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2015 OCT 16 PM 1:28

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Attorneys for the City of Blackfoot

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM**

THE CITY OF BLACKFOOT,

Petitioner,

v.

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

Respondents.

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

In the name of the City of Blackfoot.

Case No. CV - 2015-1687

Fee Category L.3.a – \$221.00

**NOTICE OF APPEAL AND
PETITION FOR JUDICIAL REVIEW
OF FINAL AGENCY ACTION**

**NOTICE OF APPEAL AND
PETITION FOR JUDICIAL REVIEW
OF FINAL AGENCY ACTION**

Petitioner, the City of Blackfoot, by and through its above-listed counsel of record files this *Notice of Appeal and Petition for Judicial Review of Final Agency Action* challenging a decision by the Idaho Department of Water Resources issued by its director, pursuant to Idaho Code §§ 42-1701A(4), 67-5270, and 67-5279.

STATEMENT OF THE CASE

1. This is a civil action pursuant to Idaho Code §§ 42-1701A(4), 67-5270, and 67-5279 seeking judicial review of the *Order Addressing Exceptions and Denying Application for Permit*, issued by the Director of the Idaho Department of Water Resources, Gary Spackman, (“Director”) on September 22, 2015.

2. To aid in the construction of Interstate 15, the City of Blackfoot (the “City”) allowed the Federal Highway Administration to relocate a portion of the Snake River to avoid construction of certain bridges. This created a gravel pit, known as Jensen’s Grove, in the former location of a portion of the Snake River channel.

3. Decades later, with federal assistance, the City was able to purchase a water right, Water Right No. 01-181C (hereinafter, simply “01-181C”), in order to turn Jensen’s Grove into a recreation area with a 73-acre lake that is filled with water beginning in the spring of each year.

4. In 2005, the City filed a transfer application, administratively numbered as Transfer No. 72385 (hereinafter, simply “72385”), to amend 01-181C. A group of canal companies and irrigation districts known as the Surface Water Coalition (the “Coalition”) protested. In June 2006, the City and the Coalition agreed to resolve the Coalition’s protest pursuant to a *Settlement Agreement, IDWR Transfer of Water Right, Transfer No. 72385, June*

2006 (the "Agreement"). In February 2007, the Department of Water Resources approved 72385, incorporating the Agreement into the approval.

5. In relevant part, 01-181C allows the City to divert a total of 2,266.8 AF for recreation storage. Of that total amount, 1,100 AF is stored in Jensen's Grove during its season of use (which must be refilled before each season of use), 980.8 AF accounts for seepage losses during the season of use, and 186 AF makes up for losses from evaporation during the season of use.

6. Thus, the City contends that a total of 2,080.8 AF enters the aquifer as ground water recharge annually—comprised of the 980.8 AF of seepage during the season of use and 1,100 AF that fills Jensen's Grove but seeps into the aquifer in the months after each season of use.

7. On September 12, 2013, the City submitted an application for permit to the Idaho Department of Water Resources (the "Department") which was administratively numbered as 27-12261 (hereinafter, simply ("27-12661"). The application was amended on September 2, 2014, and January 27, 2015. By submitting 27-12261, the City is seeking a water right permit to develop 9.71 cfs of ground water for the irrigation of 524.2 acres by relying on the mitigation provided by the 2,080.8 AF of ground water recharge described above.

8. The Coalition protested 27-12261.

9. The Department's Hearing Officer conducted a hearing on April 21, 2015. Thereafter, the Hearing Officer allowed post-hearing briefs on the question of whether there was a legal impediment to using water right 01-181C in a mitigation plan for the proposed permit.

10. On June 30, 2015, the Hearing Officer issued a *Preliminary Order Issuing Permit*, which issued the permit, 27-12261, with certain restrictions (the "Preliminary Order"). In reaching that conclusion, the Hearing Officer considered 01-181C, as amended, and the Agreement. The Hearing Officer approved the issuance of a permit for 01-181C, but also required that the City file a transfer application to amend 01-181C to allow for it to be used for ground water recharge.

11. The City filed exceptions to the *Preliminary Order* on July 14, 2015 with the Director. The City challenged two of the *Preliminary Order*'s Findings of Fact, several points of Evaluation Criteria/Analysis, and the Conclusions of Law. The Coalition responded on July 28, 2015.

12. On September 22, 2015, the Director issued the *Order Addressing Exceptions and Denying Application for Permit* (the "Final Order"). The *Final Order* reversed the *Preliminary Order* by denying issuance of a permit for 27-12261, and surprisingly, did not consider or interpret the Agreement at all.

13. The Final Order is the subject of this *Notice of Appeal and Petition for Judicial Review of Final Agency Action*.

JURISDICTION AND VENUE

14. This petition is authorized by Idaho Code §§ 42-1701A(4), 67-5270, and 67-5279.

15. This Court has jurisdiction over this action pursuant to Idaho Code §§ 42-1701A(4) and 67-5272.

16. Venue lies in this Court pursuant to Idaho Code § 67-5272 because the City of Blackfoot is located in and does business in Bingham County, Idaho.

17. Pursuant to the Idaho Supreme Court's Administrative Order issued on December 9, 2009, "all petitions for judicial review of any decision regarding administration of water rights from the Department of Water Resources shall be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District." The Snake River Basin Adjudication District Court's procedures instruct the clerk of the district court in which the petition is filed to issue a *Notice of Reassignment*. Blackfoot has attached a copy of the Snake River Basin Adjudication District Court's *Notice of Reassignment* form for the convenience of the clerk.

18. The Director's *Order Addressing Exceptions and Denying Application for Permit*, dated September 22, 2015, is a final agency action subject to judicial review pursuant to Idaho Code § 67-5270(3).

PARTIES

19. Petitioner, City of Blackfoot, is an incorporated city, located in Bingham County, Idaho, provides water to its residents, and is the applicant for Permit No. 27-12261.

20. Respondent, Gary Spackman, is the Director of the Idaho Department of Water Resources, and a resident of Ada County, Idaho.

21. Respondent, Idaho Department of Water Resources, is an executive department existing under the laws of the state of Idaho pursuant to Idaho Code § 42-1701, *et seq.*, with its state office located at 322 E. Front Street, Boise, Ada County, Idaho.

STATEMENT OF INITIAL ISSUES

22. Petitioner intends to assert the following initial issues on judicial review:

- a. Whether the Director erred in a manner described in Idaho Code § 67-5279(3) by failing to consider the *Settlement Agreement, IDWR Transfer of Water Right, Transfer No. 72385, June 2006*, as an element of Water Right No. 01-181C.
- b. Whether the Director erred in a manner described in Idaho Code § 67-5279(3) by not engaging in contractual interpretation of the *Settlement Agreement, IDWR Transfer of Water Right, Transfer No. 72385, June 2006*.
- c. Whether the Director erred in a manner described in Idaho Code § 67-5279(3) by concluding that “[n]othing in Transfer No. 72[3]85 [sic] or the Partial Decree issued by the Snake River Basin Adjudication indicate Right 01-181C can be used for ground water recharge.” *Final Order* at 2. Stated another way, whether the City gave away its ability to use 01-181C to mitigate for 27-12261 when it entered into the *Settlement Agreement, IDWR Transfer of Water Right, Transfer No. 72385, June 2006*.
- d. Whether the Director erred in a manner described in Idaho Code § 67-5279(3) by concluding that the City must file a transfer if it wants to use 01-181C for mitigation purposes. *Final Order* at 2.
- e. Whether the Director erred in a manner described in Idaho Code § 67-5279(3) by determining that “any recharge to the aquifer achieved by diversion and use under Right 01-181C, is merely incidental recharge [under Idaho Code § 42-234(5)] and cannot be used as a basis for claim of a separate or expanded water right.”

- f. Whether questions of injury to the Coalition's water rights were already addressed in the contested case, and therefore, under principles of res judicata, the City should not be required to file a transfer application to permit the Coalition to have a second opportunity to raise injury arguments.
- g. Whether the Director's actions prejudiced a substantial right of the City.

AGENCY RECORD

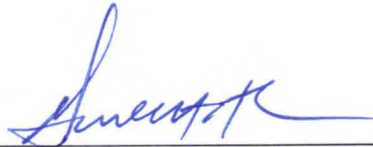
23. Judicial Review is sought of the Director's *Order Addressing Exceptions and Denying Application for Permit*, dated September 22, 2015.

24. The Department held a hearing in this matter on April 21, 2015, which was recorded, and the recording should be made a part of the agency record in this matter. The person who has a digital copy of the hearing is Sharla Cox, Idaho Department of Water Resources, 900 North Skyline Drive, Suite A, Idaho Falls, ID 83402-1718, Telephone: (208) 525-7161, Facsimile: (208) 525-7177, Email: sharla.cox@idwr.idaho.gov. Counsel for the City hereby certifies that the City contacted Ms. Cox to verify that she has the recording. In accordance with I.R.C.P. 84(g), the City has contacted M&M Court Reporting at the direction of the agency clerk to obtain an estimate of the cost to prepare the transcript. The estimated cost is Two Hundred Dollars (\$200.00), and the City certifies that a check has been sent to M&M Court Reporting, 101 S. Capitol Blvd., Suite 503, Boise, ID 83702 on October 16, 2015, as the estimated cost for preparing the transcript in this matter, and will pay the actual cost of the transcript if it is determined to be more than the estimated cost.

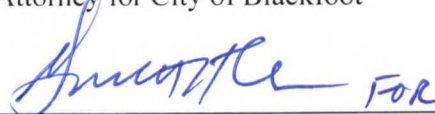
25. Petitioner anticipates it can reach a stipulation regarding the agency record with the Respondents and any intervenors, and will pay its necessary share of the fee for preparation of the record at such time.

26. Service of this Petition for Judicial Review has been made on the Respondents as they exist at the time of the filing of this Petition.

Dated this 16 day of October 2015.



Garrett Sandow
Attorney for City of Blackfoot



Robert L. Harris
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys and/or individuals listed below, by the method indicated, a true and correct copy thereof on this 16 day of October 2015.

Document Served: NOTICE OF APPEAL AND PETITION FOR JUDICIAL REVIEW OF FINAL AGENCY ACTION

Attorneys and/or Individuals Served:

Paul L. Arrington
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195 River Vista Place, Suite 204
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Courtesy Copy:

Snake River Basin Adjudication District Court
of the Fifth Judicial District
P.O. Box 2707
Twin Falls, Idaho 83303-2707

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() Facsimile
() Courthouse Box



Garrett Sandow
Attorney for City of Blackfoot

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2015 OCT 21 PM 4:32

CASE #
PAMELA W. ECKHARDT CLERK
BY BC DEPUTY

**IN THE DISTRICT COURT OF THE SEVENTH DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM**

THE CITY OF BLACKFOOT,

Petitioner,

v.

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

Respondent.

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

In the name of the City of Blackfoot.

Case No. CV 2015-1687

NOTICE OF REASSIGNMENT

WHEREAS Idaho Supreme Court Administrative Order dated December 9, 2009, declares that all petitions for judicial review made pursuant to I.C. § 42-1701A of any decision from the Department of Water Resources be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District, and

WHEREAS Idaho Supreme Court Administrative Order dated December 9, 2009, vests in the Snake River Basin Adjudication District Court the authority to adopt procedural rules necessary to implement said Order, and

WHEREAS on July 1, 2010, the Snake River Basin Adjudication District Court issued an Administrative Order regarding the Rule of Procedure Governing Petitions for Judicial Review or Actions for Declaratory Relief of Decisions from the Idaho Department of Water Resources.

THEREFORE THE FOLLOWING ARE HEREBY ORDERED:

1. The above-matter is hereby assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District for disposition and further proceedings.

2. All further documents filed or otherwise submitted in this matter, and all further filing fees filed or otherwise submitted in this matter, shall be filed with the Snake River Basin Adjudication District Court of the Fifth Judicial District at P.O. Box 2707, Twin Falls, Idaho 83303-2707, provided that checks representing further filing fees shall be made payable to the county where the original petition for judicial review or action for declaratory judgment was filed.

DATED this 21st day of October 2015.

CLERK OF THE COURT

By: Brandee Cammack
Deputy Clerk



CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the NOTICE OF REASSIGNMENT on the attorneys and/or individuals listed below, by the method indicated, on this 21st day of October 2015.

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() Facsimile
() Courthouse Box

CLERK OF THE COURT

By: Brandee Cammar
Deputy Clerk



2015 OCT 21 PM 5:02

CASE NO.
PAMELA W. ECKHARDT

BY BC CITY

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM**

THE CITY OF BLACKFOOT,)
)
Petitioner,)

Case No. CV-2015-1687

-vs-)

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

CERTIFICATE OF SERVICE

Respondent.)

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

In the name of the City of Blackfoot.)

I, PAMELA W. ECKHARDT, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bingham, do hereby certify I served a true copy of the this Court's file in the above-entitled case on the person(s) listed below in the manner indicated:

Snake River Basin Adjudication District Court
Fifth Judicial District
PO Box 2707
Twin Falls, ID 83303-2707

☒ U.S. Mail

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court
at Blackfoot, Idaho, this 21st day of October 2015.

PAMELA W. ECKHARDT,
Clerk of the District Court

Brandee Cammack
Deputy Clerk



CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of October, 2015, I served a true copy of the foregoing document to the person(s) listed below in the manner indicated:

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PAMELA W. ECKHARDT,
Clerk of the Court

Brandee Cammack
Deputy Clerk

