal administrative proceeding under the Administrative Procedures Act.

Idaho Code § 42-1425 sets forth a procedure for claiming a previously unauthorized transfer of the place of use, point of diversion, purpose of use or period of use, elements of a water right in lieu of following the formal administrative transfer requirements of Idaho Code § 42-222. The statute expressly acknowledges that "examination of these changes by the director through the procedures of section 42-222, would be impractical and unduly burdensome" and authorizes that the change "be claimed in a general adjudication even though the person has not complied with sections 42-108 and 42-222, Idaho Code." The statute provides that following the hearing, the director is to file a "supplemental report." A supplemental report is a procedural component of a general adjudication. Idaho Code 42-1412 (4) provides: "Following expiration of the period for filing objections. . . . The court may request the director to conduct a further investigation and to submit a supplemental report for any water right acquired under state law that is the subject of an objection." I.C. § 42-1412 (4). It is clear the procedures set forth in Idaho Code § 42-1425 were not intended to require independent administrative proceedings, and do not trigger a separate right of review pursuant to the Administrative Procedures Act. Rather the procedures are intended to be integrated with the general adjudication. *See Memorandum Decision and Order on Challenge (City Of Pocatello)*, subcases 29-00271, *et al.*, p. 9 (Nov. 9, 2009) (holding application of Idaho Code § 42-1425 should be read in the context of the rest of the SRBA adjudication processes). To conclude otherwise would vitiate the purpose of the process set forth in the statute by substituting one administrative proceeding for another. There are procedures in place for allowing administrative transfers to proceed concurrently with the adjudication; however Idaho Code § 42-1425 does not provide one of them. *See* e.g. ***AOI*** 17 b.(3).

b. The "further hearing" requirement is met where the objector has an opportunity to submit information on injury or enlargement.

The statute requires remand to IDWR for "further hearing" but does not define the scope of the hearing. The language implies that one "hearing" has already occurred. In the adjudication process the only "hearing" that occurs prior to the deadline for filing objections, is the proceedure relating to the claims taking process and IDWR's investigation of the claims. During the investigative process, the claimant is afforded an opportunity to present information to be considered by IDWR in support of the claim. This opportunity is particularly important in the context of an accomplished transfer because IDWR may have no record of the change to the water right. However, no formal hearing is conducted as part of investigative process nor is the claimant at that point authorized to conduct formal discovery to present a case to IDWR in support of the claim. The culmination of the investigation results in the issuance of a director's report. In most instances, IDWR obtains information from the claimant during this procedure. Prior to the filing of objections, IDWR may have limited information identifying objectors or the information they have to support allegations of injury or enlargement. The remand contemplated under Idaho Code § 42-1425 provides IDWR an opportunity to consider this information in conjunction with its prior investigation. Thus use of the term "further hearing" implies a proceeding no broader in scope than originally occurred at the investigative stage of the proceedings. Namely, parties are accorded the opportunity to submit information and argument to IDWR regarding injury and enlargement. The culmination of the "further hearing" results in the issuance of an amended or supplemental report to the adjudication court.

Therefore, the Court concludes that the scope of the remand hearing contemplated under Idaho Code § 42-1425 is no broader than that associated with the preparation of a director's report or in the preparation of a supplemental director's report. The parties have the opportunity to submit information and argument to IDWR regarding injury or enlargement. IDWR considers the information and argument and files an amended or supplemental report with the Court, and the case proceeds through the adjudication process.

c. The Special Master erred by refusing to remand to IDWR.

The Special Master did not grant the SWC's request for remand due to the late stage of the proceedings. The refusal for remand was based on the SWC's failure to show or even allege injury or enlargement in conjunction with its request. On August 8, 2008, the SWC filed a *Notice of Filing Initial Reasons Supporting Objections* but did not identify injury or enlargement as a basis for the objection. *Budge Aff.* Exhibit C. The Special Master issued a scheduling order on September 2, 2008. The scheduling order set discovery cut off for March 6, 2009, the deadline for filing dispositive motions for March 27, 2009, the pre-trial conference for May 21, 2009, and the trial to commence June 8, 2009. On April 23, 2009, in a response brief to ASCC's motion for summary judgment the SWC alleged for the first time if the SWC's motion for summary judgment was denied the matter must remand to IDWR for a hearing on injury or enlargement. The SWC did not allege how the accomplished transfer would result in injury or enlargement. The Special Master denied the request because he determined it would result in delay and because IDWR had already considered injury and enlargement in the *Amended Director's Report.*

Under ordinary circumstances, this Court would agree with the Special Master's reasoning that there would be no basis for remand. The remand request came well after discovery had closed and the trial date was a little over a month away. Granting the request at that point would have resulted in delayed the trial. The SWC had ample opportunity to request a remand prior to or during the discovery process. However, the recommendation in the *Amended Director's Report* in this case was based on a negotiated settlement between ASCC, the State of Idaho and IDWR as opposed to an independent objective examination. This undermines the previously discussed reasoning for not automatically remanding to IDWR, namely that IDWR has already investigated for injury or enlargement. Moreover, it gives *prima facie* weight to a negotiated settlement entered into prior to the filing of a director's report and the opportunity for objections.

The settlement agreement was reached in 2002. The settlement involves mitigation credits and implicates the conjunctive administration of ground and surface water. For all intents and purposes the *Amended Director's Report* based on the settlement was prepared in 2002. Former Director Dreher concludes in his affidavit "the

accomplished change in purpose of use from irrigation to recharge for a portion of ASCC's water rights did not injure other water rights or result in an enlargement because of the amount of water ASCC diverted and consumptively used." *Dreher Aff.*, p. 2. Since 2002, as a result of the interim administration of water rights and the implementation of conjunctive management of ground and surface water, the understanding of what constitutes injury to an existing water right has evolved. This Court has ruled on what constitutes injury to other rights since that time.[14] Despite these developments, IDWR is in the awkward position of defending an old settlement instead of re-evaluating whether its terms would result in injury to existing users or enlargement.

For these reasons the Court orders that on recommitment to the Special Master, the matter be remanded to IDWR for a supplemental report if so requested by the parties.

VI.
CONCLUSION AND ORDER

For the above stated reasons the matter is recommitted to the Special Master for further proceedings and the development of a record consistent with this opinion.

IT IS SO ORDERED

DATED: April 4, 2011.

ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

[14] In *City of Pocatello* this Court ruled that injury to an existing water right is not limited to the situation where immediate physical interference occurs between water rights on the date of the change but rather includes the diminished effects on existing priorities in times of administration, including the ability to pump out of priority in times of shortage. *Id.* at 14.

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER ON CHALLENGE was mailed on April 04, 2011, with sufficient first-class postage to the following:

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