IN THE SUPREME COURT OF THE STATE OF IDAHO

THE CITY OF BLACKFOOT,

Petitioner-Appellant,

v.

GARY SPACKMAN, in his capacity as Director of the Idaho Department of Water Resources, and THE IDAHO DEPARTMENT OF WATER RESOURCES,

Respondents,

and

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

Intervenors-Respondents.

IN THE MATTER OF APPLICATION FOR PERMIT NO. 27-12261,

In the name of the City of Blackfoot.

Supreme Court Docket No. 44207-2016

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

APPELLANT'S REPLY BRIEF

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

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Appellant, the City of Blackfoot, through its attorneys of record, Garrett H. Sandow, Blackfoot's City Attorney, and Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby submits *Appellant's Reply Brief.*[1]

I. INTRODUCTION.

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

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

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

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

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

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

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

II. ARGUMENT.

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

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

to it was only done "as a courtesy to the parties and their successors-in-interest." *IDWR Respondents' Brief*, p. 11 (citation and internal quotation marks omitted); *Coalition's Response Brief*, pp. 11-13 (both arguing that the *Partial Decree* only references the *Settlement Agreement*). The Coalition further asserts that the "[t]he City provides no legal authority for the premise that a private settlement agreement will become binding on the Department if a condition is placed on the water right referencing that agreement." *Coalition's Response Brief*, p. 11. Essentially, the Department and Coalition assert that all references to settlement agreements are informational only and do not implicate the Department in any way because the Department is not a party to the *Settlement Agreement*. In support of this argument, Respondents rely on the words of the transfer approval and the *Partial Decree* to surmise that "enforcement of the agreement is limited to the parties to the agreement." Clerk's R., p. 117; *see also IDWR Respondents' Brief*, p. 11; *Coalition's Response Brief*, pp. 11-12.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

. . .

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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8 "The reservoir established by the storage of water under this right shall not exceed a total capacity of **1100 acre feet** or a total surface area of 73 acres. This right authorizes additional storage in the amount of 186 afa to make up losses from evaporation and **980.8 afa for seepage losses**." A.R., Hrg. Exh. List, Exhibit 105, p. 90 (emphasis added).

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

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

> e. The CITY shall not lease, sell, transfer, grant, or assign to any other person or entity any right to recover groundwater or mitigation for the diversion of groundwater as a result of diversions **under the Water Right including any incidental groundwater recharge that may occur as a result of such diversions**. Furthermore, the CITY shall not request or receive **any such mitigation credit** on behalf of any other person or entity. If the CITY proposes **to utilize the Water Right for groundwater recharge or mitigation purposes** associated with existing or future groundwater rights, the CITY must file the appropriate application for permit and/or transfer.

A.R., Hrg. Exh. List, Exhibit 4, p. 20.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> The CITY and [New Sweden Irrigation District] agree that the following terms and conditions be included in the Water Right ("Conditions") after transfer: ....
>
> (b) Without the written consent of the COALITION, the CITY agrees to hold the Water Right in perpetuity for diversion of water from the Snake River into storage at the Pond, for irrigation and recreation purposes, and to not transfer the Water Right or change the nature of use or place of use of the Water Right.

A.R., Hrg. Exh. List, Exhibit 4, p. 19 (capitalization in original). As an initial matter, the predicate of this provision reaffirms the incorporation and intent to incorporate the *Settlement Agreement* into 181C as "terms and conditions" of 181C.

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

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

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

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

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

The application for 12261 is an appropriate application for the City to realize the mitigative benefits provided by 181C. The *Settlement Agreement* provides, without further definition, that if the City itself wants to claim the mitigative benefits of the recharge provided by 181C "with existing or future groundwater rights," the City must "file the appropriate application for permit and/or transfer." A.R., Hrg. Exh. List, Exhibit 4, p. 20 (Paragraph 1.e.). 12261 is a "future groundwater right[]" seeking to claim the mitigation benefits of 181C, as contemplated in this provision.[13] The application for permit 12261 is an "appropriate application for permit and/or transfer" in accordance with the *Settlement Agreement*, because the mitigation provided by 181C is already specified in the *Settlement Agreement* and 12261 can be granted with reference to 181C, which is an administrative procedure frequently undertaken by the Department.

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[13] Footnote 20 of the *Coalition's Response Brief* asserts that it was a "patronizing argument" for the City to assert that the Coalition is very familiar with Idaho water law and understood the terms of art associated with filing of a transfer application or an application for permit when interpreting Paragraphs 1.a or 1.b of the *Settlement Agreement*. The City's argument is not patronizing. Contractual interpretation law considers the context of how and when an agreement was entered into, including the sophistication of the parties to the agreement. The Coalition is very involved in water matters, in many forums, and therefore, the City asserts that the terms used in the *Settlement Agreement* should be interpreted consistent with water law terms of art. In Paragraph 1.a. and 1.b, both paragraphs refer to a "transfer" or to "change the nature of use or place of use" of 181C as administrative actions that require the Coalition's consent, but these provisions do not mention a water right permit application. A "transfer" or "change" are terms of art under Idaho water law and are specific to the provisions of Idaho Code § 42-222, not the provisions of Idaho Code § 42-203A(5) for new permit applications. Because 27-12261 is an application for permit, and not a transfer application, the plain language of the provisions of Paragraphs 1.a and 1.b do not require written consent from the Coalition.

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

"There is nothing improper about mitigation as a beneficial use." *North Snake Ground Water Dist. v. Idaho Dep't of Water Res.*, 160 Idaho 518, _____, 376 P.3d 722, 731 (2016). By the same token, that mitigation does not have to be listed as a beneficial use for a water right to be used as mitigation. Mitigation is not explicitly defined or described by statute, but use of mitigation associated with water is implied from the Department's ability to approve any application "upon conditions." Idaho Code § 42-203A(5). The Department has specified that "[a]n application that would otherwise be denied because of injury to another water right may be approved upon conditions which will mitigate losses of water to the holder of an existing water right, as determined by the Director." IDAPA 37.03.08.045.01.a.iv. This singular mention of mitigation in the context of a water right application suggests that it is broad and involves analysis

of the actual utilization of water. Here, it is uncontested that the actual utilization of 181C provides mitigation for the use proposed by 12261.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. CONCLUSION.

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

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

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

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

Dated this 23rd day of November, 2016.

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