

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION FOR)	
PERMIT NO. 27-12261 IN THE NAME OF)	PRELIMINARY ORDER
<u>THE CITY OF BLACKFOOT</u>)	ISSUING PERMIT

PROCEDURAL HISTORY

On September 12, 2013, the City of Blackfoot ("Blackfoot" or "City") filed Application for Permit No. 27-12261 with the Idaho Department of Water Resources ("Department"). The application was amended on September 2, 2014. Notice of the application was published in The Morning News (Bingham County) on September 18 and 25, 2014. A joint protest was filed by A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company and Twin Falls Canal Company, represented by attorney Paul Arrington, and American Falls Reservoir District #2 and Minidoka Irrigation District, represented by attorney Kent Fletcher (protestants collectively referred to as "protestants" or the "Coalition"). The City is represented in this contested case by attorneys Garrett Sandow and Robert Harris.

The application was amended a second time on January 27, 2015. Because the second amended application proposed a larger diversion rate than was proposed in September 2013, notice of the second amended application was published in The Morning News on February 5 and 12, 2015. No additional protests were filed.

A pre-hearing conference was conducted on January 27, 2015. The parties were unable to resolve the issues of protest at that time and requested that a hearing be held to decide the contested case. An administrative hearing was conducted on April 21, 2015, in Blackfoot, Idaho. During the hearing, the parties offered testimony and documentary evidence into the record.

After the hearing, the parties filed post-hearing briefs addressing the legal question: "Is there a legal impediment to using water right 01-181C in a mitigation plan for the proposed permit?" The parties filed their opening briefs on May 15, 2015. Response briefs were filed on May 22, 2015. After carefully considering the evidence in the record, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application for Permit 27-12261 was filed on September 12, 2013. The original application proposed diverting 9.23 cfs from ground water for the irrigation of 523.3 acres. The application was amended on September 2, 2014, increasing the proposed irrigation place of use to 524.2 acres but retaining the proposed diversion rate of 9.23 cfs.

2. The application was amended a second time on January 27, 2015 (the second amended application hereinafter referred to as “Application 27-12261” or “application”). Paul Loomis, the current mayor of Blackfoot, signed Application 27-12261.

3. Application 27-12261 proposes diverting 9.71 cfs from ground water for the irrigation of 524.2 acres near the City. The application describes two points of diversion: an existing ground water well, known as the “Lansing St. Well,” located on the west side of Interstate 15 (“I-15”) and a proposed well, known as the “Camas St. Well,” to be located on the east side of I-15.

4. The proposed 524.2-acre place of use is made up of lands irrigated under Blackfoot River water rights 27-3G, 27-17, 27-20A, 27-20B, 27-23E, 27-10296, 27-10341, 27-10344, 27-10505, 27-10756, 27-10790, 27-10999, 27-11117, 27-11940, and/or shares from the Eastern Idaho Water Company (“EIWC”), Corbett Slough Ditch Company (“CSDC”), or Blackfoot Irrigation Company (“BIC”). The proposed place of use is comprised of a number of privately owned parcels and is not owned by the City. The proposed points of diversion are on property owned by the City.

5. Of the 524.2 irrigated acres described in Application 27-12261, 282.3 acres are already covered by ground water irrigation right 27-7577. Application 27-12261 provides additional flow rate for losses associated with conveying water to the 282.3 acres described in water right 27-7577. Application 27-12261 proposes to cover conveyance losses *and* irrigation demand for the remaining 241.9 acres.

6. The City described its proposal as follows:

This application proposes to develop a new ground water right for two purposes: to capture omitted diversion rate from water right no. 27-7577 (which covers the west side of the interstate) and to obtain a new water right for irrigation of the lands on the east side of the interstate that are currently receiving water through the City of Blackfoot’s river pump.

Application, page 2.

7. “[The City] currently provides delivery of several surface water rights . . . through a pump on the Blackfoot River.” Ex. 1, page 1. “The [r]ights consist of the users of the Miner’s Ditch east of [I-15], including water right nos.: 27-17, 27-20A, 27-20B, 27-23E, 27-10790, 27-10999, 27-11117, shareholders from [CSDC] and shareholders from the [BIC].” *Id.* “The City has already made a similar change for the Miner’s Ditch water right holders west of [I-15], under license no. 27-7577 (diverted from the Lansing St. Well).” *Id.*

8. The Miner’s Ditch diverts and conveys water from the Blackfoot River for the irrigation of land near Blackfoot, Idaho. Miner’s Ditch does not own any water rights. It conveys privately held water rights from the Blackfoot River and conveys water for shareholders in EIWC, CSDC, and BIC.

9. Prior to 1960, the Miner’s Ditch diverted water from the Blackfoot River at a location east of the City and conveyed water in a ditch running from east to west through the city to irrigated

acres west of the City. Loomis Testimony. The upper part of Miner's Ditch ran past school properties and posed a safety threat. *Id.*

10. In the 1960s, pursuant to a City resolution, the City eliminated the Miner's Ditch diversion on the Blackfoot River and filled in the upper portion of the Miner's Ditch. Loomis Testimony. In exchange for the safety benefits derived from eliminating the upper portion of the ditch, the City constructed a pump station on the Blackfoot River to deliver water into the remaining section of the Miner's Ditch system for use by the Miner's Ditch patrons. *Id.*

11. The City assumed responsibility for maintenance and operation of the pump station on the Blackfoot River and has operated the pump station since the 1960s. Loomis Testimony. The current annual maintenance costs for the pump station are approximately \$40,000. *Id.*

12. The following privately held water rights from the Blackfoot River describe the Miner's Ditch (pump station) as an authorized point of diversion: 27-3G, 27-17, 27-20A, 27-20B, 27-23E, 27-10296, 27-10341, 27-10344, 27-10505, 27-10756, 27-10790, 27-10999, 27-11117 and 27-11940. In addition, water is delivered to the Miner's Ditch (pump station) for use by shareholders in EIWC, CSDC and BIC.

13. EIWC's water rights authorize diversion from the Blackfoot river. CSDC and BIC divert water from the Snake River and inject that water into the Blackfoot river upstream of the Miner's Ditch pump station for use by their shareholders on various Blackfoot River ditches, including the Miner's Ditch.

14. The City's Blackfoot River pump station is an authorized point of diversion for all of the privately held water rights in the Miner's Ditch and the EIWC water rights. It is also an authorized point of re-diversion for the CSDC and BIC water rights.

15. On July 1, 1996, the City filed Application for Permit No. 27-7577, seeking a permit to divert 7.28 cfs from ground water for the irrigation of 364 acres. Application 27-7577 proposed to deliver ground water to irrigated acres authorized under privately held water rights from the Blackfoot River (and/or covered by shares in EIWC, CSDC, or BIC) conveyed through the Miner's Ditch. Because Application 27-7577 constituted a new consumptive use of water from the Eastern Snake Plain Aquifer ("ESPA"), the City was required to identify a means of mitigating the impacts resulting from the proposed use of ground water.

16. Application 27-7577 included the following mitigation plan: "Miner's Ditch users will allow all their surface water shares held in [EIWC, CSDC, BIC], and private rights to continue down the Snake River as mitigation to [offset] the use of this well." The Department accepted the proposed mitigation plan and issued Permit 27-7577 on June 17, 1998.

17. Water Right License 27-7577 (issued by the Department on December 24, 2007) authorized the diversion of 7.28 cfs, an annual diversion volume of 1,457 acre-feet, and the irrigation of 282.3 acres. The license included the following condition:

Diversion of water under this right shall be used to supply share holders of [EIWC, CSDC, and BIC] diverting water from the Miner [sic] Ditch. Miner [sic] Ditch users will allow their surface water shares to continue down the Snake River as mitigation to offset the use of groundwater under this right.

18. In September 2008, the Department approved Transfer 74459 which changed the point of diversion under water right 27-7577 from the original Lansing St. Well to a new well located on the west side of I-15. The new well continues to be referred to as the "Lansing St. Well." Ex. 1, page 1. The diversion rate and annual diversion volume of water right 27-7577 did not change as part of the transfer approval.

19. The City hired Rocky Mountain Environmental Associates, Inc. ("RMEA") to assist the City in preparing the pending application. RMEA reviewed the surface water rights associated with the Miner's Ditch and water right 27-7577 and determined that water right 27-7577 did not fully cover the water use on the west side of I-15 as described in the existing surface water rights. RMEA calculated that the irrigation use and bed loss for the Miner's Ditch on the west side of I-15 is actually 9.13 cfs. Therefore, water right 27-7577 is 1.85 cfs short of a full water supply.

20. Application 27-12261 proposes a diversion rate of 9.71 cfs, intended to cover the demand for the Miner's Ditch on the east side of I-15 (6.29 cfs (irrigation) + 1.57 cfs (bed loss) = 7.86 cfs) and the calculated shortfall on the west side of I-15 (1.85 cfs). The Coalition did not challenge RMEA's review of the water rights and water shares conveyed through the Miner's Ditch or RMEA's bed loss calculations.

21. Jensen Grove is a recreation area owned by the City. Ex. 7. It includes a 73-acre lake that is filled with water from the Snake River. *Id.* The bed of Jensen Grove Lake is gravelly, resulting in high seepage rates from the bottom of the lake when it is full. Loomis Testimony. The lake goes dry during the winter months and the lake bed is used as a gravel extraction area by the City during those months. *Id.*

22. Application 27-12261 included a mitigation plan with the following summary:

To compensate for potential injury of the application, it is proposed to use existing on-going recharge under water right no. 01-181C This water right was converted to a storage water right for Jensen Grove through Transfer No. 72385, which was approved in 2007.

...

During the irrigation season, water is continually delivered to the [Jensen Grove] reservoir to maintain its water level. As described in [water right 01-181C], 1,100 acre-feet remain in the reservoir for recreation storage, 980.9 acre-feet seep into the aquifer, and 186 acre-feet are lost to evaporation. Once delivery of water to Jensen Grove ceases at the end of the irrigation season, the remaining water in the reservoir sinks into the aquifer, adding an additional recharge of 1,100 acre-feet under water

right 01-181C. Since the transfer was approved and accomplished, the City has been recharging the aquifer through this water right for which no recharge credit was pursued. As the water right owner of 01-181C, the [City] proposes to use a portion of this recharge as mitigation for the new application.

Ex. 1, page 2.

23. RMEA used the Department's ESPA Transfer Tool to evaluate impacts to the various reaches of the Snake River if ground water were diverted as proposed in Application 27-12261. Ex. 1, page 2. RMEA assumed an annual diversion volume of 967.6 acre-feet from the proposed wells for irrigation use under the proposed permit. *Id.* This value was calculated based on an irrigation demand of 4 acre-feet per acre (241.9 acres x 4 acre-feet/acre = 967.6 acre-feet). *Id.*

24. In its impact analysis, RMEA assumed that 1,066 acre-feet would be recharged at Jensen Grove each year. Ex. 1, pages 2-3. RMEA found that all of the Snake River reaches upstream of Blackfoot were fully mitigated by 1,066 acre-feet of recharge in Jensen Grove. *Id.* The transfer tool showed that downstream Snake River reaches would have a remaining depletion of 24.6 acre-feet per year. *Id.* RMEA proposes to offset this depletion by holding 6.2 acres of the existing Miner's Ditch Blackfoot River rights and CSDC shares unused. *Id.*

25. The Coalition did not challenge RMEA's depletion calculations or RMEA's calculation of benefits accruing from the recharge of 1,066 acre-feet in Jensen Grove during the irrigation season. The Coalition did not challenge the City's proposal to hold 6.2 acres of Blackfoot River rights unused to offset depletions to the Snake River downstream of Blackfoot.

26. Prior to the construction of I-15, the Snake River flowed through the area that is now covered by Jensen Grove Lake. Reese Testimony. To avoid the construction of multiple freeway bridges across the river, the Snake River channel was altered to remain on the west side of I-15, effectively cutting off the Jensen Grove area from the Snake River. *Id.* A culvert was installed under I-15 to connect Jensen Grove to the Snake River and create a recreation area for the City. *Id.*

27. In the late 1980s, the City's diversion of Snake River water into Jensen Grove was challenged and it was determined that the City did not have sufficient Snake River water rights to maintain Jensen Grove Lake during the summer. Reese Testimony. The City contacted its congressman and obtained funding from the federal government for the City to purchase water right 01-181C to cover the diversion of water into Jensen Grove. *Id.*

28. The administrative record for this contested case and the Department's water right records contain very little information about the history of water right 01-181. For purposes of this order, it is sufficient to note that water right 01-181 was originally described in the 1910 Rexburg Decree and New Sweden Irrigation District ("NSID") filed a claim in the Snake River Basin Adjudication for a portion of water right 01-181 (identified as water right 01-181C).

29. On October 27, 2005, the City filed Application for Transfer 72385 proposing to move water right 01-181C from NSID to Jensen Grove and change the nature of use listed on the water right. The application proposed changing the nature of use from "irrigation" to "diversion to

storage,” “storage” (for irrigation, recreation, fish & wildlife, aquifer recharge, and aesthetics), “irrigation from storage,” and “recharge.” The Department published notice of Application for Transfer 72385 and protests were filed by NSID and the Coalition.

30. Application 72385 proposed excluding 616.7 acres from NSID to represent the acres that would have been irrigated under water right 01-181C. Because Application 72385 proposed changing the nature of use of water right 01-181C, to prevent enlargement, the consumptive elements of the changed water right were limited to the historical consumptive use of the right. The Department estimated that water right 01-181C, when used for irrigation, would have consumed 1,541.8 acre-feet per year (616.7 acres x 2.5 acre-feet per acre = 1,541.8 acre-feet). Ex. 102.

31. In June 2006, NSID, the City and the Coalition executed a settlement agreement (“Agreement”) to resolve the protests filed against Application for Transfer 72385. Ex. 4. The Agreement included the following provision: “If the CITY proposes to utilize [water right 01-181C] for groundwater recharge or mitigation purposes associated with existing or future groundwater rights, the CITY must file the appropriate application for permit and/or transfer.” *Id.* at 3, ¶ 1(e) (capitalization in original).

32. On December 1, 2006, the Department distributed a draft transfer approval to the City, NSID and the Coalition for the parties to review. Ex. 103. The draft approval listed “ground water recharge” and “ground water recharge storage” as authorized beneficial uses. *Id.*

33. Attorney Travis Thompson, representing the Coalition, provided a written response to the draft transfer approval on December 15, 2006. Ex. 8. The Coalition’s response to the draft transfer approval included two statements related to recharge: “Contrary to the Agreement, the draft approval includes ‘ground water recharge’ and ‘ground water recharge storage’ as new purposes of use for water right 1-181C” and “Further, under paragraph 1.e of the Agreement, only incidental recharge will be recognized and the City is required to file a new application if it desires to change the nature of use to ‘recharge’.” *Id.* at 1-2.

34. Attorney Daniel Acevedo, representing the City, provided a written response to the draft transfer approval on December 19, 2006. The City’s response referred to the December 15, 2006 letter from Travis Thompson and stated that the changes proposed by Thompson were not consistent with the Agreement. The City urged the Department to “simply sign the transfer with the proposed conditions as originally drafted by [the Department] as soon as possible.” Ex. 9.

35. On February 14, 2007, Transfer 72385 was approved by the Department. Ex. 105. Water right 01-181C included the following beneficial uses: diversion to storage (46 cfs), irrigation (1 cfs, 200 af), irrigation storage (200 af), irrigation from storage (200 af), and recreation storage (2,266.8 af). *Id.* Water right 01-181C *did not* include “recharge” or “mitigation” as authorized beneficial uses. *Id.*

36. Transfer Approval 72385 included the following conditions, among others, on water right 01-181C:

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

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

Ex. 105, page 2.

37. There are two other water rights associated with Jensen Grove. Water right 01-4007 bears a priority date of June 1, 1962 and authorizes a diversion of 2.80 cfs and an annual volume of 464 acre-feet for recreation storage. Water right 01-7092 bears a priority date of July 15, 1987 and authorizes a diversion rate of 2.80 cfs and an annual diversion volume of 1188.5 acre-feet for recreation storage. Water right 01-7092 includes a condition stating: "Use of water under this right shall be non-consumptive. Seepage and evaporation losses in Jensen Grove Lake are accounted for under right 01-181C."

EVALUATION CRITERIA / ANALYSIS

1. Idaho Code § 42-203A(5) states in pertinent part:

In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho . . . the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

2. The applicant bears the burden of proof regarding all factors set forth in Idaho Code § 42-203A(5). *See* IDAPA 37.03.08.040.04.

3. During the hearing, the parties agreed that criteria (b) – (f) of Idaho Code § 42-203A(5) are not at issue in this contested case. Therefore, criteria (b) – (f) are only addressed briefly in this order.

Reduction to Existing Water Rights

4. Rule 45.01.a of the Department's Water Appropriation Rules (IDAPA 37.03.08) sets forth the criteria used to determine whether a proposed use of water will reduce the quantity of water under an existing water right:

A proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if:

i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less.

5. "An 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 37.03.08.45.01.a.iv

6. The proposed permit constitutes a consumptive use of water and, without mitigation, would reduce the amount of water available to satisfy water rights from sources connected to the Eastern Snake Plain Aquifer.

Application for Transfer for Water Right 01-181C

7. The City proposes to mitigate for the proposed permit by receiving credit for the seepage occurring at Jensen Grove under water right 01-181C. The City argues it does not need to file an application for transfer to add "recharge" or "mitigation" as elements to water right 01-181C. City's Response Brief, page 10. The City believes "the ability for Blackfoot to realize the benefits associated with seepage under 01-181C was already approved through [Transfer 72385], and through the transfer, 01-181C expressly included seepage as one of its elements and incorporated the provisions of the Agreement wherein Blackfoot retained the right to claim the benefits of recharge." *Id.* As discussed below, the City's argument on this point is not persuasive.

8. The beneficial uses of "recharge" and "mitigation" are not explicitly authorized under water right 01-181C. Although there is a condition that recognizes that seepage results from the storage of water in Jensen Grove Lake, a minor reference to seepage, as a clarification of the beneficial uses listed on the face of a water right, does not create or equate to a new or independent beneficial use of water.

9. The Agreement directly addresses the beneficial uses of "mitigation" and "ground water recharge." It states: "If the CITY proposes to utilize [water right 01-181C] for groundwater

recharge or mitigation purposes associated with existing or future groundwater rights, the CITY must file the appropriate application for permit and/or transfer.” Ex. 4 at 3 (capitalization in original). This statement confirms that “ground water recharge” and “mitigation” were not intended to be included as beneficial uses on water right 01-181C through Transfer 72385.

10. Documents associated with Transfer 72385 provide further evidence that “recharge” is not currently authorized under water right 01-181C. An initial draft of transfer approval 72385 included “ground water recharge” and “ground water recharge storage” as beneficial uses. Travis Thompson, representing the Coalition, referred to the Agreement and asked that those beneficial uses be removed from the transfer approval. Daniel Acevedo, representing the City, asked the Department to issue the transfer consistent with the initial draft. Ultimately, the Department determined that “ground water recharge” and “ground water recharge storage” should not be included on water right 01-181C and those beneficial uses were removed from the final approval for Transfer 72385.

11. Prior to diverting water under water right 01-181C for “mitigation” or “ground water recharge” purposes, the City must file an application for transfer to describe one or both of these beneficial uses to water right 01-181C.

Using Water Right 01-181C in a Mitigation Plan

12. The parties raised a number of arguments about using water right 01-181C in a mitigation plan. Some of these arguments can be addressed in this order. However, most of the arguments should be raised and fully vetted in a contested case arising from a transfer application filed by the City to change the beneficial uses authorized under water right 01-181C.

13. The protestants raise three specific arguments against the City using 01-181C in a mitigation plan for the pending application for permit:

- 1) Acquiring a recharge right for the incidental recharge occurring under water right 01-181C is barred by Idaho Code § 42-234(5).
- 2) The Agreement between the City and the Coalition prohibits using water right 01-181C for mitigation in this contested case.
- 3) Water right 01-181C does not provide adequate mitigation for the proposed use under Application 27-12261.

Incidental Recharge - Idaho Code § 42-234(5)

14. Idaho Code § 42-234(5) states: “The legislature . . . recognizes that incidental ground water recharge benefits are often obtained from the diversion and use of water for various beneficial purposes. However, such incidental recharge may not be used as the basis for claim of a separate or expanded water right.”

15. It is undisputed that a significant amount of water seeps from Jensen Grove Lake when the lake is kept full. Loomis Testimony; Ex. 102. The Coalition argues that “any water seeping in the ground in Jensen Grove, under water right 01-181C is incidental recharge – i.e. it is ‘merely incidental’ to the recreational use of the water right.” Coalition’s Post-Hearing Brief, page 10.

16. If the City files an application for transfer as described above and converts all or a portion of water right 01-181C to “recharge” or “mitigation,” then the authorization to divert water for “recharge” or “mitigation” would be a discrete element of the right, and not incidental to the other beneficial uses listed on the right. In other words, the transfer application could be structured in a way that does not create a “separate or expanded water right.”

17. At this point, it is not clear whether Idaho Code § 42-234(5) would restrict the City in changing water right 01-181C to describe “recharge” or “mitigation” as beneficial uses. This question can only be addressed within the transfer proceeding, because the outcome would depend on how the beneficial uses, diversion rates, and annual volumes of water right 01-181C are proposed to be changed in the transfer application.

18. It should be noted, if the City were to file an application for transfer to describe “recharge” or “mitigation” as a beneficial use on water right 01-181C, in order to prevent enlargement of the water right, the Department would likely evaluate the historical consumptive use occurring under the water right. See Idaho Code § 42-222(1).

19. During the review process for Transfer 72385, the Department determined that the historical consumptive use of water right 01-181C (prior to Transfer 72385) was 1,541.8 acre-feet per year. Ex. 102, page 2. The parties have not had an opportunity to present evidence on the historical consumptive use of water right 01-181C. The question of historical consumptive use, non-consumptive use and incidental recharge are best addressed within an application for transfer proposing to change the nature of use for water right 01-181C.

Provisions from the 2006 Agreement

20. In its post hearing brief, the Coalition cites paragraphs 1(a), 1(b) and 1(e) of the 2006 Agreement and argues that these provisions prohibit using water right 01-181C to offset the diversion of water proposed in the pending application for permit.

21. Paragraph 1(a) of the Agreement states: “After approval of [Transfer 72385], the CITY shall not, temporarily or permanently, thereafter transfer [water right 01-181C], or any portion thereof, without receiving the written consent of the COALITION.” Ex. 4, page 2 (capitalization in original).

22. Paragraph 1(b) of the Agreement states: “Without the written consent of the COALITION, the CITY agrees to hold [water right 01-181C] in perpetuity for diversion of water from the Snake River into storage at [Jensen Grove], for irrigation and recreation purposes, and to not transfer the [w]ater [r]ight or change the nature of use or place of use of the [w]ater [r]ight.” Ex. 4, page 2 (capitalization in original).

23. As stated above, in order for the Department to recognize “recharge” or “mitigation” as beneficial uses under water right 01-181C, the City must file an application for transfer to include those beneficial uses on the water right. No transfer has yet been filed. It is logical that the City would not seek to change the beneficial uses listed on water right 01-181C until after a final decision is reached in the pending contested case. Stated differently, a transfer application for water right 01-181C only makes sense if Application 27-12261 is approved.

24. It appears that the private Agreement between the City and the Coalition requires the City to obtain written consent from the Coalition prior to making changes to water right 01-181C. However, this provision only comes into effect if and when a transfer application is filed. The written consent from the Coalition would likely be requested when the transfer application is prepared. Therefore, the issues related to paragraphs 1(a) and 1(b) of the agreement are not ripe for review in the context of the pending application.

25. Paragraph 1(e) of the Agreement states: “The CITY shall not lease, sell, transfer, grant or assign to any other person or entity any right to recover groundwater or mitigation for the diversion of groundwater as a result of diversion under [water right 01-181C] including any incidental groundwater recharge that may occur as a result of such diversion. Furthermore, the CITY shall not request or receive any such mitigation credit on behalf of any other person or entity.”

26. The Coalition argues that the proposed permit violates Paragraph 1(e) of the Agreement because the City is providing water to water users outside of the City limits for irrigation use.

27. The record is clear that, by eliminating the upper portion of the Miner’s Ditch, the City assumed an obligation to provide water to the Miner’s Ditch water users during the irrigation season. By its own admission, the City describes its responsibility to Miner’s Ditch as an obligation to “provide water” rather than merely to convey existing water rights. City’s Post-Hearing Brief, pages 2 and 15.

28. Whether the City “provides water” to the Miner’s Ditch under the existing Blackfoot River rights (and shares in CSDC, BIC and EIWC) or whether the City “provides water” to the Miner’s Ditch under the City’s water rights is a decision that rests entirely with the City. The City must determine how it will satisfy its existing legal obligations. For example, the City could satisfy its obligation to the Miner’s Ditch by adjusting its municipal water system service boundary and supplying ground water to the Miner’s Ditch under its existing municipal water rights.

29. There is no evidence in the record that the City intends to “lease, sell, transfer, grant or assign” any portion of the proposed permit to the Miner’s Ditch water users or any other entity. According to the Testimony provided by Mayor Loomis, the City intends to deliver water to the Miner’s Ditch in the short term, and then will convert the permit to municipal use as the irrigated lands are subdivided and developed.

30. Paragraphs 1(a), 1(b) and 1(e) of the Agreement do not bar approval of Permit 27-12261.

Available Recharge Water Supply

31. The Coalition also argues that the amount of water available under water right 01-181C is not sufficient to satisfy the amount of recharge needed to offset pumping under Permit 27-12261. The Coalition argues that the seepage occurring at the end of the irrigation season, after water is shut off at the Snake River headgate, should not be counted toward the available recharge water supply because the storage water right for Jensen Grove is a year-round storage right and the purported late-season seepage may not actually occur.

32. As stated above, until an application for transfer is filed, it is difficult to determine whether 1,066 acre-feet of water right 01-181C can be designated for “recharge” or “mitigation” use. The City may propose to change the season of use for “recreation storage” to require an annual draining of Jensen Grove Lake. The City may also choose to adjust the amounts of water dedicated to other beneficial use under water right 01-181C. The amount of water available for recharge under water right 01-181C is best determined during the review of an application for transfer, after it is filed by the City.

Sufficiency of Mitigation Plan

33. If a transfer is filed to describe “ground water recharge” or “mitigation” as an authorized beneficial use for 1,066 acre-feet under water right 01-181C (and certain water rights from the Blackfoot River are held unused), then the pending application for permit will be fully mitigated. The Coalition did not object to or provide evidence about the adequacy of the mitigation plan if 01-181C can in fact be used to provide 1,066 acre-feet per year for recharge/mitigation.

34. Therefore, the following condition should be added to Permit 27-12261:

Prior to diversion of water under Permit 27-12261, the right holder shall file an application for transfer to describe “ground water recharge” and/or “mitigation” as an authorized beneficial use under water right 01-181C. If the transfer application is denied, then this permit is void and no longer of any effect. If the transfer application is approved and the beneficial use of “ground water recharge” or “mitigation” is for an annual diversion volume less than 1,066 acre-feet, then the diversion rate and annual diversion volume for this permit shall be reduced in proportion to the shortfall.

Sufficiency of Water Supply

35. During the hearing, the parties stipulated that sufficiency of the water supply as an element of review under Idaho Code § 42-203A(5) is not at issue in this contested case. Rule 45.01.b of the Department’s Water Appropriation Rules (IDAPA 37.03.08) sets forth the criteria for determining whether the water supply is not sufficient for a proposed project: “The water supply will be determined to be insufficient for the proposed use if water is not available for an adequate time interval in quantities sufficient to make the project economically feasible” There is no

evidence in the record that the ground water aquifer at the proposed point of diversion is insufficient to supply the 9.71 cfs sought in the application during the proposed season of use.

Good Faith / Speculation

36. During the hearing, the parties stipulated that the good faith/speculation element of Idaho Code § 42-203A(5) is not at issue in this contested case. There is no evidence in the record suggesting that the application was not filed in good faith or that it was filed for delay or speculative purposes.

37. The City does not own some of the water rights proposed to be held unused as part of its mitigation plan. The mitigation conditions for water right 27-7577 (which is mitigated by holding other privately owned Miner's Ditch water rights unused) and the history of that water right is evidence that Miner's Ditch and their patrons consent to the mitigation plan proposed by the City. The City was prepared to call representatives from Miner's Ditch and CSDC to testify at the hearing, but did not do so because the Coalition agreed that the speculation element of Idaho Code § 42-203A(5) was not at issue in this contested case.

38. Rule 45.01.c of the Department's Water Appropriation Rules (IDAPA 37.03.08) sets forth the criteria for determining whether an application is filed in good faith and not for speculative purposes. Rule 45.01 requires an applicant to show that it is "in the process of obtaining other permits needed to construct and operate the project" and that there are "no obvious legal impediments" to prevent successful completion of the project. IDAPA 37.03.08.45.01.c. An applicant should provide "copies of applications for other needed permits, licenses and approvals" required to complete the project. IDAPA 37.03.08.40.05.e.ii.

39. The Coalition argues that the City's failure to acquire prior written consent from the Coalition regarding the transfer of water right 01-181C to describe "recharge" as a beneficial use should result in the pending application being considered speculative under Idaho Code § 42-203A(5). Coalition's Rebuttal Brief, page 4, fn1.

40. The Coalition's argument fails for two reasons. First, during the hearing, the Coalition stipulated that good faith/speculation was not at issue in this contested case. The Coalition cannot now raise arguments about speculation in support of its protest against the proposed permit.

41. Second, and more importantly, the Department's Water Appropriation Rules do not require that other permits, licenses and approvals be finalized or in place prior to issuing a water right. An applicant simply has to be "in the process of obtaining" the needed approvals. Inherent in this phrase is the concept that an applicant will pursue the proper approvals at the proper time.

42. In this case, the City would not file the required transfer application for water right 01-181C until after the pending application for permit is approved. The transfer application would only make sense if the pending application were approved. As noted above, a condition will be added to Permit 27-12261 requiring the City to make changes to water right 01-181C prior to diverting water under the proposed permit. The written consent from the Coalition, described in the Agreement, would logically be sought when said transfer application is prepared.

43. The Coalition did not indicate nor is there any evidence in the record that the Coalition intends to withhold its written consent to the required transfer. The questions of whether or not the Coalition must provide written consent for the transfer and whether it would be reasonable to refuse to provide written consent are private contractual matters, outside of the jurisdiction of the Department.

Sufficient Financial Resources

44. During the hearing, the parties stipulated that the sufficient financial resources element of review under Idaho Code § 42-203A(5) is not at issue in this contested case. There is no evidence in the record suggesting that the City does not have sufficient financial resources to complete the proposed project. Rule 45.01.d.ii of the Department's Water Appropriation Rules (IDAPA 37.03.08) states: "A governmental entity will be determined to have satisfied [the sufficient financial resources] requirement if it has the taxing, bonding or contracting authority necessary to raise the funds needed to commence and pursue project construction" The City qualifies as a governmental entity with taxing authority and has satisfied this element of review.

Local Public Interest

45. The local public interest analysis under Idaho Code § 42-203A(5)(e) is meant to be separate and distinct from the injury analysis under § 42-203A(5)(a). Local public interest is defined as "the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource." (Idaho Code § 42-202B(3))

46. During the hearing, the parties stipulated that the local public interest element of review under Idaho Code § 42-203A(5) is not at issue in this contested case. There is no evidence in the record that the proposed permit is not in the local public interest or would have a negative effect on the public water resource.

Conservation of Water Resources

47. During the hearing, the parties stipulated that the conservation of water resources element of review under Idaho Code § 42-203A(5) is not at issue in this contested case. There is no evidence in the record that the proposed permit is inconsistent with the conservation of water resources within the state of Idaho.

CONCLUSIONS OF LAW

The proposed permit constitutes a consumptive use of water and, without mitigation, would reduce the amount of water available to satisfy water rights from sources connected to the ESPA. See Idaho Code § 42-203A(5)(a). The City's proposal to divert 1,066 acre-feet of water per year for "ground water recharge" or "mitigation" under water right 01-181C and to hold certain Blackfoot River water rights unused constitutes a sufficient mitigation plan, provided water right 01-181C is

changed to describe “ground water recharge” or “mitigation” as an authorized beneficial use under the water right. If the proposed mitigation plan is fully implemented, the City has satisfied its burden of proof for all of the applicable elements set forth in Idaho Code § 42-203A(5). In order to prevent injury to existing water rights, diversion under Permit 27-12261 may only occur after the transfer application described above is approved.

ORDER

IT IS HEREBY ORDERED that Application for Permit No. 27-12261 in the name of the City of Blackfoot is APPROVED and Permit 27-12261 is ISSUED with the following elements and conditions:

Priority Date: January 27, 2015

Source: Ground Water

Beneficial Use: Irrigation

Period of Use: 4/1 – 10/31

Diversion Rate: 9.71 cfs

Maximum Diversion Rate: 9.71 cfs

Point of Diversion: SE¼ SE¼ of Section 4, T03S, R35E, B.M. Bingham County

SE¼ SE¼ of Section 5, T03S, R35E, B.M. Bingham County

Place of Use: 524.2 acres in Sections 3, 4, 5, 7, 8, 9 and 10, T03S, R35E, B.M. Bingham County

Twp	Rge	Sec	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
03S	35E	3											10.2						10.2
03S	35E	4															21.4	21.3	42.7
03S	35E	5													37.0	6.3	4.9	16.0	64.2
03S	35E	7													25.0	3.8	8.7	12.0	49.5
03S	35E	7													L 9	L 9	L 8		
03S	35E	7														4.6	1.0		5.6
03S	35E	8	25.0	20.0	29.6	32.5	3.5		7.8	31.0	32.0	31.0	.9	2.3	.5	11.7	.1		227.9
03S	35E	9	8.0	14.9			48.0	49.0		1.0									120.9
03S	35E	10						3.2											3.2

Total Acres: 524.2

Permit Conditions

1. Proof of application of water to beneficial use shall be submitted on or before **July 01, 2020**.
2. Subject to all prior water rights.
3. Rights 27-7577 and 27-12261 when combined shall not exceed the irrigation of 524.2 acres.
4. A portion of this water right (3.42 cfs) is used to offset conveyance losses in the Miner's Ditch.

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 Water District No. 120 and Water District No. 27.
6. Prior to diversion of water under this right, the right holder shall install and maintain lockable controlling works and a flow meter of a type acceptable to the Department on each of the points of diversion described in this right.
7. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 4.0 afa per acre at the field headgate for irrigation of the place of use.
8. 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 divert 1,066 acre-feet of water under water right 01-181C into Jensen Grove Lake for recharge purposes. In addition, the right holder shall cease diverting and using water as authorized by the following water rights in the amounts specified below. The mitigation amounts described below shall be left in the Blackfoot River and allowed to flow to the Snake River as described in the 2013 Blackfoot River Management Plan (pages 22 and 23). Moreover, the official records for the following water rights will be changed to show that diversion and use of water is not authorized because the rights, or a portion thereof, are being dedicated to mitigation purposes.

Water Right No.	Mitigation Rate (cfs)	Mitigation Acres
27-17	0.06	1.6
27-20A	0.02	0.8
27-20B	0.01	0.7
27-23E	0.01	0.5
27-10790	0.02	0.8
27-10999	0.001	0.1
CSDC Shares	0.04	1.7
Total	0.16	6.2

9. Prior to diversion of water under this right, the right holder shall file an application for transfer to describe "ground water recharge" and/or "mitigation" as an authorized beneficial use under water right 01-181C. If the transfer application is denied, then this permit is void and no longer of any effect. If the transfer application is approved and the beneficial use of "ground water recharge" or "mitigation" is for an annual diversion volume less than 1,066 acre-feet, then the diversion rate and annual diversion volume for this permit shall be reduced in proportion to the shortfall.
10. The right holder shall record the daily quantity of water diverted under water right 01-181C for ground water recharge or mitigation 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.
11. Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code and applicable Well Construction Rules of the Department.

12. 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.
13. 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.

Dated this 30th day of June, 2015.

A handwritten signature in black ink, appearing to read 'J. Cefalo', is written over a horizontal line.

James Cefalo
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of June 2015, a true and correct copy of the document described below was served by placing a copy of the same with the United States Postal Service, certified with return receipt requested, postage prepaid and properly addressed, to the following:

Document Served: Preliminary Order Issuing Permit (27-12261)


City of Blackfoot
c/o Mayor Paul Loomis
157 North Broadway
Blackfoot, ID 83221

Office of Garrett H. Sandow
220 North Meridian
Blackfoot, ID 83221

Holden Kidwell Hahn & Crapo
Robert L. Harris
PO Box 50130
Idaho Falls ID 83405-0130

Barker Rosholt & Simpson
Paul Arrington
195 River Vista Place, Suite 204
Twin Falls ID 83301-3027

Fletcher Law Office
W. Kent Fletcher
PO Box 248
Burley ID 83318-0248



Sharla Cox
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.