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.	**Case No. CV-2015-1687**
IN THE MATTER OF APPLICATION FOR PERMIT NO. 27-12261 In the name of the City of Blackfoot.	

PETITIONER'S OPENING BRIEF

Judicial Review from the Idaho Department of Water Resources
Honorable Eric J. Wildman, District Judge, Presiding

Garrett H. Sandow, ISB # 5215
220 N. Meridian
Blackfoot, Idaho 83221
Telephone: (208) 785-9300
Facsimile: (208) 785-0595

Robert L. Harris, ISB #7018
Luke H. Marchant, ISB #7944
D. Andrew Rawlings, ISB #9569
HOLDEN KIDWELL HAHN & CRAPO, P.L.L.C.
1000 Riverwalk Drive, Suite 200
P.O. Box 50130
Idaho Falls, ID 83405
Telephone: (208)523-0620
Facsimile: (208) 523-9518

Attorneys for the City of Blackfoot

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
195 River Vista Place, Suite 204
Twin Falls, ID 83301-3029
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

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

W. Kent Fletcher, ISB #2248
FLETCHER LAW OFFICE
P.O. Box 248
Burley, Idaho 83318
Telephone: (208) 678-3250
Facsimile: (208) 878-2548

Attorneys for American Falls Reservoir District #2 and Minidoka Irrigation District

Garrick L. Baxter, ISB #6301
Deputy Attorney General
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720
Telephone: (208) 287-4800
Facsimile: (208) 287-6700

Attorneys for the Idaho Department of Water Resources

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Petitioner, the City of Blackfoot (the "City" or "Blackfoot"), hereby submits *Petitioner's Opening Brief.* This brief is filed pursuant to this Court's *Procedural Order* of October 27, 2015; I.R.C.P. 84(p); I.A.R. 35; and I.A.R. 36.

I. STATEMENT OF THE CASE.

A. Nature of the Case.

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* (the "*Final Order*") issued by the Director of the Idaho Department of Water Resources, Gary Spackman (the "Director"), on September 22, 2015.

B. Course of Proceedings.

The City submitted the application for permit for 27-12261 (hereinafter simply "27-12261") on September 12, 2013. R. at 1-27. The original application was signed by then-Mayor Mike Virtue. R. at 3. On September 2, 2014, the Idaho Department of Water Resources (the "Department") assisted the City with preparation of an amended application for permit, which was signed by Mayor Paul Loomis.[1] R. at 28-58. On January 27, 2015, the City submitted a second amended application with the assistance of Rocky Mountain Environmental Associates, Inc., complete with an amended mitigation plan. R. at 92-105. The second amended application was also signed by Mayor Paul Loomis. R. at 93.

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[1] Evidence of the Department's assistance is contained in the style and layout of a map submitted with the amended application.

After these amendments, 27-12261 sought a water right permit to develop 9.71 cfs of ground water for the irrigation of 524.2, acres with Water Right No. 01-181C (hereinafter, simply "01-181C") being offered as mitigation for the depletive effects to the Eastern Snake Plain Aquifer (the "ESPA") resulting from diversion of water under 27-12261. R. at 200-01.

27-12261 was protested by the Surface Water Coalition (the "Coalition"). At the hearing, the Coalition stipulated that items (b) through (e) of Idaho Code § 42-203A(5) were not at issue, and specifically stipulated that they did not disagree with or object to the modeling analysis performed quantifying the recharge benefits of water lost from Jensen's Grove or the proposal to leave small portions of certain water rights in the Blackfoot River to mitigate for modeled impacts to downstream reaches of the Snake River. R. at 203-04, 207. More specifically, the Coalition's concern was not **factual** in nature, but based only on **legal** issues surrounding interpretation of the *Settlement Agreement, IDWR Transfer of Water Right, Transfer No. 72385*, dated June 2006 (the "*Settlement Agreement*"). Ex. at 18-23.

In fact, the Coalition presented no witnesses at the hearing. Tr., p. 49, ll. 21-23. Stated another way, the Coalition did not submit evidence of any factual concerns or rebuttal testimony or analysis regarding the modeling analysis and other analyses submitted by the City, or to rebut the reality that ground water recharge occurs at Jensen's Grove under 01-181C. The only assertion of injury was that use of 01-181C for mitigation would injure the Coalition because 01-181C would be used differently than the Coalition believed the *Settlement Agreement* allowed. R. at 155-56. The Coalition has taken the position that 01-181C was not authorized to be used for mitigation purposes. R. at 163-69. This is why briefing was submitted specifically

addressing the legal question of: "Is there a legal impediment to using water right 01-181C in a mitigation plan for the proposed permit?" R. at 200. Therefore, the only item under Idaho Code § 42-203A(5) at issue was subpart (a), which is whether 27-12261 "will reduce the quantity of water under existing water rights" based on the Coalition's interpretation of the *Settlement Agreement* and its perceived limitations of using 01-181C for mitigation purposes.

On June 30, 2015, the hearing officer entered the *Preliminary Order Issuing Permit* (the "*Preliminary Order*"), which issued 27-12261 with the condition that the City file a transfer to allow it to use the recharge provided by 01-181C as mitigation for 27-12261. R. at 200-16. On July 14, 2015, the City filed its *Exceptions* to the *Preliminary Order* and asked the Director to correct errors made by the hearing officer in reaching his conclusion. R. at 220-44. The Coalition responded on July 30, 2015. R. at 249-69.

On September 22, 2015, the Director issued the *Final Order* within which the Director refused to consider the *Settlement Agreement*, found that 01-181C could not be used for ground water recharge without a transfer application, and denied the City's application for 27-12261. R. at 271-74. The City filed this present petition for judicial review on October 16, 2015. R. at 278-85.

C. Statement of Facts.

1. The City of Blackfoot is located in Bingham County, Idaho, and with a population of nearly 12,000 people, is one of eastern Idaho's major cities. *See, e.g.,* http://quickfacts.census.gov/qfd/states/16/1607840.html; http://en.wikipedia.org/wiki/Blackfoot,_Idaho.

2. Many years ago, during the planning and construction of Interstate 15 ("I-15"), the Blackfoot City fathers were approached by Federal Highway Administration officials to discuss relocation of a portion of the Snake River channel because doing so would eliminate construction of four bridges, thereby saving the federal government the expense of constructing the bridges. Tr., p. 35, l. 22–p. 36, l. 10.

3. As responsible citizens, these City fathers recognized the benefit to taxpayers, and agreed to the channel relocation even though doing so would mean sacrificing significant riverfront property. Tr., p. 36, ll. 19-23. In addition, the old river channel was used to mine gravel for the road construction, and has continued to be used for mining gravel. Tr., p. 29, l. 16–p. 30, l. 17. The City therefore effectively replaced Snake River riverfront property with a gravel pit.

4. This gravel pit that exists at the former location of a portion of the Snake River channel on the east side of I-15 is known as Jensen's Grove. R. at 203-04.

5. Decades after the City allowed the federal government to relocate the Snake River channel, the City was awarded a federal grant of approximately two hundred and fifty thousand dollars ($250,000.00), through the help of Congressman Mike Simpson, to secure a water right to fill and maintain water levels in Jensen's Grove. Tr., p. 36, l. 24–p. 37, l. 11.

6. The City used these funds to purchase 01-181C from the New Sweden Irrigation District. Tr., p. 37, ll. 12-15; *see also* Ex. at 12. These federal funds represent payment for only a small part of the losses the City incurred by giving up its riverfront property, and the

benefit of the City's purchase of a water right for Jensen's Grove is that it salvaged some of that loss by significantly improving a recreational area and facility for local residents.

7. The City filed a transfer application to amend 01-181C on October 27, 2005, which was numbered as Transfer No. 72385 (hereinafter, simply "72385"). Ex. at 28, 49. 01-181C was an irrigation-only water right. Tr., p. 37, ll. 16-19. The transfer requested a change in the place of use and changes to the nature of use of most of 01-181C to diversion to storage, storage, diversion to recharge, as well as retaining a small portion for irrigation purposes. Ex. at 28, 49.

8. The Coalition protested 72385. *See* Ex. at 15, 65. Eventually, the parties agreed to resolve the Coalition's protest pursuant to the terms and conditions of the *Settlement Agreement*. Ex. at 18-23, 46-47, 74-87.

9. Approval of 72385 was issued on February 14, 2007. Ex. at 88-90. 01-181C now allows the City to divert (1) 46.00 cfs as diversion to storage; (2) 1.00 cfs and 200.0 AF for irrigation; (3) 200.00 AF for irrigation storage; (4) 200.00 AF for irrigation from storage; and (5) 2,266.8 AF for recreation storage, of which 1,100 AF of this amount is stored in Jensen's Grove during its season of use and 980.8 AF is allocated for seepage losses during its season of use. As stated by condition no. 5 of the transfer approval:

> 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 ("Condition No. 5") (emphasis added). Thus, in addition to 980.8 AF of seepage, 1,100 AF of water left in Jensen's Grove at the end of the irrigation season enters into the ESPA as ground water recharge in the amount 2,080.8 AF.

10. It is this annual seepage loss—ground water recharge—of 2,080.8 AF that the City seeks to use as mitigation for 27-12261. *See* Ex. at 2.

11. Additionally, condition no. 9 of the transfer approval incorporates the provisions of the *Settlement Agreement*:

> **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 the New Sweden Irrigation District, the City of Blackfoot, A& B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, Twin Falls Canal Company, and North Side Canal Company. 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 90 ("Condition No. 9") (emphasis added).

12. Condition No. 5 and Condition No. 9 were incorporated into the SRBA partial decree for 01-181C as part of the quantity element and as an "other provision necessary for definition or administration of this water right," respectively. Ex. at 91-94.

13. Thus, both the Department's approval of 72385 and the SRBA partial decree for 01-181C incorporate the *Settlement Agreement*. *See* Ex. at 90 and 93.

14. For that reason, the interpretation of the elements and conditions of 01-181C, including the provisions of the *Settlement Agreement*—particularly paragraph 1—was at issue in the contested case of 27-12661. *See* R. at 137, 155-156.

15. The City applied for 27-12661 in order to replace an expensive and dated pump station on the Blackfoot River that the City currently operates.

16. The City delivers several surface water rights through the pump station. Tr., p. 9, l. 22–p. 10, l. 1. The water right entitlements diverted at the pump station include water rights that were previously delivered through a facility known as the "Miner's Ditch,"[2] as well as water allocated to shares owned by certain shareholders of the Corbett Slough Irrigation Company and shareholders of the Blackfoot Irrigation Company. Ex. at 1; R. at 201.

17. Prior to the 1960s, Miner's Ditch ran through the City and crossed I-15. Tr., p. 9, ll. 13-17. Miner's Ditch ran near a proposed school, and in an effort to increase safety and eliminate the dangers of an open ditch, the City, the State of Idaho, and the school district decided to eliminate Miner's Ditch in exchange for installation of a pump station on the Blackfoot River to provide water to the water users who took delivery of their water through Miner's Ditch. Tr., p. 9, l. 18–p. 10, l. 1.

18. The pump station arrangement was accepted by the City, not by agreement, but by actions of the Blackfoot City Council. Tr., p. 10, ll. 2-9. Since its construction, the City has maintained the pump station almost entirely on its own. Tr., p. 10, ll. 10-14. The

[2] Water Right Nos. 27-17, 27-20A, 27-20B, 27-23E, 27-10790, 27-10999, and 27-11117.

City only receives a small stipend yearly from the irrigators who benefit from the pump station, but receives no contribution from the school district, the State of Idaho, or anyone else for maintenance and operation of the pump station. Tr., p. 10, ll. 10-14.

19. The pump station has proven to be a major burden for the City, both operationally and financially, particularly with no help from the school district or the State of Idaho.

20. The pump station requires significant maintenance because of the high sediment load in Blackfoot River water. Tr., p. 10, ll. 21-22. The pump station has to be refurbished every two to three years, and due to these maintenance issues, operates at an annual cost of between $40,000 and $50,000 per year. Tr., p. 10, l. 22–p. 11, l. 9. The pump station has two pumps, one of which operates, while the other is being serviced or repaired. Tr., p. 35, ll. 1-10.

21. Currently, the concrete culvert and other attendant equipment associated with the pump station have aged and may need to be replaced soon. Tr., p. 11, ll. 1-5. As a result, the City, with the aid of consultants, examined a number of options to address the situation. Tr., p. 11, l. 10–p. 13, l. 13.

22. The City analyzed refurbishment of the pump station, installation of settling ponds, and replacing the delivery of water to the Miner's Ditch users with a well. Tr., p. 11, l. 10–p. 13, l. 13. Results from the City's experts estimated that refurbishment of the Blackfoot River pump station would cost just under $400,000.00, and that settling ponds would be very expensive as well. Tr., p. 12, ll. 5-14. The most cost effective option was drilling a new well, at an estimated cost of $80,000.00. Tr., p. 12, ll. 10-11.

23. The City first analyzed drilling a well very near to the pump station on the Blackfoot River with the hope that it would qualify under the Department's current policy for changing a water right's source. Tr., p. 11, ll. 13-24; *See also Administrator's Memorandum*, Transfer Processing No. 24, December 21, 2009, at 26 ("The ground water and surface water sources must have a direct and immediate hydraulic connection (at least 50 percent depletion in original source from depletion at proposed point of diversion in one day)"). Unfortunately, based upon analysis of the local geology, the City's consultants determined that there is a basalt layer approximately 50 feet below land surface which would require the City to hit a "sweet spot" of 48.5 feet for the well to function and operate appropriately. Tr., p. 12, l. 25–p. 13, l. 6. With so little margin of error, the City elected to look at other options instead. Tr., p. 13, ll. 7-13.

24. The alternative eventually pursued by the City was to drill a new well and use ground water recharge from Jensen's Grove to mitigate for the ground water withdrawals. Tr., p. 13, ll. 7-24. The operational costs of the new well are anticipated to be between $12,000.00 and $14,000.00 per year, compared to $40,000.00 to $50,000.00 per year to maintain the Blackfoot River pump station. Tr., p. 15, ll. 1-12. The result is an estimated savings of between $28,000.00 and $36,000.00 per year to the City. The new well would provide water to the lands serviced by the pump station, most of which is within City limits or within the City's impact area. Tr., p. 15, ll. 13-21.

25. Accordingly, the City filed 27-12261 to authorize development of a water right to provide water to the Miner's Ditch users. *See* R. at 1, 28, and 92.

26. 27-12261was protested by the Coalition. R. at 66-67.

27. The only matter at issue at the hearing on this matter was the legal question of whether, under Idaho Code 42-203A(5)(a), 27-12261 "will reduce the quantity of water under existing water rights" based on the *Settlement Agreement* and the use of 01-181C for mitigation purposes.

II. ISSUES PRESENTED ON APPEAL.

A. Whether the Director erred in a manner described in Idaho Code § 67-5279(3) by failing to consider the *Settlement Agreement* as an element of 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*.

C. Whether the Director erred in a manner described in Idaho Code § 67-5279(3) by concluding that nothing in 72385 or the SRBA partial decree that allows 01-181C to be used for ground water recharge.

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.

E. Whether the Director erred in a manner described in Idaho Code § 67-5279(3) by determining that the recharge to the aquifer accomplished under 01-181C is merely incidental recharge and therefore 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 *Settlement Agreement* and 01-181C, and therefore, under principles of *res judicata*, the City is not required to file a transfer application to permit the Coalition to have a second opportunity to raise the same injury arguments addressed previously.

G. Whether the Director's actions prejudiced a substantial right of the City.

III. ARGUMENT.

Judicial review of a final decision of the Director is governed by the Idaho Administrative Procedures Act (I.C. § 67-5201, *et seq.*, hereinafter "IDAPA"). I.C. § 42-1701A. Under IDAPA, the Court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The Court cannot substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1); *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). Where, as here, the agency "was required . . . to issue an order," the Court must affirm the agency decision unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

> (a) in violation of constitutional or statutory provisions;
> (b) in excess of statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) not supported by substantial evidence on the record as a whole; or
> (e) arbitrary, capricious, or an abuse of discretion.

I.C. § 67-5279(3); *Castaneda*, 130 Idaho at 926, 950 P.2d at 1265. Further, the party challenging the agency decision must also show that at least one of its substantial rights have been prejudiced. I.C. § 67-5279(4).

As set forth below, the City requests that this court engage in contractual interpretation of the *Settlement Agreement* because the Director did not. If this Court finds that the Director's failure to engage in contractual interpretation violated the provisions of Idaho law as described herein, then the court should thereafter itself engage in contractual interpretation and rule on this issue because "[w]hen the language of a contract is clear and unambiguous, its interpretation and legal effect are questions of law," *Lamprecht v. Jordan, LLC*, 139 Idaho 182, 185, 75 P.3d 743, 746 (2003), and "[o]n appeal, this Court exercises free review over matters of law." *Id.*

A. The *Settlement Agreement* is an element of Water Right No. 01-181C, and should therefore have been considered by the Director.

The Director improperly refused to "consider[] or discuss[]" the *Settlement Agreement*. R. at 272. The Director held that "the *Settlement Agreement* does not in any way affect the Director's decision in this matter. The decision can be made using principles of Idaho water law without referring to the *Settlement Agreement*." R. at 272 (italics added). In effect, the Director was, in three sentences, refusing to consider a component of 01-181C and its significant implications on how 27-12261 could be mitigated. The Director narrowly focused only on the listed beneficial uses on the face of 01-181C, and because he did not see ground water recharge expressly listed, he concluded that 01-181C could not be used for mitigation. But this approach ignored the conditions in 01-181C which refer to the *Settlement Agreement* and necessarily make the analysis of 01-181C more nuanced.

Conditions contained in a water right are recognized as elements of the water right and are no more or less important than other elements of a water right. For permits, Idaho Code § 42-203A(5) allows the Director to "grant a permit upon conditions." The perfected permit is

then licensed pursuant to Idaho Code § 42-219 wherein the license issued must bear "the number of[] the permit under which the works from which such water is taken were constructed." Such license must therefore incorporate any permit conditions which are part and parcel to the description of how the water right can be used, and in some instances, additional conditions can also be included in the license. *See Idaho Power Co. v. Idaho Dep't of Water Res.* (In Re Licensed Water Right No. 03-7018), 151 Idaho 266, 255 P.3d 1152 (2011) (Department had authority to include a term condition in Idaho Power's license, even though such a condition was not included in the original permit). As a result of including these conditions in a license, "[s]uch license **shall be binding upon the state** as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right[.]" Idaho Code § 42-220 (emphasis added).

The binding effect of conditions in a water right license remains unchanged in the formal adjudication of a water right license. With claims submitted in an adjudication (such as the SRBA), the claim form requires inclusion of "conditions of the exercise of any water right included in any decree, license, approved transfer application or other document," Idaho Code § 42-1409(j), the report of the Director requires inclusion of the same conditions, Idaho Code § 42-1411(2)(j), and the final step of the adjudication process—issuance of the partial decree—is required to "contain or incorporate a statement of each element of a water right as stated in subsections (2) and (3) of section 42-1411, Idaho Code." Idaho Code § 42-1412(6). Therefore, conditions in a water right license or partial decree are elements of the water right and are no less important than the diversion rate or any other water right element.

The *Settlement Agreement* is an incorporated element of 01-181C. The Department's approval of 72385, the City's transfer that changed the beneficial use of 01-181C, specifically states that it is "subject to additional conditions and limitations contained in [the *Settlement Agreement*], including any properly executed amendments thereto." R. at 90. Further, the corresponding SRBA partial decree relating to 72385 contains **the exact same language**, incorporating the *Settlement Agreement* by reference. R. at 93.

Based on the above, the Director did not give appropriate consideration to the *Settlement Agreement*, and instead, focused on the other elements of the water right to excuse him from considering the provisions of the *Settlement Agreement* or engaging in contractual interpretation. In effect, the Director elevated other elements of the water right over the provisions of the *Settlement Agreement* despite the statutory edict that such conditions are binding on him, as an agent of the State of Idaho: "[s]uch license **shall be binding upon the state** as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right[.]" Idaho Code § 42-220 (emphasis added). Ignoring the conditions of 01-181C was not a lawful exercise of the Director's discretion and would not be a lawful exercise of this Court's discretion as well.

In terms of how the *Settlement Agreement* should be considered in an incorporated agreement, the principle of incorporating an agreement is perhaps best illustrated in divorce jurisprudence, because in divorce cases, the parties will frequently arrive at a property settlement agreement, which may or may not thereafter be incorporated, or merged, into the court's divorce decree. *See, e.g., Phillips v. Phillips*, 93 Idaho 384, 386-87, 462 P.2d 49, 51-52 (1969). Courts

first look within the four corners of the divorce decree to determine whether the agreement was incorporated. *Borley v. Smith*, 149 Idaho 171, 177, 233 P.3d 102, 108 (2010). Only if the divorce decree is ambiguous regarding incorporation may a court look to extrinsic evidence. *Id.* If the agreement is incorporated, it has become a part of the divorce decree. *Davidson v. Soelberg*, 154 Idaho 227, 230, 296 P.3d 433, 436 (Ct. App. 2013). In that circumstance, the only way to enforce or otherwise adjudicate the incorporated agreement is to pursue that action in the original divorce case, because it is no longer just an agreement between the parties, but is the court's judgment. *Id.* Further, subsequent courts are not at liberty to ignore or disregard the agreement, which has become part of the divorce decree. *See id.*

Here, by conducting the same analysis, this Court must conclude that the *Settlement Agreement* was incorporated into the Department's approval of 01-181C and the SRBA's partial decree that affected 01-181C. Ex. at 90 and 93 (the approval and the partial decree, respectively, both stating that the diversion and use was "subject to additional conditions and limitations contained in [the *Settlement Agreement*], including any properly executed amendments thereto"). The first step of the appropriate analysis, "to look first *only* to the four corners" of the judgment, *Borley*, 149 Idaho at 177, 233 P.3d at 108 (emphasis in original), is dispositive since both the administrative determination and the judicial decree clearly and unambiguously incorporate the *Settlement Agreement*. Because the license and partial decree are unambiguous, this Court need not consider any evidence extrinsic to those documents to determine whether the *Settlement Agreement* was incorporated into 01-181C or to interpret the *Settlement Agreement*. The Director erred by failing to consider the *Settlement Agreement* at all. Neither the Department nor

this Court may consider 01-181C without the *Settlement Agreement*, because to do so is to consider only part of the City's water right.

Assume, for illustrative purposes only, that the City and the Coalition properly amended the *Settlement Agreement* to allow 01-181C to be applied to mitigate a third party's water right. By the terms of the approval of 72385 and the SRBA's partial decree, that would settle the issue (at the very least between the City and the Coalition). But, under the Director's approach of refusing to consider the *Settlement Agreement*, the amendment would not be recognized and the third party's water right would not be mitigated. By refusing to consider the *Settlement Agreement*, the Director erroneously discarded part of 01-181C, R. at 272, and this Court should not do the same.

The only way to understand 01-181C is to consider and construe (by contractual interpretation) the *Settlement Agreement*. The Director's error in not doing so is in violation of the statutory provisions described above (Idaho Code §§ 42-203A(5), 42-219, 42-1409, 42-1411, 42-1412(6)) because the Director may not arbitrarily ignore part of an appropriator's water right. The error was made unsupported by substantial evidence, since there is nothing to show that the *Settlement Agreement* is not relevant to this dispute. Finally, the error was arbitrary, capricious, and an abuse of discretion, since the three sentences in the *Final Order* detailing the Director's decision to ignore the *Settlement Agreement* provide no rational reason for ignoring what was incorporated by the Department's approval of 72385 and the SRBA's partial decree regarding 01-181C.

B. 01-181C, as modified by 72385, can be used by the City as mitigation for 27-12261.

Because the *Settlement Agreement* is incorporated into 01-181C, it must be construed (along with the rest of 01-181C) in order to determine how 01-181C relates to 27-12261 and answer the following questions: (1) whether the City gave away its ability to use 01-181C to mitigate for 27-12261 when it entered into the *Settlement Agreement*; (2) whether the City must file a transfer in order to have the Department consider any portion of 01-181C as mitigation; and (3) whether the recharge provided to the aquifer provided by 01-181C can be used as mitigation or whether it is merely incidental.

1. The plain language of the *Settlement Agreement*, when considered in conjunction with the rest of 01-181C, shows that the City should be allowed to utilize the annual seepage loss of 01-181C as mitigation for 27-12261.

Any time interpretation of a contract is in dispute, it can certainly be argued that the contract should have been more clearly drafted. If it had, then perhaps this matter would not even be before this Court. But the parties to this proceeding are bound by the words that the parties agreed to in the *Settlement Agreement*, and rather than thinking of ways that the contract could have been better drafted, this court should focus on what it has before it and engage in the appropriate analysis outlined by the Idaho Supreme Court.

The testimony from the mayor and former mayor of the City stated clearly that the City never intended to give away the recharge benefits from 01-181C's diversion and use in Jensen's Grove, a well-known gravel pit. The City needs this Court to tell it whether it did or did not give away those benefits through interpretation of the plain language of the *Settlement Agreement*. If

the City did give those rights away in this Court's estimation, then the City will have to move on now knowing it executed a poorly-worded agreement that did not reflect its intent, and will be more careful when working with the Coalition the future. However, as set forth below, the City is confident that the plain language of the *Settlement Agreement* supports its position that it never gave away its rights use the recharge occurring in Jensen's Grove from 01-181C.

The interpretation of three paragraphs—paragraphs 1.a., 1.b., and 1.e—of the *Settlement Agreement* are critical in determining the rights of the City in this matter. These provisions provide:

> a. After approval of the pending Transfer, the CITY shall not, temporarily or permanently, thereafter transfer the Water Right, or any portion thereof, without receiving the written consent of the COALITION.
>
> b. Without the written consent of the COALITION, the CITY agrees to hold the Water Right in perpetuity for diversion of the 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.
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> . . .
>
> 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.

Ex. at 19-20 (capitalization in original).

Contractual interpretation is a two-step process wherein the administrative agency or court first reviews the plain language of the contract to determine if there is an ambiguity. *City of Meridian v. Petra Inc.*, 154 Idaho 425, 435, 299 P.3d 232, 242 (2013) (citations omitted). If there is no ambiguity, then the contract is interpreted consistent with its plain language. *Id.* (citations omitted); *see also Kepler–Fleenor v. Fremont Cnty.*, 152 Idaho 207, 211, 268 P.3d 1159, 1163 (2012). This is especially true where, as here,[3] the contract is fully integrated; meaning that the language of the contract reflects the entirety of the parties' intent. *City of Meridian*, 154 Idaho at 435, 299 P.3d at 242 (citations omitted); *Hap Taylor & Sons, Inc. v. Summerwind Partners, LLC*, 157 Idaho 600, 610, 338 P.3d 1204, 1214 (2014). Only if there is ambiguity in the term or terms in dispute may the court or hearing officer resort to extrinsic evidence, also known as parol evidence, to interpret the ambiguous provisions. *Buku Properties, LLC v. Clark*, 153 Idaho 828, 834, 291 P.3d 1027, 1033 (2012). In the face of ambiguity, the goal remains to give effect to the parties' intent at the time of contracting. *Hap Taylor & Sons*, 157 Idaho at 610, 338 P.3d at 1214; *Bondy v. Levy*, 121 Idaho 993, 998, 829 P.2d 1342, 1347 (1992).

As already explained above, the Director did not consider or interpret the *Settlement Agreement*, but found that 01-181C as currently described could not be used for mitigation, "using principles of Idaho water law without referring to the *Settlement Agreement*." R. at 272 (italics added). The Director made this decision on his own, not based on a position taken by the

[3] The *Settlement Agreement* is an integrated agreement. *See* Ex. at 21, ¶ 7.

Coalition. In its *Post-Hearing Brief*, the Coalition focused on interpretation of the *Settlement Agreement*, and specifically, the requirement to obtain written consent from the Coalition:

> It is undisputed that the City failed to comply with requirements 1(a) and 1(b). Each requires that the City obtain "written consent" from the Coalition before seeking to transfer any portion of water right 01-181C. *Id.* This includes any attempt to change the nature of use of the water right. *Id.* In order to effectuate the proposed mitigation, the City would be required to file a transfer of water right 01-181C to include "recharge" as a purpose of use. Since the City has not complied with this obligation, it has no authority to seek the changes proposed by the mitigation plan.

R. at 167.

This Court must engage in the contractual interpretation process. The proposition that the City must obtain written consent from Coalition is not supported by the plain language of either Paragraph 1.a. or 1.b. Both paragraphs refer to a "transfer" or to "change the nature of use or place of use" of 01-181C 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. Furthermore, these provisions were included and approved by the Coalition as a party to the *Settlement Agreement*, and it perhaps goes without saying that the Coalition is very familiar with Idaho water law. Use of these specific terms has specific meaning. Because 27-12261 is an application for permit, and not a transfer application, the provisions of Paragraphs 1.a and 1.b do not require written consent from the Coalition. Consequently, there is no legal limitation under these provisions that would prohibit the City from pursuing 27-12261 without obtaining written consent from the Coalition.

Similarly, there is no part of the plain language of Paragraph 1.e which would require the City to file a transfer to realize the benefits associated with seepage under 01-181C already approved through the prior transfer that changed its nature of use. Through that transfer, 01-181C expressly included seepage as one of its elements and incorporated the provisions of the *Settlement Agreement* wherein the City—under certain circumstances—retained the right to claim the benefits of the recharge at a future date.

The circumstances under which the City could claim the benefits of ground water recharge are described in the *Settlement Agreement*. In what appears to be a clear attempt to prevent others from benefitting from Jensen's Grove recharge under 01-181C, the first sentence of Paragraph 1.e provides:

> **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.

R. at 20 (bold emphasis added, capitalization in original). Nothing in the plain language of this provision states that **the City** cannot claim any credit from the ground water recharge occurring under 01-181C. In fact, the plain language of this sentence contemplates that the City **would actually accrue benefits from ground water recharge**, but that it could not convey those benefits to "any other person or entity." R. at 20.

The second sentence of Paragraph 1.e is similar to the first, and it provides that the City "shall not request or receive any such mitigation credit **on behalf of any other person or entity**." R. at 20 (emphasis added). Again, this sentence recognizes the recharge benefits the

City generates, and it does not say that the City cannot claim any credit from the ground water recharge occurring through the annual seepage. While the first sentence prevents the City from assigning ground water recharge benefits, this second sentence prevents the City from requesting or receiving such benefits on behalf of someone else.

Finally, the third sentence of Paragraph 1.e most directly addresses the City's ability to use the benefits or credits of ground water recharge occurring under 01-181C:

> 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 <u>application for permit</u> and/or transfer.**

R. at 20 (underlining and bold emphasis added, capitalization in original). This sentence does not prohibit the City from using ground water recharge under 01-181C for mitigation. In fact, it specifically states that the City can use the mitigation credits as long as it submits the appropriate **application for permit** and/or transfer. Under the plain language of Paragraph 1.e, the City is permitted to use 01-181C "for groundwater recharge or mitigation purposes associated with future groundwater rights," R. at 20, and 27-12261 is a future ground water right sought by the appropriate application for permit because a transfer is unnecessary (*see* Section III.B.2, *infra*).

Based on the plain language of the *Settlement Agreement*, the City has the option of filing a permit application (or transfer) to realize the benefits of the seepage under 01-181C. The City has done that by submitting 27-12261. There is nothing ambiguous about these provisions. If the *Settlement Agreement* was intended to bar the City from using 01-181C for mitigation or recharge purposes, it should have simply said so—and it does not say so. In fact, the *Settlement*

Agreement is completely preoccupied with preventing the City from conveying the mitigation benefits of 01-181C to any third party. In other words, the *Settlement Agreement* specifically recognizes the mitigation, in the form of ground water recharge, resulting from 01-181C and only limits how the City can later utilize the benefits from such recharge. If the parties intended the *Settlement Agreement* to require the Coalition's consent in all cases where 01-181C is proposed as mitigation, the contract would have simply stated that the City must obtain the Coalition's consent before submitting a permit application that requires mitigation under 01-181C. Or it could have said that there is no recharge benefit from 01-181C, without the necessity of specifying that such a recharge benefit cannot be conveyed to or applied on behalf of another. The *Settlement Agreement* does not say any of this, and that omission does not create an ambiguity.

Because the *Settlement Agreement* is not ambiguous, and because it is integrated into the four corners of the partial decree, this Court should not look to parol evidence to interpret it as the Director did. The Director relied on parol evidence (correspondence between the parties' attorneys) to find an ambiguity sufficient to consider parol evidence in construing 01-181C. R. at 272 (citing exhibits 8 and 103 from the hearing, presently Ex. at 46 and 70, respectively). This approach gets the analysis of contractual interpretation out of order. Parol evidence cannot be the source of ambiguity that causes this Court to consider parol evidence to interpret 01-181C, including the *Settlement Agreement*. *See Steel Farms, Inc. v. Croft & Reed, Inc.*, 154 Idaho 259, 266, 297 P.3d 222, 229 (2012) ("Parol evidence may be considered to aid a trial court in determining the intent of the drafter of a document if ambiguity exists," citation omitted).

Furthermore, if this Court were to consider parol evidence, the only testimony presented at the hearing of the contemporaneous negotiations or conversations concerning the *Settlement Agreement* were from Mayor Reese, the mayor of the City at the time the *Settlement Agreement* was executed. Tr., pp. 34-49. Mayor Reese was asked what his recollection of the *Settlement Agreement* was relative to ground water recharge, and he testified that the City neither gave up nor intended to give up its right to use recharge from Jensen's Grove under 01-181C in the settlement negotiations. Tr., p. 38, l. 5–p. 40, l. 19. The mayor also discussed the provisions of Paragraph 1.e, and the language therein stating that the City preserved the right to submit an application for permit to utilize the benefits accruing from the ground water recharge in Jensen's Grove under 01-181C. Tr., p. 38, l. 5–p. 40, l. 19. This is consistent with the plain language of the *Settlement Agreement*.

No member of the Coalition was present to submit any testimony supporting the Coalition's interpretation of the *Settlement Agreement*. Even if this Court reviews and considers the correspondence of Travis Thompson and Daniel Acevado, Ex. at 46-48, nothing there states that the City cannot claim the annual seepage from 01-181C for mitigation under a permit application. The correspondence provides a legal argument based on the language of the *Settlement Agreement*, rather than a factual argument that illuminates the parties' intent; therefore the correspondence has only minor probative value of the parties' intent in drafting the *Settlement Agreement*. *See* Ex. at 46-48. In fact, the correspondence only addresses a request to not expressly include ground water recharge as a beneficial uses at the time of the transfer approval (*see* Section III.B.3., *infra*). This makes sense under the terms of the *Settlement*

Agreement because the benefits of the recharge could not be realized yet until the City filed an application for permit (such as 27-12261) or a transfer application.

The Director erred in failing to consider that the *Settlement Agreement*, as part of 01-181C, expressly forbids the City from conveying any mitigation credit associated with 01-181C to any third party without the Coalition's approval and, while tacitly acknowledging that 01-181C provides mitigation, the *Settlement Agreement* does not bar the City from using that mitigation itself. Properly interpreted by this Court, it should find that the *Settlement Agreement* allows the City to use the recharge from 01-181C to mitigate for 27-12261.

2. The mitigation provided by 01-181C can be used to mitigate for 27-12261 without the necessity of filing a transfer to list ground water recharge as an express beneficial use of 01-181C.

The City's position is that the *Settlement Agreement*, incorporated into 01-181C, already acknowledges the recharge occurring under 01-181C and the parties' limitation of the circumstances upon which the City could use that recharge. The Director ignored the *Settlement Agreement*, and focused instead on the listed beneficial uses of the water right which do not list ground water recharge as one of those uses. But there is rational explanation for not expressly including it and that is because at the time of the transfer approval for 01-181C, the City was not immediately claiming credit for the ground water recharge. If the City wanted to claim credit for the ground water recharge, it had to file an application for permit or a transfer, so why list ground water recharge on the face of the water right? By only reading the listed elements of the water right, and ignoring the *Settlement Agreement*, the Director's reading of the elements of 01-181C

is much too narrow. The *Settlement Agreement* condition is just as much part of the water right as any other element of the water right.

Unfortunately, with that incorrect first step, the *Final Order* proceeds down an analytical track that it should not have gone, and we see no need to respond to the details that the Director discussed (such as the difference between how non-use of a water right does not require a transfer but a change in how a water right is used for mitigation does require one). The bottom line is that the City and the Coalition entered into the *Settlement Agreement* which described the process for claiming credit for the recharge from 01-181C, and it was accepted by the Department and the SRBA Court when it issued the partial decree for 01-181C. From the City's perspective, it is only trying to finally get credit for recharge that everyone factually acknowledges it is responsible for:

> Q. Was the City going to forfeit it for a time, a period of time, meaning that they weren't getting any credit at the time the application was settled?
> A. Yes.
> Q. Okay. But did the City agree, to your understanding, to forfeit that forever?
> A. No.

Tr., p. 39, l. 22–p. 40, l. 14 (Testimony of Mayor Scott Reese).

No additional conditions on 01-181C are needed because the *Settlement Agreement* already recognizes the recharge that occurs. The *Final Order* ignores 72385—the prior approved transfer wherein the ability for the City to realize the benefits associated with seepage under 01-181C—which was already approved and 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 the recharge (while bargaining away its ability to convey that right to any third party without the Coalition's approval). The Court should fix these errors and properly construe 01-181C.

There is also no need to file a second transfer for 01-181C and then file an application identical to 27-12261 (as required by the *Final Order*) and provide the Coalition, and other persons, two additional chances to protest this action and make it more costly for the State, the Department, and especially the City to beneficially use the water that annually seeps into the ESPA from Jensen's Grove.

Instead, consistent with 72385 and *Settlement Agreement*, approval of 01-181C's seepage as mitigation for 27-12261 should be addressed through the conditions of approval for 27-12261. Providing conditions for approval is something that the Department does routinely and the mitigation provided by 01-181C should be addressed in the same way. It is important to note on this point that the Department did not state or advise the City at the time it submitted its application and revised applications— with which the Department assisted—that the City had to file another transfer of 01-181C before it could be used for mitigation purposes. The City believed that any question of injury caused by using 01-181C for mitigation purposes was to be—and actually was—addressed in this contested case. As further described below, a transfer would be a duplicative proceeding not permitted under principles of *res judicata*. Therefore, this Court should determine that seepage from 01-181C can be designated in the approval order for 27-12261 as mitigation without the need for the City to file a transfer for this water right.

Finally, if a transfer for 01-181C was required, the Department should have informed the City before proceeding to a hearing on 27-12261. The transfer could have been filed and consolidated with the 27-12261 proceedings to address the entire matter at once. The Department's determination that a transfer now has to be filed will subject the City to a duplicitous hearing. And it is unlikely that a transfer hearing will even occur. It is unrealistic to think that that the Coalition will consent to the transfer only to later protest it. The consent will not be given, which will effectively hold the City hostage indefinitely.

In sum, a transfer application is not necessary because the City's ability to realize the benefits associated with 01-181C's annual seepage was already approved through 72385 that changed 01-181C's nature of use which expressly included seepage as one of 01-181C's elements and incorporated the provisions of the *Settlement Agreement* wherein the City retained the right to claim the benefits of the recharge occurring under this right. It is only if the City wanted to file a transfer to add beneficial uses which would allow the City to possibly assign those benefits to others that the Coalition was concerned about. Accordingly, the City requests this Court to determine that a transfer application is not necessary to amend 01-181C and that the consent of the Coalition is therefore not necessary to utilize the ground water seepage occurring under 01-181C for mitigation purposes.[4]

[4] To be clear, the City recognizes that if the City were change the nature of use of other portions of 01-181C (such as converting the right back to solely an irrigation water right), such a transfer application would require consent from the Coalition based on the plain language of the *Settlement Agreement*. However, as to utilization of the ground water recharge benefits, no such consent is required.

3. The ground water recharge provided by 01-181C is not merely incidental, and therefore can serve as mitigation for 27-12261.

The annual seepage of 2,080.8 AF into the ESPA from Jensen's Grove was, and is, intentional and not incidental, and may therefore be considered as mitigation. The Director held that "[w]ithout expressly listing recharge as a beneficial use, any recharge to the aquifer achieved by diversion and use under Right 01-181C, is merely incidental recharge and cannot be 'used as the basis for claim of a separate or expanded water right.'" R. at 272 (quoting I.C. § 42-234(5)). However, this analysis does not go far enough.

The City agrees that, pursuant to Idaho Code § 42-234(5), incidental recharge cannot be used as the basis for an additional water right, but this is for situations where ground water recharge or seepage is not included anywhere on the water right. Stated another way, incidental recharge is for recharge not included as an element of a water right. This is not the case with 01-181C. The *Settlement Agreement* is a condition of 01-181C and it allowed the City to claim the ground water recharge benefits occurring under 01-181C. Both the *Settlement Agreement* and the reference to seepage losses on the face of 01-181C expressly acknowledge the ground water recharge that occurs under 01-181C. That which is express in not implied or incidental. The annual seepage accounted for in 01-181C is allowed with the express purpose of providing recharge to the aquifer so that the City (and not some third party, as apparently concerned the Coalition) could use that as mitigation. This is allowed by 01-181C and the *Settlement Agreement* (*see* Sections III.B.1 and 2, *supra*), and therefore, is not incidental recharge under Idaho Code § 42-234(5). All of the evidence indicates that the City intended (and still intends)

for the 2,080.8 AF of annual seepage to recharge the aquifer and be used to offset an application for permit, which, in this matter, is 27-12261.

C. The questions of injury to the Coalition's water rights were already addressed in the *Settlement Agreement* and 01-181C, 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 the same injury arguments regarding 01-181C's use for ground water recharge.

As described above, the Coalition's concerns in this matter were only based on **legal** issues surrounding interpretation of the *Settlement Agreement*, not **factual** issues of injury to its water supply. The Coalition did not submit any factual concerns or rebuttal testimony or analysis regarding the modeling analysis and other analyses submitted by the City. The Coalition did so knowing full well that the hearing was the time to submit evidence of injury, if any, and it did not submit any such evidence. It was clear to the Hearing Officer and the parties that the City proposed 01-181C to be used for mitigation purposes.

Because the question of injury has already been addressed, addressing it again in a transfer proceeding is barred by *res judicata*, specifically, the claim preclusion portion of *res judicata*:

> *Res judicata* is comprised of claim preclusion (true *res judicata*) and issue preclusion (collateral estoppel). Under principles of claim preclusion, a valid final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties upon the same claim. The three fundamental purposes served by *res judicata* are:
>
> > First, it "[preserves] the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results." Second, it serves the public interest in protecting the courts against the

> burdens of repetitious litigation; and third, it advances the private interest in repose from the harassment of repetitive claims.
>
> . . .
>
> **The doctrine of claim preclusion bars not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of any claims relating to the same cause of action which were actually made or which might have been made.**

Hindmarsh v. Mock, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002) (citations omitted, brackets in original, emphasis added).

The *Final Order* was likely just as much of a surprise to the Coalition as it was to the City because both parties believed that the major issue to be decided was interpretation of the *Settlement Agreement*, and not a decision that now requires the City to file a second transfer to again amend 01-181C. The Coalition had the opportunity to offer evidence of injury, and the only evidence offered was injury based on a legal interpretation of the *Settlement Agreement*. Tr., p. 49, ll. 21-24. It would be improper to now give the Coalition a second bite at the apple to assert other bases of injury in a transfer proceeding. It is important to remember that the doctrine of claim preclusion bars not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of any claims relating to the same cause of action which were actually made **or which might have been made**. Accordingly, the Coalition should now be barred from presenting the same claims of injury that were addressed in 01-181C, 72385, and the *Settlement Agreement*. The City should not be required to file a second transfer for 01-181C to have its recharge benefits tied to a water right permit and then submit an application identical to 27-

12261 (as required by the *Final Order*) and provide the Coalition two more chances to protest this action with the same arguments it has already made.

The Coalition has already raised its issues with using 01-181C for mitigation (where the Coalition's primary concern appears to be that the City would transfer that mitigation credit to a third party) and in this contested case (where the Coalition presented no factual evidence, but merely a legal argument that the City was not allowed to file 27-12261 by the terms of the *Settlement Agreement*). The Director's error was made in excess of the Department's authority, since the Department may not arbitrarily ignore *res judicata* and require the City to give the Coalition multiple chances to protest 27-12261. The error was made unsupported by substantial evidence, since the evidence shows that the Coalition had opportunity to protest and put forward its evidence of injury (which it chose not to do) and there is no factual reason to give the Coalition multiple chances to protest 27-12261. Finally, the error was arbitrary, capricious, and an abuse of discretion, since *res judicata* should estop the Coalition from asserting the same injuries over and over, yet the *Final Order* appears to require just that.

D. The Director's actions prejudiced a substantial right of the City.

Generally, "directly interested parties . . . have, as a procedural matter, substantial rights in a reasonably fair decision-making process and, of course, in proper adjudication of the proceeding by application of correct legal standards." *State Transp. Dep't v. Kalani-Keegan*, 155 Idaho 297, 302, 311 P.3d 309, 314 (Ct. App. 2013).

Here, the City is a directly interested party, since it made the application for 27-12261. The Department's procedure was "a reasonably fair decision-making process." *Id.* However,

the Department's adjudication was not made by the "application of correct legal standards." *Id.* As discussed above, the *Final Order* erroneously failed to consider the *Settlement Agreement*, which is an incorporated part of 01-181C and the application of Idaho water law to this case in the absence of the entirety of 01-181C was incorrect. Additionally, the law was applied by the Director incorrectly, since he wholly failed to consider mitigatory conditions for 27-12261 since his analysis hung solely on the fact that ground water recharge is not expressly listed as a beneficial use of 01-181C. Thus, the City's substantial right "in proper adjudication of the proceeding by application of correct legal standards" was violated. *Id.*

IV. CONCLUSION.

The City never intended to give away the recharge benefits from 01-181C's diversion and use in Jensen's Grove, a well-known gravel pit. The City needs this Court to tell it whether it did or did not give away those benefits through interpretation of the plain language of the *Settlement Agreement.* If the City did give those rights away in this Court's estimation, then the City will have to move on now knowing it executed a poorly-worded agreement that did not reflect its intent, and will be more careful when working with the Coalition the future. However, as set forth above, the City is confident that the plain language of the *Settlement Agreement* supports its position that it never gave away its rights use the recharge occurring in Jensen's Grove from 01-181C. If it did, why didn't the *Settlement Agreement* just say that the City could not ever claim those benefits?

For the reasons set forth above, there is no legal impediment to using 01-181C's annual seepage in a mitigation plan for 27-12261. Under the plain language of Paragraph 1.e of the

Settlement Agreement, the City is permitted to use 01-181C "for groundwater recharge or mitigation purposes associated with future groundwater rights," and 27-12261 is a future ground water right. 27-12261 provides substantial benefits to the City in the form of reduced costs of maintaining the Blackfoot River pump station. Furthermore, because 27-12261 is an application for permit, and not a transfer application, the provisions of Paragraphs 1.a and 1.b do not require written consent from the Coalition.

The errors described above have been made in violation of statutory provisions; in excess of the statutory authority of the Department; without support of substantial evidence; and arbitrarily, capriciously, and as an abuse of discretion. The errors have violated the City's substantial right in the proper adjudication of this matter by the application of correct legal standards. Where, as here, "there is no indication in the record that further findings of fact could be made from the paucity of evidence that would affect the outcome of this case," remand to the Department is unnecessary. *Bonner Gen. Hosp. v. Bonner Cnty.*, 133 Idaho 7, 11, 981 P.2d 242, 246 (1999); *see also* I.C. § 67-5279(3). The Coalition has only ever made a legal argument in this case, which can be answered by this Court upon the record already established because contract interpretation is a matter of law.

This Court should issue an order approving the issuance of a permit for 27-12261 because there are no legal impediments to using ground water recharge under 01-181C to mitigate for 27-12261. Indeed, such mitigation for a water right permit like 27-12261 was specifically contemplated under the *Settlement Agreement*. A determination that the City must file a transfer and obtain consent from the Coalition is contrary to the plain language of the *Settlement*

Agreement, and as a practical matter, the Coalition will not consent to any transfer. The inequitable result will be that the City will never be able to utilize the recharge benefits everyone acknowledges occurs at Jensen's Grove under 01-181C to aid the growing City of Blackfoot.

Dated this 11th day of January, 2016.

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

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the following described pleading or document on the parties listed below by hand delivery, email, mail, or by facsimile, with the correct postage thereon, on this 11th day of January, 2016.

DOCUMENT SERVED: PETITIONER'S OPENING BRIEF

ORIGINAL TO: Eric J. Wildman
District Judge
253 3rd Avenue North
P.O. Box 2707
Twin Falls, Idaho 83303-2707

ATTORNEYS AND/OR INDIVIDUALS SERVED:

Paul L. Arrington Barker Rosholt & Simpson LLP 195 River Vista Place, Suite 204 Twin Falls, ID 83301-3029 pla@idahowaters.com	(✓) First Class Mail ( ) Hand Delivery ( ) Facsimile ( ) Overnight Mail (✓) Email
W. Kent Fletcher Fletcher Law Office P.O. Box 248 Burley, ID 83318 wkf@pmt.org	(✓) First Class Mail ( ) Hand Delivery ( ) Facsimile ( ) Overnight Mail (✓) Email
Garrick Baxter Idaho Department of Water Resources P.O. Box 83720 Boise, ID 83720 Garrick.baxter@idwr.idaho.gov	(✓) First Class Mail ( ) Hand Delivery ( ) Facsimile ( ) Overnight Mail (✓) Email

Robert L. Harris

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

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