

**IN THE SUPREME COURT FOR 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-Respondents,

and

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

Intervenors-Respondents.

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

Supreme Court Docket No. 44207-2016

Bingham County Case  
No. CV-2015-1687

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**IDWR RESPONDENTS' BRIEF**

Appeal from the District Court of the Seventh Judicial District for Bingham County  
Honorable Eric J. Wildman, Presiding

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**ATTORNEYS FOR RESPONDENTS-  
RESPONDENTS**

**LAWRENCE G. WASDEN**  
ATTORNEY GENERAL

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

**GARRICK L. BAXTER, ISB #6301**  
**EMMI L. BLADES, ISB #8682**  
Deputy Attorneys General  
P.O. Box 83720  
Boise, ID 83720-0098  
Telephone: (208) 287-4800  
[garrick.baxter@idwr.idaho.gov](mailto:garrick.baxter@idwr.idaho.gov)  
[emmi.blades@idwr.idaho.gov](mailto:emmi.blades@idwr.idaho.gov)

*Attorneys for Idaho Department of Water  
Resources and Gary Spackman*

**ATTORNEYS FOR PETITIONER-  
APPELLANT**

Robert L. Harris  
D. Andrew Rawlings  
Holden Kidwell Hahn & Crapo  
P.O. Box 50130  
Idaho Falls, ID 83405  
Telephone: (208) 785-9300  
[rharris@holdenlegal.com](mailto:rharris@holdenlegal.com)  
[arawlings@holdenlegal.com](mailto:arawlings@holdenlegal.com)

Garrett H. Sandow  
220 N. Meridian  
Blackfoot, ID 83221  
Telephone: (208) 523-0620  
[gsandow@aol.com](mailto:gsandow@aol.com)

*Attorneys for the City of Blackfoot*

**ATTORNEYS FOR INTERVENORS-RESPONDENTS**

John K. Simpson  
Travis L. Thompson  
Paul L. Arrington  
Barker Rosholt & Simpson LLP  
P.O. Box 63  
Twin Falls, ID 83303-0063  
Telephone: (208) 733-0700  
[jks@idahowaters.com](mailto:jks@idahowaters.com)  
[tlr@idahowaters.com](mailto:tlr@idahowaters.com)  
[pla@idahowaters.com](mailto:pla@idahowaters.com)

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

W. Kent Fletcher  
Fletcher Law Office  
P.O. Box 248  
Burley, Idaho 83318  
Telephone: (208) 678-3250  
[wkf@pmt.org](mailto:wkf@pmt.org)

*Attorney for American Falls Reservoir  
District #2 and Minidoka Irrigation  
District*

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## **I. STATEMENT OF THE CASE**

### **A. NATURE OF THE CASE**

This is a judicial review proceeding in which the City of Blackfoot (“City”) appeals a final order issued by the Director (“Director”) of the Idaho Department of Water Resources (“Department”) denying the City’s application for water right permit 27-12261 (“Application”). The order appealed is the September 22, 2015, *Order Addressing Exceptions and Denying Application for Permit* (“Final Order”). R. at 273.<sup>1</sup> For the reasons set forth below, the Court should affirm the District Court’s April 6, 2016, *Memorandum Decision and Order* (“Memorandum Decision”) and *Judgment* affirming the Final Order.

### **B. PROCEDURAL BACKGROUND & STATEMENT OF FACTS**

The City filed the Application with the Department on September 12, 2013.<sup>2</sup> R. at 1. The Application seeks a permit to divert 9.71 cfs of ground water to irrigate 524.2 acres near the City. R. at 92-105. The Coalition<sup>3</sup> timely filed a joint protest. R. at 66. A hearing was held on April 21, 2015.

The City seeks the permit for two purposes. First, the City currently operates a pump station that diverts water from the Blackfoot River for delivery to irrigators. The permit would allow the City to deliver ground water to those irrigators instead of surface water from the Blackfoot River. R. at 93. The permit would also allow the City to deliver additional ground water to irrigators the City currently delivers ground water to via water right 27-7557. *Id.*

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<sup>1</sup> Citations to the record and exhibits herein refer to Bates stamp numbers of the agency record and exhibits as lodged with the District Court.

<sup>2</sup> The City amended the Application on September 2, 2014, and January 27, 2015. R. at 28, 92.

<sup>3</sup> The Coalition is comprised of A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company.

The City submitted a mitigation plan with the Application because 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 [“ESPA”].” R. at 95-97, 207. The City proposes to mitigate the new ground water use under the permit by leaving water the City currently diverts through the pump station in the Blackfoot River and using water right 01-181C to recharge the ESPA through Jensen Grove, a recreation area owned by the City which includes a reservoir filled with water from the Snake River under water right 01-181C. R. at 96-97, 203.

Water right 01-181 was decreed as an irrigation right in the 1910 Rexburg Decree. R. at 204. New Sweden Irrigation District (“NSID”) claimed a portion of the water right in the Snake River Basin Adjudication (“SRBA”). The claim was assigned water right number 01-181C. *Id.* After the claim was filed, but before the water right was decreed in the SRBA, the City purchased water right 01-181C from NSID. The City filed an application for transfer with the Department in 2005 (“Transfer”). Ex. at 49. The Transfer sought to add the following purposes of use to water right 01-181C: diversion to storage, storage, irrigation from storage, and diversion to recharge. Ex. at 49. The Transfer also sought to change the place of use to Jensen Grove. *Id.*

The Coalition protested the Transfer. Ex. at 75. The City, NSID, and the Coalition executed a private settlement agreement in June 2006 (“Settlement Agreement”). Ex. at 18. The City agreed “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 [water right 01-181C] or change the nature of use or place of use of [water right 01-181C]” without the written consent of the Coalition. Ex. at 19. The City also agreed that, if it “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. at 20.

The Department circulated a draft approval of the Transfer for comment on December 1, 2006. Ex. at 70. The draft included “ground water recharge” and “ground water recharge storage” as purposes of use. Ex. at 72. The Coalition disagreed with inclusion of “ground water recharge” and “ground water recharge storage” as purposes of use. Ex. at 46. The City requested approval of the Transfer as drafted. Ex. at 48.

The Department approved the Transfer in February 2007 without “ground water recharge” or “ground water recharge storage” as purposes of use. Ex. at 88. The Transfer authorized five purposes of use: diversion to storage, irrigation, irrigation storage, irrigation from storage, and recreation storage. Ex. at 89. The Transfer also imposed two conditions relevant to this matter. First, the Transfer stated:

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

Ex. at 90. Second, the Transfer stated:

The diversion and use of water under this transfer is subject to additional conditions and limitations contained in a Settlement Agreement – IDWR Transfer of Water Right, Transfer No. 72385, dated June 2006, including any properly executed amendments thereto, entered into by and between [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.

*Id.* The City did not seek any review of the Transfer approval. *Memorandum Decision* at 9.

The SRBA District Court issued a partial decree for water right 01-181C on May 29, 2009, listing the same five purposes of use authorized by the Transfer. Ex. at 91-92. The partial

decree for water right 01-181C also contains the two Transfer conditions quoted above nearly verbatim.<sup>4</sup> The first appears under the quantity element and the second appears under Other Provisions Necessary. Ex. at 93. The City did not appeal issuance of the partial decree for water right 01-181C in the SRBA. *Memorandum Decision* at 9.

Whether the City can utilize water right 01-181C to mitigate the new ground water use proposed by the Application through recharge at Jensen Grove was a question raised at hearing. R. at 207-08. The City argued it did not need to file an application for transfer to add mitigation or recharge as a purpose of use because, through the Transfer, water right 01-181C “expressly included seepage as one of its elements and incorporated the provisions of the [Settlement Agreement] wherein [the City] retained the right to claim the benefits of recharge.” R. at 207.

The hearing officer issued a *Preliminary Order Issuing Permit* (“Preliminary Order”) on June 30, 2015. R. at 200. The hearing officer rejected the City’s argument, reasoning that water right 01-181C’s reference to seepage “does not create or equate to a new or independent beneficial use of water” and that language in the Settlement Agreement “confirms that ‘ground water recharge’ and ‘mitigation’ were not intended to be included as beneficial uses on [water right 01-181C] through [the Transfer].” R. at 207-08. This notwithstanding, the hearing officer approved the Application conditioned upon the City obtaining an approved transfer adding mitigation or recharge as a purpose of use for water right 01-181C. R. at 211, 215.

The City filed exceptions to the Preliminary Order with the Director on July 14, 2015. R. at 221. The City asked the Director to interpret the Settlement Agreement differently than the

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<sup>4</sup> The only difference is that the Transfer refers “[t]he diversion and use of water under *this transfer*,” whereas the partial decree for water right 01-181C refers to “[t]he diversion and use of water under *Transfer 72385*.” Ex. at 90, 93 (emphasis added).

hearing officer and to not require that the City file a transfer to use water right 01-181C to mitigate for the new ground water use under the permit. R. at 230.

On September 22, 2015, the Director issued the Final Order. R. at 271. The Director determined a decision on the City's exceptions could be made without interpreting the Settlement Agreement. R. at 272. The Director first determined that the plain language of the purpose of use element of the partial decree for water right 01-181C does not authorize "mitigation or ground water recharge as a beneficial use." R. at 273. The Director further determined that "[n]othing in [the Transfer] or the Partial Decree issued by the [SRBA] indicate [water right 01-181C] can be used for ground water recharge." R. at 272. The Director agreed with the hearing officer that, "if the City wants to use [water right 01-181C] as mitigation through ground water recharge, it must file a transfer." *Id.*

On the issue of the hearing officer's conditional approval of the Application, the Director agreed that, "until the transfer application is filed, it is difficult to determine how much water is available for mitigation." R. at 273. However, the Director determined "the analysis of how much water is being consumptively used, what water is available for mitigation credit, and other information regarding the mitigation plan should not be deferred to future proceedings." *Id.* The Director concluded "the better approach in this case is to deny the application, without prejudice, for failure to submit sufficient information for the Department to consider the City's mitigation plan." *Id.* Accordingly, the Director denied the Application and suggested the City re-file it in conjunction with a transfer to add mitigation or recharge as a purpose of use for water right 01-181C to "allow the Department to fully consider the City's mitigation plan as part of the application for permit process." R. at 274.

The City timely filed its petition for judicial review of the Final Order on October 16, 2015. R. at 278-85. The District Court affirmed the Final Order because the unambiguous language of the purpose of use element of water right 01-181C does not authorize the City to use water for mitigation or recharge and, if the City desires to do so, it must file a transfer. *Memorandum Decision* at 7-8, 10. The City timely filed its petition for judicial review with this Court on May 16, 2016, raising the same issues the City presented to the District Court.

## **II. ISSUES ON APPEAL**

Respondents' formulation of the issues presented on appeal is as follows:

- A. Whether the Director erred by concluding the City is not authorized to use water right 01-181C for purposes of mitigation or recharge.
- B. Whether the Director erred by concluding the City must file a transfer if it desires to use water right 01-181C for purposes of mitigation or recharge.
- C. Whether the Settlement Agreement prohibits the City from utilizing water right 01-181C for purposes of mitigation or recharge without first filing a transfer.
- D. Whether the Final Order prejudices the City's substantial rights.



### III. STANDARD OF REVIEW

In an appeal from a decision of the district court acting in its appellate capacity under the Idaho Administrative Procedure Act, the Idaho Supreme Court reviews “the decision of the district court to determine whether it correctly decided the issues presented to it.” *Clear Springs Foods v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 78 (2011). However, the Court reviews the agency record independently of the district court's decision. *Chisholm v. Twin Falls County*, 139 Idaho 131, 132, 75 P.3d 185, 187 (2003). The Court does not substitute its judgment as to the weight of the evidence presented, but instead defers to the agency's findings of fact unless they are clearly erroneous. *Id.* When conflicting evidence is presented, the agency's findings must be sustained on appeal if they are supported by substantial and competent evidence, regardless of whether the Court might have reached a different conclusion. *Barron v. Id. Dept. of Water Resources*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Court exercises “free review over questions of law.” *A&B Irr. Dist. v. Idaho Dep't Of Water Res.*, 153 Idaho 500, 516, 284 P.3d 225, 241 (2012).

The district court must affirm the agency's action unless it finds the agency's findings, conclusions, or decisions (a) violate constitutional or statutory provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence on the record as a whole; or (e) are arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279(3); *Barron*, 135 Idaho at 417, 18 P.3d at 222. Even if one of these conditions is met, the agency action must be affirmed unless a substantial right of the appellant has been prejudiced. Idaho Code § 67-5279(4). If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary. *Idaho Power Co. v. Idaho Dep't of Water Res.*, 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011).

#### IV. ARGUMENT

##### A. **The Director Correctly Concluded the City Is Not Authorized to Use Water Right 01-181C for Mitigation or Recharge.**

- i. Mitigation and recharge are not listed under the purpose of use element as authorized purposes of use for water right 01-181C.

In the Final Order, the Director correctly determined that the City is not authorized to use water right 01-181C for mitigation or recharge. A water right can only be used for a purpose of use authorized in the water right. Idaho Code § 42-351 (“It is unlawful for any person to ... use water not in conformance with a valid water right.”). In response to the City’s argument that it is entitled to use water right 01-181C for mitigation and recharge, the Director first examined the purpose of use element of the partial decree for water right 01-181C. R. at 272.

The same rules of interpretation applicable to contracts apply to interpretation of water right decrees. *Rangen, Inc. v. Idaho Dep’t of Water Res.*, 159 Idaho 798, \_\_\_, 367 P.3d 193, 202 (2016). The decree’s meaning and legal effect are to be determined from the plain meaning of the decree’s words. *Cf. Sky Cannon Properties, LLC v. The Golf Club at Black Rock, LLC*, 155 Idaho 604, 606, 315 P.3d 792, 794 (2013).

The Director found the partial decree for water right 01-181C identifies five authorized purposes of use: (1) irrigation storage, (2) irrigation from storage, (3) diversion to storage, (4) recreation storage, and (5) irrigation. R. at 272. Neither mitigation nor recharge is listed as an authorized purpose of use under the purpose of use element. The Director reviewed the remainder of the partial decree and concluded that “[n]othing...in the Partial Decree issued by the [SRBA] indicate[s] [water right 01-181C] can be used for ground water recharge.” *Id.* The Director rejected the City’s argument that he must apply principles of contract interpretation to the private Settlement Agreement to determine the authorized purposes of use for water right 01-

181C. The Director concluded he could decide the matter “using principles of Idaho water law” (i.e. relying on the plain language on the face of the partial decree) instead of referring to the Settlement Agreement. *Id.* Citing Idaho Code § 42-222, the Director concluded that, “if the City wants to use [water right 01-181C] as mitigation through ground water recharge, it must file a transfer.” *Id.*

The City argues the Director erred in his approach to interpreting the partial decree for water right 01-181C. The City raises a number of arguments in support of its contention that mitigation and recharge are authorized purposes of use for water right 01-181C.

- ii. The Director properly relied upon the language on the face of the partial decree for water right 01-181C instead of interpreting the Settlement Agreement in determining the right cannot be used for mitigation or recharge.

The City asserts the Director erred by not considering the Settlement Agreement in denying the Application. Specifically, the City argues the Settlement Agreement is “incorporated” into water right 01-181C because it is referenced in the Other Provisions Necessary section of the partial decree and, therefore, binding upon the Director. *Appellant’s Brief* at 13, 22. That reference states:

The diversion and use of water under transfer 72385 is subject to additional conditions and limitations contained in a Settlement Agreement – IDWR Transfer of Water Right, Transfer No. 72385, 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. at 93.

This reference to the Settlement Agreement does not incorporate the agreement into water right 01-181C as the City contends. It has been a long standing practice in the SRBA to include remarks referencing private contracts or private agreements in partial decrees that resolve

objections. *See, e.g.,* SRBA Subcases 75-5 (Arrowhead Water District)<sup>5</sup> and 75-14608 (Tyacke)<sup>6</sup>. The Department has adopted the same practice with protested transfers and applications for permit and will, as this case evidences, include a condition referencing a private settlement agreement in approval documents to resolve a protest. The purpose of referencing private settlement agreements is to provide notice of the agreements that govern the relationships of parties to the agreements. References such as these are included in the Other Provisions Necessary section of partial decrees “as a courtesy to the parties” and “their successors-in-interest.” *See Memorandum Decision and Order on Motion to Alter or Amend Judgment, Order Granting Motion to Strike*, In Re SRBA Subcase No. 02-2318A at 6, fn.4 (5<sup>th</sup> Jud. Dist. Ct.) (Oct. 31, 2011).<sup>7</sup> Such references do not, however, incorporate the private settlement agreements into water rights such that the Director must look beyond the plain language of partial decrees to interpret the agreements in administering the rights.

In addition, the language of the partial decree for water right 01-181C referencing the Settlement Agreement specifies the agreement is “entered into by and between” NSID, the City,

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<sup>5</sup> The partial decree includes a remark that states; “This water right is subject to a private agreement among the City of Salmon, Myrtle, Dale and Laura Edwards and Arrowhead Water District, and recorded in the Lemhi County Recorder's Office on December 1, 2011, as instrument no. 288296.” A copy of the partial decree from the SRBA District Court file for water right 75-5 is attached hereto as Addendum A. The Department moves the Court to take judicial notice of the partial decree pursuant to IRE 201(d). “Judicial notice may be taken at any stage of the proceeding.” IRE 201(f).

<sup>6</sup> The partial decree includes a remark that states; “The operation, use and administration of this water right is subject to a private water agreement effective December 21, 2011, between Sunset Heights Water District, Cecil and Judith Bailey Jackson, Michael Tyacke, and the State of Idaho, and recorded in the Lemhi County Recorder's Office as Instrument No. 288625.” A copy of the partial decree from the SRBA District Court file for water right 75-14608 is attached hereto as Addendum B. The Department moves the Court to take judicial notice of the partial decree pursuant to IRE 201(d).

<sup>7</sup> A copy of the *Memorandum Decision and Order on Motion to Alter or Amend Judgment, Order Granting Motion to Strike* is attached hereto as Addendum C. The Department moves the Court to take judicial notice of this memorandum decision pursuant to IRE 201(d).

and the Coalition and “enforceable by the parties thereto.” Ex. at 90. The Director is not a party to the Settlement Agreement. While the partial decree for water right 01-181C is binding on all parties to the adjudication and the State of Idaho, the Settlement Agreement referenced in the partial decree is only binding upon, and enforceable by, the parties thereto.

The City also asserts the private Settlement Agreement authorizes the City “to use recharge from [water right 01-181C] to mitigate for” the new ground water use proposed by the Application. *Appellant’s Brief* at 27. Water rights, however, are defined by their elements, including purpose of use. Idaho Code § 42-1411(2); *see Olson v. Idaho Dept. of Water Resources*, 105 Idaho 98, 101 666 P.2d 188, 191 (1983). In a general adjudication such as the SRBA, the court must decree each purpose of use authorized under a state-based claim. Idaho Code § 42-1412(6)(“The district court shall enter a partial decree determining the nature and extent of the water right ...”). As the District Court explained, the City’s argument “fundamentally changes how water under the right can be used.” *Memorandum Decision* at 7. The City’s argument is an “impermissible expansion” of water right 01-181C because it expands the right to include a use not authorized in the partial decree. *Id.* The City’s argument must be rejected. *See cf. Jensen v. Boise-Kuna Irr. Dist.*, 75 Idaho 133, 142, 269 P.2d 755, 760 (1954) (A contract that is contrary to law is ultra vires and void.)

Further, the adjudication statutes require that a decree include the period of year when water may be used for each authorized purpose, Idaho Code § 42-1411(2)(g), and the quantity of water that may be used, Idaho Code § 42-1411(2)(c). The partial decree for water right 01-181C does not identify a period of year when water may be used for mitigation or recharge or a quantity of water that may be used for mitigation or recharge. The absence of this information in

the partial decree for water right 01-181C reinforces that the City is not authorized to utilize the right for mitigation or recharge.

Moreover, the Director must be able to rely on the plain language of partial decrees in administering water rights. The Director does not always have copies of private agreements referenced in partial decrees and many of the agreements, like the Settlement Agreement, are subject to amendment or modification by the signatories. *See* Ex. at 90, 93 (“The diversion and use of water under [the Transfer] is subject to additional conditions and limitations contained in [the] Settlement Agreement . . . including any properly executed amendments thereto). A rule that would allow parties to a settlement agreement to change unambiguous elements of a water right decree via private agreement, and make those changes binding upon the Director, would result in uncertainty and inhibit the Director’s ability to administer water rights. Such a rule is also contrary to the notice rights of other water users. In water right permitting (Idaho Code § 42-203A), in the transfer process (Idaho Code § 42-222), and in water right decrees (Idaho Code § 42-1412), third parties have the opportunity to object to elements of a proposed water right that may affect their interests. If parties to settlement agreements can alter the unambiguous elements of water right decrees via private agreement, third parties will be deprived of the right to receive notice of changes.

In sum, the partial decree for water right 01-181C unambiguously establishes that mitigation and recharge are not authorized purposes of use for the right. The reference to the Settlement Agreement in the partial decree does not incorporate the agreement into water right 01-181C as the City contends. The Settlement Agreement cannot authorize mitigation or recharge as a purpose of use for water right 01-181C because such authorization would constitute an impermissible enlargement of the right. A rule that would allow parties to settlement

agreements to change the unambiguous elements of water right decrees via private agreement would result in uncertainty, inhibit the Director's ability to administer water rights, and deprive third parties of the right to receive notice of changes. The Director did not err by relying upon the face of the partial decree for water right 01-181C to conclude the City may not use the right for mitigation or recharge.

- iii. The reference to "seepage losses" in the quantity element of the partial decree for water right 01-181C does not authorize the City to use the right for recharge.

The City argues that, because the quantity element in the partial decree for water right 01-181C includes a condition which recognizes that "additional storage" is authorized to make up for "seepage losses," the City is authorized to use the water right for recharge purposes.

*Appellant's Brief* at 22, 29, 33. The condition the City relies upon provides:

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

Ex. at 92.

The reference to seepage in the quantity element of water right 01-181C explains how authorized storage volumes in the purpose of use element were calculated. The language makes clear that an additional volume of water was authorized *for storage* to make up for losses from both evaporation and seepage. This condition in no way suggests its inclusion was intended to authorize additional purposes of use not included in the purpose of use element. The reference to seepage losses in the partial decree for water right 01-181C does not authorize the City to utilize the water right for recharge. To argue otherwise goes against the plain language of the partial decree for water right 01-181C.



In addition, as the District Court explained, “[t]he seepage loss was quantified by the Director, and approved by [the District Court], to justify a total authorized diversion of water under the right that exceeds the capacity of the reservoir.” *Memorandum Decision* at 8. “In this respect it is similar to the Director’s recognition of conveyance loss when quantifying certain irrigation rights.” *Id.* “However, seepage loss does not automatically equate to authorized recharge.” *Id.* Only if recharge is an authorize use can seepage identified under the quantity element be considered for purposes of mitigation or recharge. The District Court was correct in concluding that, “since recharge is not an authorized purpose of use under the right, neither the Director nor the Court was required to evaluate whether all of the water that is attributed to seepage losses for purposes of quantifying the right indeed acts to, and/or should be authorized as, recharge ground water.” *Id.*

- iv. The City’s argument that it may use water right 01-181C for mitigation or recharge constitutes an impermissible collateral attack on the partial decree and Transfer proceeding.

The City’s argument that the Court should interpret the partial decree for water right 01-181C as authorizing mitigation or recharge inconsistent with the plain language of the purpose of use element constitutes an impermissible collateral attack on the decree. *See Rangen, Inc.*, 159 Idaho at \_\_\_, 367 P.3d at 201. Any interpretation of the partial decree for water right 01-181C that is inconsistent with its plain language “would necessarily impact the certainty and finality of SRBA judgments and, therefore, requests for such interpretations needed to be made in the SRBA itself.” *Id.* If the City wanted the partial decree for water right 01-181C to be interpreted inconsistent with the plain language of the decree, the City “should have timely asserted that in the SRBA.” *Id.* As the District Court determined, “[i]f the City believed it was authorized to divert water for recharge, it had a duty timely object to the Director’s recommendation” for water

right 01-181C “and present evidence to rebut the same in the SRBA. Idaho Code § 42-1411(5). It did not.” *Memorandum Decision* at 9. Accordingly, “this proceeding is not the proper time or place to raise that argument.” *Id.* at 8.

This proceeding is also not the proper time or place for the City to raise the argument that the Transfer approval authorized the City to use water right 01-181C for recharge. *See Appellant’s Brief* at 29. Again, the Department circulated a draft approval of the Transfer for comment on December 1, 2006. Ex. at 70. The draft included “ground water recharge” and “ground water recharge storage” as purposes of use. Ex. at 72. The Coalition disagreed with inclusion of “ground water recharge” and “ground water recharge storage” as purposes of use and the City requested approval of the Transfer as drafted. Ex. at 46, 48. The Department approved the Transfer in February 2007 without “ground water recharge” or “ground water recharge storage” as purposes of use. Ex. at 88. The Transfer approval was issued as a preliminary order pursuant to Idaho Code § 67-5243. *Transfer Approval Notice* (Feb. 15, 2007).<sup>8</sup> That preliminary order became final because it was not reviewed by the Department pursuant to Idaho Code § 67-5245. *See* Idaho Code § 67-5246. The City did not seek judicial review of the final order approving the Transfer. *Memorandum Decision* at 9. Since the City did not appeal the Department’s determination in the Transfer proceeding that recharge is not an authorized purpose of use for water right 01-181C, collateral estoppel bars the City from now arguing the Transfer authorized use of water right 01-181C for recharge. *See Ticor Title Co. v. Stanion*, 144 Idaho 119, 124, 157 P.3d 613, 618 (2007).<sup>9</sup>

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<sup>8</sup> The Department and Director filed a *Motion to Augment the Record* with the *Transfer Approval Notice* on November 3, 2016.

<sup>9</sup> The five factors required for collateral estoppel to bar the City from arguing the Transfer authorized use of water right 01-181C for recharge are met in this case. *See Ticor Title Co.*, 144 Idaho at 124, 157 P.3d at 618. The City had full and fair opportunity to litigate the issue in the

**B. The Director Correctly Concluded the City Must File a Transfer if It Desires to Use Water Right 01-181C for Mitigation or Recharge.**

The plain language of the partial decree for water right 01-181C unambiguously establishes that mitigation and recharge are not purposes of use authorized by water right 01-181C. Idaho Code provides strict processes for changing water rights. Idaho Code § 42-222; *see City of Pocatello v. Idaho*, 152 Idaho 830, 839, 275 P.3d 845, 854 (2012) (explaining that, if the City of Pocatello wants to change the purpose of use of its water right, it must “proceed with an administrative transfer proceeding.”). The Director correctly applied this statutory requirement in holding that, “if the City wants to use [water right 01-181C] as mitigation through ground water recharge, it must file a transfer.” R. at 272. The City has not done so.

The City suggests the Department’s position is that the “City gave away its ability to use [water right 01-181C] to mitigate for [the new ground water use proposed by the Application] when it entered into the [Settlement Agreement].” *Appellant’s Brief* at 19. This is not the Department’s position. Rather, the Department’s position is that the plain language of the purpose of use element of water right 01-181C does not authorize mitigation or recharge. *See* R. at 273. Therefore, if the City wants to use the water right for those purposes, it must follow the correct procedural process by filing a transfer to add mitigation or recharge to water right 01-181C as a purpose of use. *Id.* The Department has not prejudged whether a transfer may be approved that would authorize the City to utilize water right 01-181C for mitigation or recharge.

The City points to the Director’s statement in the Final Order citing Idaho Code § 42-234(5) that, “[w]ithout expressly listing recharge as a beneficial use, any recharge to the aquifer achieved by diversion and use under [water right 01-181C], is merely incidental and cannot be

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Transfer proceeding, the City asks the Court to decide the identical issue in this case, the issue was decided in the preliminary order approving the Transfer, the preliminary order became a final order on the merits, and the City was a party to the Transfer proceeding.

‘used as the basis for claim of a separate or expanded water right.’” *Appellant’s Brief* at 33-34,

36. The City suggests that, by this statement, the Director determined the City cannot ever utilize water right 01-181C to mitigate the new ground water use proposed by the Application through recharge. *See id.* However, as the District Court noted, the Director “was careful not to prejudge any legal issues that may arise in the context of a potential transfer proceeding.”

*Memorandum Decision* at 11. Whether the City can obtain an approved transfer authorizing mitigation or recharge as a purpose of use so the City can potentially utilize water right 01-181C to mitigate the new ground water use proposed by the Application through recharge is an issue to be addressed in the context of a transfer proceeding.

**C. The Settlement Agreement Prohibits the City From Utilizing Water Right 01-181C for Mitigation or Recharge Without Filing a Transfer.**

Even if the Settlement Agreement could alter the unambiguous elements of the partial decree for water right 01-181C, the plain language of the Settlement Agreement prohibits the City from utilizing the water right for mitigation or recharge without first filing a transfer to change its purpose of use. The City agreed “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 [water right 01-181C] or *change the nature of use* or place of use of [water right 01-181C]” without the written consent of the Coalition. Ex. at 19 (emphasis added). The City also agreed that, if it “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. at 20 (emphasis added).

The unambiguous language of the Settlement Agreement requires that the City hold water right 01-181C “for irrigation and recreation purposes” and not “change the nature of use” of

water right 01-181C without the written consent of the Coalition. In other words, the plain language of the Settlement Agreement confirms that the City is not authorized to utilize water right 01-181C for mitigation or recharge purposes. Further, the Settlement Agreement is clear that, if the City wishes to utilize water right 01-181C for mitigation or recharge, it must file the “appropriate application.” Again, Idaho Code provides strict processes for changing the purpose of use of water rights. Idaho Code § 42-222; *see City of Pocatello*, 152 Idaho at 839, 275 P.3d at 854. As the Director and District Court concluded, if the City wishes to utilize water right 01-181C for mitigation or recharge, the City must file an application for transfer. R. at 272; *Memorandum Decision* at 10-11.<sup>10</sup>

**D. The Final Order Does Not Prejudice the City’s Substantial Rights.**

The City asserts its “substantial right ‘in a proper adjudication of the proceeding by application of correct legal standards’ was violated” because the Director relied upon the plain language of the partial decree for water right 01-181C instead of interpreting the Settlement Agreement in determining the right cannot be used for mitigation or recharge. *Appellant’s Brief* at 37. As discussed above, the Director applied the correct legal standards in evaluating the City’s proposal to utilize water right 01-181C to mitigate the new ground water use proposed by the Application. The Director determined the plain language of the partial decree for water right 01-181C does not include mitigation or recharge as a purpose of use. The Settlement Agreement cannot expand the authorized purposes of use of water right 01-181C. The Director did not need

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<sup>10</sup> The City suggests that it does not need to file a transfer because “[n]on use of one water right can, **without the filing of a transfer**, mitigate for another water right.” *Appellant’s Brief* at 35 (emphasis in original). As the District Court determined, while “[a] transfer is not required under Idaho Code § 42-222 to effectuate the non-use of an existing right . . . the City does not propose the non-use of [water right 01-181C].” *Memorandum Decision* at 10. “Rather, it proposes using the right for the additional purpose of recharge in order to mitigate for a new appropriation. To do so, Idaho law requires the City to file a transfer application with the Department to add recharge as an authorized purpose of use under that right.” *Id.*

to interpret the Settlement Agreement to determine that water right 01-181C does not authorize the City to use the right for mitigation or recharge. As the Director and District Court determined, if the City wishes to use water right 01-181C for mitigation or recharge, it must file a transfer. The Final Order does not prejudice the City's substantial rights.

## V. CONCLUSION

The Director correctly determined that, because the plain language of the partial decree for water right 01-181C does not authorize mitigation or recharge as a purpose of use, and Idaho Code provides a strict process for changing the purpose of use of water rights, if the City wants to use water right 01-181C for mitigation or recharge, it must file a transfer. The Settlement Agreement is not incorporated into the partial decree for water right 01-181C as the City contends. The Settlement Agreement cannot alter the purposes of use authorized by water right 01-181C because such alteration would constitute an impermissible enlargement of the water right. The reference to seepage losses in the quantity element of the partial decree for water right 01-181C does not authorize the City to use the right for recharge. The City's argument that it may use water right 01-181C for mitigation or recharge is an impermissible collateral attack on the partial decree for the water right and the Department's final order approving the Transfer. If the City wants to use water right 01-181C for mitigation or recharge, the City must follow the correct procedural process by filing a transfer. In addition, the plain language of the Settlement Agreement prohibits the City from utilizing water right 01-181C for mitigation or recharge without first filing an application for transfer. The Final Order does not prejudice the City's substantial rights. The Respondents respectfully request that the Court affirm the District Court's Memorandum Decision and *Judgment* affirming the Final Order.



RESPECTFULLY SUBMITTED this 3<sup>RD</sup> day of November 2016.

LAWRENCE G. WASDEN  
Attorney General

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



---

GARRICK L. BAXTER  
Deputy Attorney General  
Idaho Department of Water Resources

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that, unless otherwise noted, I served a true and correct copy of the following described document on the persons listed below by electronic mail and by United States mail, first class, with the correct postage affixed thereto on this 3<sup>RD</sup> day of November 2016.

Document Served: **IDWR RESPONDENTS' BRIEF**

Clerk of the Court  
IDAHO SUPREME COURT  
451 W. State Street  
Boise, Idaho 83702  
[sctbriefs@idcourts.net](mailto:sctbriefs@idcourts.net)  
*Hand Delivered*

Robert L. Harris  
D. Andrew Rawlings  
Holden Kidwell Hahn & Crapo  
P.O. Box 50130  
Idaho Falls Idaho 83405  
[rharris@holdenlegal.com](mailto:rharris@holdenlegal.com)  
[arawlings@holdenlegal.com](mailto:arawlings@holdenlegal.com)

John K. Simpson  
Travis L. Thompson  
Paul L. Arrington  
Barker Rosholt & Simpson, LLP  
P.O. Box 63  
Twin Falls, ID 83303-0063  
[jks@idahowaters.com](mailto:jks@idahowaters.com)  
[tlt@idahowaters.com](mailto:tlt@idahowaters.com)  
[pla@idahowaters.com](mailto:pla@idahowaters.com)

Garrett H. Sandow  
220 N. Meridian  
Blackfoot, Idaho 83221  
[gsandowlaw@aol.com](mailto:gsandowlaw@aol.com)

W. Kent Fletcher  
Fletcher Law Office  
P.O. Box 248  
Burley, ID 83318  
[wkf@pmt.org](mailto:wkf@pmt.org)

  
\_\_\_\_\_  
GARRICK L. BAXTER  
Deputy Attorney General

# ADDENDUM A

**AMENDED**

**Water Right 75-00005**

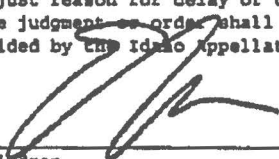
SRBA Partial Decree Pursuant to I.R.C.P. 54(b) (continued)

OTHER PROVISIONS (continued)

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS  
NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT  
ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY  
DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE  
ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

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.

  
\_\_\_\_\_  
Eric J. Wildman  
Presiding Judge of the  
Snake River Basin Adjudication

# ADDENDUM B

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 )  
 )  
Case No. 39576 )  
 )

PARTIAL DECREE PURSUANT TO  
I.R.C.P. 54(b) FOR  
Water Right 75-14608

DISTRICT COURT - SRBA  
Fifth Judicial District  
County of Twin Falls - State of Idaho

FEB 29 2012

NAME AND ADDRESS: MICHAEL JOSEPH TYACKE  
PO BOX 2156  
IDAHO FALLS, ID 83403

SOURCE: HYDE CREEK TRIBUTARY: SALMON RIVER

QUANTITY: 1.94 CFS  
2.92 AFY

By

Clerk

Deputy Clerk

The quantity of water under this right for stockwater use shall not exceed 13,000 gallons per day.  
The rights listed below are limited to a total combined diversion rate of 2.0 cfs and to a total combined annual volume of 3.0 AF for irrigation storage. Combined Right Nos.: 75-14608 and 75-14609.

PRIORITY DATE: 04/01/1878

POINT OF DIVERSION: T20N R22E S05 SWNE Within Lemhi County  
T21N R22E S32 SESW

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Irrigation	04-01 TO 10-31	1.94 CFS
	Irrigation from Storage	04-01 TO 10-31	2.92 AFY
	Stockwater	01-01 TO 12-31	0.40 CFS
	Irrigation Storage	01-01 TO 12-31	2.92 AFY

PLACE OF USE:	Area	Direction	Within Lemhi County
Irrigation	T21N R22E S32	NWNE 33.0	SWNE 22.0
		NENW 25.0	SENE 41.0
		NESW 30.0	SESW 3.8
		154.8 Acres Total	
Irrigation from Storage	T21N R22E S32	NWNE 33.0	SWNE 22.0
		NENW 25.0	SENE 41.0
		NESW 30.0	SESW 3.8
		154.8 Acres Total	

Stockwater	Direction	Within Lemhi County
T21N R22E S32	NESW	

The rights listed below are limited to the irrigation of a combined total of 159.2 acres in a single irrigation season. Combined Right Nos.: 75-14608, 75-14609, 75-14610 and 75-14611. Right Nos. 75-14608 and 75-14609 are limited to the irrigation of a combined total of 159.2 acres in a single irrigation season.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

The quantity of water decreed for this water right for stockwater use is not a determination of historical beneficial use.  
The operation, use and administration of this water right is subject to a private water agreement effective December 21, 2011, between Sunset Heights Water District, Cecil and Judith Bailey



SRBA Partial Decree Pursuant to I.R.C.P. 54(b) (continued)

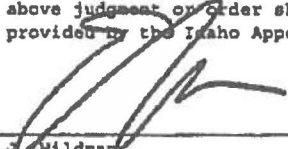
OTHER PROVISIONS (continued)

Jackson, Michael Tyacke, and the State of Idaho, and recorded in the Lemhi County Recorder's Office as Instrument No. 288625.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

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.

  
\_\_\_\_\_  
Eric J. Wildman  
Presiding Judge of the  
Snake River Basin Adjudication

# ADDENDUM C

RECEIVED  
NOV 01 2011  
DEPARTMENT OF  
WATER RESOURCES

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
OCT 31 2011	
By _____	Clerk _____
Deputy Clerk _____	

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 No. 02-2318A  
Case No. 39576 ) (Wilkerson)  
 )  
 ) MEMORANDUM DECISION AND  
 ) ORDER ON MOTION TO ALTER OR  
 ) AMEND JUDGMENT  
 )  
 ) ORDER GRANTING MOTION TO  
 ) STRIKE  
 )

Holding: *Motion to Strike is granted.*  
*Motion to Alter or Amend is denied.*

Appearances:

Debra K. Ellers, McCall, Idaho, Dana L. Hofstetter, Hofstetter Law Office, LLC, Boise, Idaho, Attorneys for Raymond C. Barker, Jr., Charles J. Kritz Jr. and Diane B. Kritz.

Josephine P. Beeman, Jane M. Newby, Beeman & Associates, P.C., Boise, Idaho, Attorneys for William R. Wilkerson, Sr. and Imogene E. Wilkerson.

I.

FACTUAL AND PROCEDURAL BACKGROUND

1. On August 29, 2011, this Court issued a *Memorandum Decision and Order on Challenge and Order of Partial Decree* ("Memorandum Decision") in the above-captioned matter. The procedural background and facts set forth in the *Memorandum Decision* are incorporated herein by reference and will not be repeated.

2. On September 12, 2011, William and Imogene Wilkerson (collectively, "Claimants") filed a *Motion to Alter or Amend*, followed subsequently by a *Brief* in support. The Claimants request that this Court alter or amend two aspects of the *Memorandum Decision* to be discussed below.

3. Raymond C. Barker, Jr., Charles J. Kritz, Jr. and Diane B. Kritz (collectively, “Objectors”) filed a *Response* in opposition to the *Motion to Alter or Amend* on September 26, 2011.

4. On October 11, 2011, the Claimants filed a *Reply Brief* in support of their *Motion* along with the *Affidavit of Josephine P. Beeman* (“*Beeman Affidavit*”).

5. Oral argument on the Claimants’ *Motion to Alter or Amend* was held before this Court on October 13, 2011. At the hearing the Objectors moved to strike the *Beeman Affidavit*.

## II.

### MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument on the Claimants’ *Motion to Alter or Amend* was heard before this Court on October 13, 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 October 14, 2011.

## III.

### DISCUSSION

#### A. Objectors’ Motion to Strike.

At oral argument the Objectors moved to strike the *Beeman Affidavit* on the grounds that it impermissibly attempts to introduce new evidence in conjunction with the *Motion to Alter or Amend*. Idaho Rule of Civil Procedure 59(e) governs motions to alter or amend a judgment. Pursuant to Rule 59(e), “a district court can correct legal and factual errors in proceedings before it.” *Straub v. Smith*, 145 Idaho 65, 71, 175 P.3d 754, 760 (2007). Since Rule 59(e) provides a mechanism for corrective action before the trial court short of an appeal, “such proceedings must of necessity . . . be directed to the status of the case as it existed when the court rendered the decision upon which the judgment is based.” *Lowe v. Lym*, 103 Idaho 249, 263, 649 P.2d 1030, 1034 (Ct. App. 1982). As a result, it is well established that new evidence may not be presented under Rule 59(e) in conjunction with a motion to alter or amend. *Johnson v. Lambros*, 143 Idaho 468, 472 fn.3, 147 P.3d 100, 104 fn.3 (Ct. App. 2006).

Attached as Exhibit A to the *Beeman Affidavit* are copies of certain documents from the Idaho Department of Water Resources' back file for water right 02-2318B.<sup>1</sup> Two of the documents are simply more legible copies of documents already contained in the record. Namely, a more legible copy of the *Notice of Claim* filed in the SRBA for water right 02-2318 as well as a more legible copy of the *Adjudication Claim Report of Examiners* for water right claim 02-2318. Less legible, although otherwise identical, copies of these two documents are already contained in the record as Exhibits C and D respectively to the June 10, 2010 *Affidavit of Jon C. Gould*. Counsel for the Objectors notified the Court at the hearing that Objectors have no objection to the Court considering the more legible copies of these two documents.

However, the Objectors ask this Court to strike the remainder of the Exhibit A documents, as well as all of the documents attached to Exhibit B to the *Beeman Affidavit*.<sup>2</sup> The remainder of the Exhibit A documents and all of the documents attached as Exhibit B to the *Beeman Affidavit* constitute new evidence that was not included in the record at the time the *Memorandum Decision* was issued. Since Idaho law makes clear that a motion to alter or amend must be directed to the status of the case as it existed when the court rendered its decision, it is inappropriate for the Court in this case to consider such new evidence in conjunction with Claimants' *Motion to Alter or Amend*. *Lowe v. Lym*, 103 Idaho at 263, 649 P.2d at 1034; *Johnson v. Lambros*, 143 Idaho at 472 fn.3, 147 P.3d at 104 fn.3. Therefore, the new evidence attached as Exhibits A and B to the *Beeman Affidavit* will be stricken from the record and not considered by this Court. Notwithstanding, the Claimants argue that this Court should consider all of the Exhibit A documents since they are part of the IDWR back file for water right 02-2318B. They note that this Court considered certain documents from the IDWR back file for water right 02-2318A when considering the *Challenge*, after that back file was cited to by the Claimants in their briefing. *Memorandum Decision*, p4, fn.3. However, water right 02-2318B is not before the Court in this proceeding, and therefore the back file for that water right is not part of the record in this proceeding.

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<sup>1</sup> Water right 02-2318B is not at issue in this proceeding. It was partially decreed in the SRBA in favor of the Objectors on January 4, 2011. It is a split from former license 02-2318. The water right at issue here, 02-2318A, is likewise a split from former license 02-2318.

<sup>2</sup> Attached as Exhibit B to the *Beeman Affidavit* are copies of certain documents filed in *Wilkerson v. Snake River R.V. Resort, et al.*, Third Judicial District, Owyhee County (Case No. CV-06-05541).

Based on the foregoing, the Objectors' *Motion to Strike* is granted. All of the documents constituting Exhibits A and B to the *Beeman Affidavit* shall be stricken from the record, save the following two documents to which there were no objections: (1) the more legible copy of the *Notice of Claim* for water right 02-2318, a copy of which is attached hereto as Exhibit 1, and (2) the more legible copy of the *Adjudication Claim Report of Examiners* for water right 02-2318, a copy of which is attached hereto as Exhibit 2.

**B. Claimants' Motion to Alter or Amend.**

"As a means to circumvent an appeal, Rule 59(e) provides a trial court a mechanism to correct legal and factual errors occurring in proceedings before it." *Slaathuag v. Allstate Ins. Co.*, 132 Idaho 705, 707, 979 P.2d 107, 109 (1999). So long as a motion to alter or amend is filed within fourteen days after entry of the judgment, "notions of finality are not disturbed." *Id.* The decision to grant or deny a Rule 59(e) motion to alter or amend is addressed to the sound discretion of the trial court, and will not be disturbed on appeal absent a showing of an abuse of that discretion. *Lowe v. Lym*, 103 Idaho 259, 263, 646 P.2d 1030, 1034 (Ct. App. 1982). In this case, the Claimants' *Motion to Alter or Amend* requests that this Court alter or amend two aspects of the *Memorandum Decision*. Each will be addressed in turn.

**i. Footnote 1.**

Claimants first request that this Court alter or amend footnote 1 of the *Memorandum Decision*, which provides as follows:

The field examiner's report for the claim filed for the right in a prior adjudication was based on an aerial photograph taken in 1977. *Gould Aff.*, Ex. D. The 13 Acre Parcel was therefore irrigated at least as of this date.

*Memorandum Decision*, p.3. Claimants assert that Exhibit D to the *Gould Affidavit* establishes that a field examination of the subject property was done on September 16, 1983, and contend that the footnote should be amended to "clarify that an IDWR filed exam on September 16, 1983 confirmed irrigation of the 13 Acre Parcel."<sup>3</sup> *Motion to Alter or Amend*, p.1. The Objectors assert in response that Exhibit D to the *Gould Affidavit* does not confirm the irrigation of the 13

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<sup>3</sup> Claimants additionally rely on certain documents attached as Exhibit A to the *Beeman Affidavit* in support of their contention in this respect. However, the Court will not consider those documents in light of its ruling on the Objectors' *Motion to Strike*.

Acre Parcel in either 1977 or 1983, but rather is inconclusive as to both dates. They further contend that the footnote is not essential or material to the Court's ruling, since the *Memorandum Decision* was decided on other grounds. This Court agrees.

The *Motion to Alter or Amend* attempts to raise a factual issue as to whether Exhibit D to the *Gould Affidavit* establishes that the 13 Acre Parcel was being irrigated in 1977, 1983, or both. However, that factual issue is immaterial to the Court's ultimate holding and reasoning in the *Memorandum Decision*, which turned primarily on the effect of the filing of the SRBA claim for water right 02-2318 on the Objectors' assertions of forfeiture and/or abandonment of water right 02-2318A. The footnote was merely contextual editorializing on the part of the Court, and if left in the opinion would be viewed merely as dicta. Therefore, rather than raise a new factual issue post-judgment which is not necessary or relevant to the Court's ultimate decision, the Court will simply remove the footnote as immaterial to the opinion.

**ii. Remark.**

Claimants also request that this Court alter or amend the following remark located in the "other provisions necessary for the definition or administration of this water right" section of the *Partial Decree* for the above-captioned water right. The remark provides as follows:

This water right is a split from former license 02-2318. As a result, access to the decreed point of diversion and delivery system for this water right is located on property other than that to which this water right is appurtenant. The decreed elements for this water right do not constitute a judicial determination of the validity of any right to access the point of diversion and/or conveyance system located on property other than to which this water right is decreed appurtenant. The judicial determination of the right of access to the point of diversion and conveyance system was decided separately in *Wilkerson v. Snake River R.V. Resort, et. al.*, Third Judicial District, Owyhee County (Case No. CV-06-05541). Any right of access to the point of diversion and the conveyance system located on property other than to which this water right is decreed appurtenant is subject to any final judgment entered in that proceeding.

("Remark"). Claimants assert that the Remark needs to be removed or clarified on the grounds that it could be "misconstrued" as determining that there was never a valid right of access for water right 02-2318A. This Court disagrees.

The parties to this case are presently engaged in litigation regarding two separate and distinct legal issues. The first – the existence of a valid water right benefitting the 13 Acre



Parcel – was addressed and decided by this Court. The second – the existence of a valid right of access (i.e., whether a license, legal easement or other legal arrangement) across the Riverfront Property in favor of the 13 Acre Parcel – was not addressed or decided by this Court. This Court lacks the jurisdiction to address or decide the right of access issue as it has not been raised before this Court. Rather the Claimants placed that issue before the jurisdiction of the Owyhee County District Court when they, acting as plaintiffs, filed their complaint in Owyhee County Case No. CV-06-05541. The Remark was included in the *Partial Decree* for water right 02-3218A simply to make clear that any issues pertaining to the validity and existence of a right of access across the Riverfront Property in favor of the 13 Acre Parcel were vested in another jurisdiction and were not decided by this Court. The Court finds, contrary to the contentions of the Claimants, that the Remark is clear in this respect and does not need to be altered or amended.<sup>4</sup>

The Claimants additionally argue that the last two sentences of the Remark should be removed or clarified because the right of access case before the Owyhee County District Court has not been fully resolved at this time, and that if the parties settle, the right of access settlement may not be reflected by a judgment of the Owyhee County District Court. While the Court is aware that the Owyhee County District Court case has not been fully resolved at this time, it does not find that the last two sentences of the Remark need to be altered or amended. As presently constituted, the second to last sentence of the Remark reads as follows: “The judicial determination of the right of access to the point of diversion and conveyance system was decided separately in *Wilkerson v. Snake River R.V. Resort, et. al.*, Third Judicial District, Owyhee County (Case No. CV-06-05541).” The language “was decided” was included as opposed to “will be decided” since the *Partial Decree* for water right 02-3218A will be in place in perpetuity, long after the case is resolved. Last, Claimants’ concern that any settlement that may be reached may not be reflected in the judgment entered in Owyhee County Case CV-06-05541 may be addressed by the parties, who in such event, may stipulate that they settlement be reflected in the judgment.

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<sup>4</sup> It is worth repeating that a remark such as the one at issue here would ordinarily be unnecessary as the ownership of a water right does not in and of itself create a right of access across the property of another. In the exercise of discretion, the Court decided to include the remark to simply make clear and reiterate, as a courtesy to the parties, their successors-in-interest and the Owyhee County District Court, that this Court did not address or decide any issues pertaining to the existence of a right of access across the Riverfront Property in favor of the 13 Acre Parcel.



Based on the forgoing, the Claimants' *Motion to Alter or Amend* is denied and the Remark will remain in the *Partial Decree* for water right 02-3218A as presently constituted.

IV.

ORDER

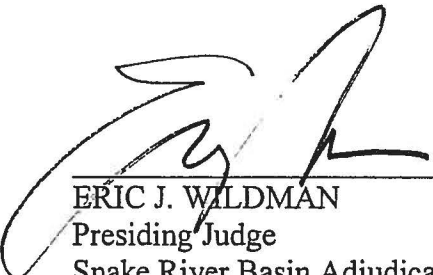
BASED ON THE FORGOING, THE FOLLOWING ARE HEREBY ORDERED:

1. The Objectors' *Motion to Strike* is **hereby granted**. All of the documents constituting Exhibits A and B to the *Beeman Affidavit* are **hereby stricken** from the record, save the following two documents to which there were no objections:

- a. The more legible copy of the *Notice of Claim* for water right 02-2318, a copy of which is attached hereto as Exhibit 1, and
- b. The more legible copy of the *Adjudication Claim Report of Examiners* for water right 02-2318, a copy of which is attached hereto as Exhibit 2.

2. The Claimants' *Motion to Alter or Amend* is **hereby denied**, although the Court will issue an *Amended Memorandum Decision and Order On Challenge and Order of Partial Decree* that removes footnote 1 as immaterial.

DATED: \_\_\_\_\_.



ERIC J. WILDMAN  
Presiding Judge  
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE \_\_\_\_\_ JUDICIAL DISTRICT  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF \_\_\_\_\_

IN THE MATTER OF THE GENERAL DETER-  
MINATION OF RIGHTS TO THE USE OF \_\_\_\_\_  
CLAIMS DERIVED FROM BASE OR IRI.  
FROM TO OREGON DRAINAGE BASIN  
BORDER.

# NOTICE OF CLAIM TO A WATER RIGHT

LD. No.	Map No.
Fee Paid	Receipt No.

Notice is hereby given that

J & L FARMIS

(Name of Claimant)

Telephone No.

(Mailing Address)

(Zip Code)

claims a right to the diversion and beneficial use of the surface or ground water. The extent and nature of said claim is as follows:

- (1) Date of priority: (When was the water first applied to a beneficial use, or priority date of decreed, licensed or permit right)
- (2) Describe the source of water: (Name of stream, lake, spring, etc., or ground water)
- (3) Describe the purpose for which the water has been used and the time during the year when you have used the right claimed:
- | Quantity        | Use                                 | Period of Use From | To         |
|-----------------|-------------------------------------|--------------------|------------|
| (CFS, GPD, A/F) | (Domestic, Irrigation, stock, etc.) | (Mo., Day)         | (Mo., Day) |
| Quantity        | Use                                 | Period of Use From | To         |
| (CFS, GPD, A/F) | (Domestic, Irrigation, stock, etc.) | (Mo., Day)         | (Mo., Day) |
| Quantity        | Use                                 | Period of Use From | To         |
| (CFS, GPD, A/F) | (Domestic, Irrigation, stock, etc.) | (Mo., Day)         | (Mo., Day) |
| Quantity        | Use                                 | Period of Use From | To         |
| (CFS, GPD, A/F) | (Domestic, Irrigation, stock, etc.) | (Mo., Day)         | (Mo., Day) |
- (4) TOTAL QUANTITY CLAIMED.
- (5) A) Point of Diversion: Give location of point where water is diverted from its source. Sec. \_\_\_\_\_ Twp. \_\_\_\_\_ Rge. \_\_\_\_\_ B.M. \_\_\_\_\_ County \_\_\_\_\_
- B) Describe means of diversion of water: (Pump and pipeline, well, diversion dam, reservoir, length of ditch and field, etc.). Give sizes and capacities: be as specific as possible. Describe any changes in the system and give the date of the change.
- (6) A) Describe location of use by listing number of irrigated acres within each 40-acre tract in appropriate box. If use is not for irrigation, place an "X" in appropriate box to show location.

T	R	SEC.	NEX				NWK				SWK				SEK				TOTAL
			NEX	NWK	SWK	SEK	NEX	NWK	SWK	SEK	NEX	NWK	SWK	SEK	NEX	NWK	SWK	SEK	
									3	9	38								

Total no. of acres

B) If water is used for other than irrigation, fully describe that use, being as specific as possible:

NOTE: Include here the type and number of stock watered:

- (7) If you are claiming water as a member of an organization, list name of organization:
- (8) Remarks:

- (9) Basis of claim (Check one) ☐ A) Right based on diversion and beneficial use.  
☐ B) Right decreed by court, cite title of case.  
☒ C) Right based on application, permit, license, or previous statutory claim filed with the Idaho Department of Water Resources. Give No. \_\_\_\_\_

Department of Water Resources  
Western Regional Office

Be it known that the undersigned, after being duly sworn on oath, deposes and says that all statements included herein are true and accurate to the best of (his, her, their) knowledge.

(Date)

State of \_\_\_\_\_ Organization \_\_\_\_\_  
County of \_\_\_\_\_ Seal \_\_\_\_\_

On this \_\_\_\_\_ day of \_\_\_\_\_, In the year \_\_\_\_\_, before me  
a notary public, personally appeared \_\_\_\_\_, who acknowledged to me that he, she, they, corporation,  
partnership or \_\_\_\_\_ executed the same.

Commission expires \_\_\_\_\_

Notary Public residing at \_\_\_\_\_

EXHIBIT

1

State of 1  
Department of Water Resources

ADJUDICATION CLAIM  
REPORT OF EXAMINERS

Claim No. 02-2318

1. Name of Applicant Largatur & sumendi
2. Priority 6/5/68
3. Source of Water Snake R.
4. (Quantity) (Domestic, Irri., Stock Water, etc.) (Period of Use)  
 \_\_\_\_\_ cfs Use \_\_\_\_\_ From \_\_\_\_\_ to \_\_\_\_\_  
.66 cfs Use irrigation From 3/15 to 11/15  
 \_\_\_\_\_ cfs Use \_\_\_\_\_ From \_\_\_\_\_ to \_\_\_\_\_
5. Location of Point of Diversion: \_\_\_\_\_ of Section \_\_\_\_\_  
 Twp. \_\_\_\_\_, Rge. \_\_\_\_\_, County of \_\_\_\_\_
6. Describe Diversion Works: \_\_\_\_\_
7. Describe Location of Use: \_\_\_\_\_

TWP	RGE	SEC	NE $\frac{1}{4}$			NW $\frac{1}{4}$			SE $\frac{1}{4}$			SW $\frac{1}{4}$			TOTALS
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
								46	25						
31N	5R	14						4	29						33

TWP. \_\_\_\_\_ RGE. \_\_\_\_\_ COUNTY \_\_\_\_\_ SCALE: 1" = 1 MILE

+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+

8. Purpose other than irrigation: none

9. Remarks: a portion of this farm has been sectioned off for housing development.

This examination was made on the 16 day of Sept., 19 83.

(Signed) John X. Noyes  
Examiner



State of :  
Department of Water Resources

## ADJUDICATION CLAIM ANALYSIS SHEET

Review by 9KADate 9/16/83Right No. 02-2318Claimant Jorge Luis A. Sumbardi

Recommendation differs from claim: ☒ Yes ☐ No ☐ Disallow  
(Document any differences)

## Claim Details Verified Against:

Check (X or ✓) those searched. Circle records used for recommendation.  
Include copies or memos where applicable to explain findings.

☒ License☐ Previous Statutory Claim.☐ Permits, valid or lapsed. Number(s) if different than above \_\_\_\_\_☐ Decree. Name & date \_\_\_\_\_☐ Conveyance Loss Calculations. See printout included.☐ Title abstract. ☐ In file. Or, Name & location \_\_\_\_\_☐ County records. ☐ In file. Or, Name & location \_\_\_\_\_☐ Affidavits. ☐ In file.☐ Posted Notices, Water Locations Notices. ☐ In file.☐ Deed Records. ☐ In file. Or, Name & location \_\_\_\_\_☐ Patent Records. ☐ In file. Or, Name & location \_\_\_\_\_☐ Metzker Maps. Identify \_\_\_\_\_☒ A.S.C.S. Records. Year & Photograph No. 1977 Alt. attached☐ Irrigation Company/District Records. ☐ In file. Or Name & location \_\_\_\_\_☐ Historical Books. Name(s) & location \_\_\_\_\_☐ Interview(s). Attach conversation memorandum.☐ Other \_\_\_\_\_☐ \_\_\_\_\_Field Exam Made: ☒ Yes ☐ No Date 7/16/83 average + P.D. only.☐ Adj. Report in file ☐ Beneficial Use Report in License (S.O.) File

Measurement \_\_\_\_\_ cfs. Amount recommended \_\_\_\_\_ cfs.

Type of measuring device: \_\_\_\_\_ Meter No. \_\_\_\_\_

Condition \_\_\_\_\_ Date \_\_\_\_\_ Time \_\_\_\_\_

Adjudication Photo(s) Used: Name or No. \_\_\_\_\_, TOP 1 & 224Field Photographs Taken ☐ Yes ☒ No

INCLOSURE

Memorandum in file ☐ Yes ☒ No

Remarks B.D. was changed from original P.D. to  
use stream - still in some H.C. area  
the etc. average on license is in error

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER ON MOTION TO ALTER OR AMEND JUDGMENT; ORDER GRANTING MOTION TO STRIKE was mailed on October 31, 2011, with sufficient first-class postage to the following:

CHARLES J KRITZ JR  
DIANE B KRITZ  
RAYMOND C BARKER JR  
Represented by:  
DANA L. HOFSTETTER  
608 WEST FRANKLIN STREET  
BOISE, ID 83702  
Phone: 208-424-7800

CHARLES J KRITZ JR  
DIANE B KRITZ  
RAYMOND C BARKER JR  
Represented by:  
DEBRA K. ELLERS  
PO BOX 1030  
MCCALL, ID 83638  
Phone: 208-315-2827

IMOGENE E WILKERSON  
WILLIAM R WILKERSON SR  
Represented by:  
JOSEPHINE P BEEMAN  
409 W JEFFERSON ST  
BOISE, ID 83702  
Phone: 208-331-0950

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