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,

vs.

GARY SPACKMAN, in his official 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, MILNER IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, AMERICAN FALLS RESERVOIR DISTRICT #2, and MINIDOKA IRRIGATION DISTRICT,

Intervenors.

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

Case No. CV-2015-1687

RESPONDENTS' BRIEF

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

ATTORNEYS FOR RESPONDENTS

LAWRENCE G. WASDEN
ATTORNEY GENERAL

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

GARRICK L. BAXTER, ISB #6301
MEGHAN CARTER, ISB #8863
Deputy Attorneys General
P.O. Box 83720
Boise, ID 83720-0098
Telephone: (208) 287-4800
garrick.baxter@idwr.idaho.gov
meghan.carter@idwr.idaho.gov

Deputy Attorneys General for Idaho Department of Water Resources and Gary Spackman

ATTORNEYS FOR PETITIONER

Garrett H. Sandow
220 N. Meridian
Blackfoot, Idaho 83221
Telephone: (208) 785-9300

Robert L. Harris
Luke H. Marchant
HOLDEN KIDWELL HAHN & CRAPO
P.O. Box 50130
Idaho Falls, Idaho 83405
Telephone: (208) 523-0620
rharris@holdenlegal.com
lmarchant@holdenlegal.com

Attorneys for the City of Blackfoot

ATTORNEYS FOR INTERVENORS

John K. Simpson
Travis L. Thompson
Paul L. Arrington
BARKER ROSHOLT & SIMPSON LLP
195 River Vista Place, Ste. 204
Twin Falls, Idaho 83301-3029
Telephone: (208) 733-0700
jks@idahowaters.com
tlt@idahowaters.com
pla@idahowaters.com

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

W. Kent Fletcher
FLETCHER LAW OFFICE
P.O. Box 248
Burley, Idaho 83318
Telephone: (208) 678-3250
wkf@pmt.org

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is a judicial review proceeding in which the City of Blackfoot ("City"), appeals a final order issued by the Director ("Director") of the Idaho Department of Water Resources ("Department") denying an application for permit filed by the City. The order appealed is the September 22, 2015, *Order Addressing Exceptions and Denying Application for Permit* ("Final Order").

B. STATEMENT OF FACTS & PROCEDURAL BACKGROUND

On September 12, 2013, the City filed Application for Permit No. 27-12261 ("Application") with the Department. R. at 1. The application was amended on September 2, 2014, (R. at 28), and again on January 27, 2015 (R. at 92). A joint protest was filed by A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company, American Falls Reservoir District #2, and Minidoka Irrigation District (collectively referred to as the "Coalition"). R. at 66.

The City seeks a permit to divert 9.71 cfs of groundwater to irrigate 524.2 acres near the City. R. at 92. The City seeks the permit to replace surface water the City currently delivers through a pump station on the Blackfoot River and to supplement other existing ground water rights. R. at 95.

The proposed permit "constitutes a consumptive use of water and, without mitigation, would reduce the amount of water available to satisfy water rights from sources connected to the Eastern Snake Plain Aquifer" R. at 207. Because of this, the City submitted a mitigation plan with the Application. R. at 95. The City proposes to mitigate for the new ground water use by leaving in the Blackfoot River 0.16 cfs of the water the City currently delivers through the river pump. R.

at 97. In addition, the City proposes using Water Right 01-181C ("01-181C") to recharge 1,066 afa of water into Jensen Grove, a gravel pit near the City. R. at 96.

Water Right 01-181 was originally described in the 1910 Rexburg Decree, and New Sweden Irrigation District ("NSID") claimed a portion of the water right in the Snake River Basin Adjudication ("SRBA"). R. at 204. The City purchased the water right from NSID and applied for a transfer in 2005 ("Transfer"). Ex. at 49. The Transfer requested a change in place of use from NSID to Jensen Grove and a change in the purpose of use. *Id.* The Transfer sought to add diversion to storage, storage, irrigation from storage and diversion to recharge as new purposes of use. *Id.* The Coalition protested the Transfer. Ex. at 75. The City and the Coalition executed a private settlement agreement in June of 2006 ("Private Agreement"). Ex. at 18. The City, NSID, and the Coalition are the only parties to the Private Agreement. *Id.* In the Private Agreement, the City voluntarily agreed to limit its ability to transfer or change the nature of use of 01-181C without first receiving consent from the Coalition. Ex. at 19. The City also agreed that if it "proposes to utilize [01-181C] for groundwater recharge or mitigation purposes associated with existing or future groundwater rights, the CITY must file the appropriate application for permit and/or transfer." Ex. at 20.

The Department circulated a draft transfer approval for comment on December 1, 2006. Ex. at 70. The draft included "ground water recharge" and "ground water recharge storage" as purposes of use. Ex. at 72. The Coalition disagreed with some aspects of the draft, specifically inclusion of "ground water recharge" and "ground water recharge storage" as purposes of use. Ex. at 46. The City disagreed with the Coalition and requested the Department approve the transfer as drafted, keeping "ground water recharge" and "ground water recharge storage" as purposes of use. Ex. at 48. The Department approved the Transfer in February of 2007 without

"ground water recharge" and "ground water recharge storage" as purposes of use. Ex. at 88. The Transfer authorized five beneficial uses: diversion to storage, irrigation, irrigation storage, irrigation from storage, and recreation storage. Ex. at 89. A partial decree was issued by the SRBA District Court for 01-181C on May 29, 2009. Ex. at 91. The five authorized purposes of use in the partial decree are the same as the Transfer. Ex. at 92. The partial decree for 01-181C contains, among other things, two conditions which were included in the transfer. The first condition under the quantity element states:

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

Ex. at 92. The second condition is located in the Other Provisions Necessary for Definition or Administration section and provides:

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

A hearing on the Application was held on April 21, 2015. Whether 01-181C could be used to mitigate for the Application was a question raised at hearing. R. at 207-208. The City argued it does not need to file an application for transfer to add recharge or mitigation as a purpose of use to 01-181C because the City's ability to realize the benefits associated with seepage under 01-181C was approved through the Transfer. R. at 207. The Coalition argued

paragraphs 1(a), 1(b) and 1(e) of the Private Agreement "prohibit using water right 01-181C to offset the diversion of water proposed in the pending application for permit." R. at 209. The hearing officer rejected the City's argument stating "[t]he beneficial uses of 'recharge' and 'mitigation' are not explicitly authorized under water right 01-181C." *Id.* The hearing officer also cited the Private Agreement and the fact ground water recharge and ground water recharge storage were removed as beneficial uses in the Transfer approval as evidence those uses "were not intended to be included as beneficial uses on water right 01-181C through [the Transfer]." R. at 208. The hearing officer issued his *Preliminary Order Issuing Permit* ("Preliminary Order") on June 30, 2015. R. at 200. In the Preliminary Order, the hearing officer conditionally granted the Application, directing the City to file a transfer for 01-181C to change the purpose of use to include either recharge or mitigation. R. at 211, 215. The hearing officer could not determine if 01-181C would provide sufficient mitigation for the Application without a transfer proceeding and included the following condition to account for all possible outcomes of the transfer proceeding:

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

R. at 211, 215.

The City filed exceptions to the Preliminary Order on July 14, 2015. R. at 221. In its exceptions, the City argued the hearing officer "did not correctly apply principles of contractual interpretation," that the hearing officer "failed to follow Department policy by requiring a transfer for 01-181C to be filed to include 'mitigation' or 'ground water recharge' as beneficial

uses," and that being required to file a transfer implicates the doctrine of *res judicata*. R. at 230. The City asked the Director to interpret the Private Agreement between it and the Coalition and requested the Director not require the City file a transfer to use 01-181C as mitigation. R. at 230.

On September 22, 2015, the Director issued the Final Order. R. at 271. In the Final Order the Director determined a decision on the City's exceptions could "be made using principles of Idaho water law without referring to the Settlement Agreement," and declined to consider principles of contract interpretation. R. at 272. The Director determined "Right 01-181C does not provide for mitigation or ground water recharge as a beneficial use. If the City would like to use Right 01-181C for mitigation through ground water recharge it must file a transfer." R. at 273. The Final Order denied the Application without prejudice and suggested the City refile the Application in conjunction with a transfer adding mitigation or recharge as authorized uses to 01-181C to "allow the Department to fully consider the City's mitigation plan as part of the application for permit process." R. at 274. The City timely filed its petition for judicial review on October 16, 2015. R. at 278-85.

II. ISSUES ON APPEAL

The Department reformulates the issues presented as follows:

A. Whether the Director correctly determined the Private Agreement did not need to be considered to decide whether 01-181C currently authorizes the use of water for mitigation or recharge purposes.

B. Whether the Director correctly determined the plain language of the Private Agreement does not authorize the use of 01-18C for recharge or mitigation.

C. Whether the reference to seepage in the quantity element of 01-181C authorizes the City to use the water right for mitigation or recharge.

D. Whether the Court may consider the documents from the earlier transfer proceeding when interpreting the partial decree for 01-181C.

E. Whether the doctrine of *res judicata* precludes the Director from concluding that the City must file a transfer to add mitigation or recharge as an authorized use to 01-181C.

F. Whether the City's substantial rights have been prejudiced.

III. STANDARD OF REVIEW

Judicial review of a final decision of the Department is governed by the Idaho Administrative Procedure Act, chapter 52, title 67, Idaho Code. Idaho Code § 42-1701A(4). Under the Act, the court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The court shall affirm the agency decision unless it finds the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the 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. Idaho Code § 67-5279(3); *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The party challenging the agency decision must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. Idaho Code § 67-5279(4); *Barron*, 135 Idaho at 417, 18 P.3d at 222. "Where conflicting evidence is presented that is supported by substantial and competent evidence, the findings of the [agency] must be sustained on appeal regardless of whether this Court may have reached a different conclusion." *Tupper v. State Farm Ins.*, 131 Idaho 724, 727, 963 P.2d 1161, 1164 (1998). If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary. *Idaho Power Co. v. Idaho Dep't of Water Res.*, 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011).

IV. ARGUMENT

Idaho Code § 42-203A(5) provides that when evaluating a new application for permit, the Director must consider whether the new use will cause injury to other water rights by "reduc[ing] the quantity of water under existing water rights. . . ." An application which would otherwise be denied because of injury to other water rights maybe approved, however, if the applicant provides mitigation to offset the injury. IDAPA 37.03.08.045.01.a.iv. The City's Application proposes a new consumptive ground water diversion from the Eastern Snake Plain Aquifer ("ESPA") which would reduce the amount of water available to satisfy existing water rights from sources hydraulically connected to the ESPA. R. at 207. In recognition of this, and to offset the injury to other water rights, the City submitted a mitigation plan along with the Application. R. at 95-97. Relevant here is the City's proposal to use water right 01-181C as mitigation by recharging 1,066 afa of water into the ESPA. R. at 96.

The question presented in this case is whether mitigation or recharge is an authorized purpose of use for water right 01-181C. The City is entitled to use 01-181C as part of its mitigation plan only if mitigation or recharge is an authorized purpose of use associated with the water right. The Director cannot recognize a purpose of use not authorized by the water right. *See* Idaho Code § 42-351 ("It is unlawful for any person to divert or use water...not in conformance with a valid water right.)

A. The Private Agreement does not need to be considered to decide whether 01-181C currently authorizes the use of water for mitigation or recharge purposes.

To decide whether recharge or mitigation is an authorized use under 01-181C, the hearing officer started with the SRBA decree and concluded that "[t]he beneficial uses of 'recharge' and 'mitigation' are not explicitly authorized under water right 01-181C." R. at 207. The hearing officer recognized that there is a condition referencing seepage but concluded the reference

"does not create or equate to a new or independent beneficial use of water." *Id.* The hearing officer also reviewed the draft transfer approval circulated as part of the finalization of the Transfer involving 01-181C. The draft approval included "ground water recharge" and "ground water recharge storage" as authorized purposes of use. Ex. at 72. In response to the draft approval, counsel for the Coalition, which had protested the Transfer, asked that those uses be removed from the transfer approval because they were contrary to the stipulation reached between parties to the transfer proceeding. Ex. at 46. The Department ultimately removed those uses from the final transfer approval. Ex. at 89. The hearing officer concluded that this was "further evidence" that mitigation and recharge "are not currently authorized under water right 01-181C." R. at 208. In addition, the hearing officer also considered whether the Private Agreement entered into between the City, the Coalition, and NSID during the Transfer proceeding authorizes the City to use 01-181C for mitigation or recharge. The hearing officer found that the Private Agreement "confirms that 'ground water recharge' and 'mitigation' were not intended to be included as beneficial uses on water right 01-181C." *Id.* Based upon the above analysis, the hearing officer concluded that before the City can divert water under 01-181C "for 'mitigation' or 'ground water recharge' purposes, the City must file an application for transfer to describe one or both of these beneficial uses on water right 01-181C." *Id.*

The City appealed the hearing officer's decision to the Director. Like the hearing officer, the Director started by reviewing the SRBA partial decree for 01-181C. The Director observed that "01-181C has five beneficial uses listed: diversion to storage, irrigation, irrigation storage, irrigation from storage, and recreation storage." R. at 272. The Director concluded that "nothing" in the in the purpose of use element "indicate[s] Right 01-181C can be used for ground water recharge." *Id.* The Director also reviewed the transfer approval documents associated

with the previous Transfer and reached the same conclusion as the hearing officer. The Director found that "ground water recharge and ground water recharge storage were deliberately removed from the beneficial uses listed in [the transfer approval]." *Id.* The Director concluded 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." *Id.* (quotations and citations omitted). Unlike the hearing officer, however, the Director concluded he did not need to review the details of the Private Agreement entered into between the City, the Coalition and NSID. He concluded he must rely on the purposes of use listed on the face of the decree to determine which uses were authorized under the water right. *Id.*

1. The Private Agreement is not an element of water right 01-181C.

On appeal to this Court, the City argues the Director erred when he did not review and consider the details of the Private Agreement entered into between the City, the Coalition and NSID in his analysis. *Opening Brief* at 12. The City argues the Private Agreement is "an element of water right No. 01-181C." *Id.* The City points to the provision referencing the Private Agreement in the decree and argues that its inclusion in the decree means the Director must consider it in determining the authorized nature of use for 01-181C. *Id.* The City argues "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." *Id.*

The Director properly concluded that he does not need to inquire into the details of the Private Agreement. First, contrary to the City's argument, the Private Agreement is not itself an element of the water right. A remark *referencing* the existence of the Private Agreement is

included under the "Other Provisions Necessary" section of the partial decree for 01-181C.[1] This is an important distinction. Since the remark only references the agreement, the question becomes what was the intent of including this information in the water right. It has been a long standing practice in the SRBA to include remarks referencing private contracts or private agreements in the partial decrees to resolve objections. *See, e.g.,* SRBA Subcases 75-5 (Arrowhead Water District)[2] and 75-14608 (Tyacke)[3]. The Department has adopted the same practice with protested transfers and applications for permit and will, as this case evidences, include a condition referencing a private settlement agreement in the approval documents to resolve a protest. The purpose of referencing such agreements, however, is only to provide notice of private agreements that govern the relationships of the parties to the agreements. Remarks such as these are included under the other provision necessary section of the partial decree "as a courtesy to the parties" and "their successors-in-interest." *Memorandum Decision and Order on Motion to Alter or Amend Judgment, Order Granting Motion to Strike,* In Re SRBA Subcase No. 02-2318A at 6, fn.4 (Oct. 31, 2011) (Hon. J. Wildman). That is the limited purpose for its inclusion.

---

[1] At least one SRBA Special Master has indicated that remarks in the "Other Provision Necessary" section of a partial decree are not elements of the water rights. *See Order Recommending Partial Decree Be Set Aside*, In Re: SRBA Subcase Nos.: 31-7311, 31-2357 and 31-2395, at 6 (Jan. 30, 2004) (Special Master Bilyeu) ("There is no legal justification for this Special Master to interpret or recommend setting aside the elements of the *Partial Decree.* What is ambiguous in the *Partial Decree* is the 'other provisions necessary' to define or administer section.") (underlining and italics in original); But *See* Idaho Code § 42-1411(2) ("The director shall determine the following elements. . . (j) such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director.").

[2] The partial decree includes a remark that provides; "This water right is subject to a private agreement among the City of Salmon; Myrtle, Dale and Laura Edwards; and Arrowhead Water District, and recorded in the Lemhi County Recorder's Office on December 1, 2011, as instrument no. 288296."

[3] The partial decree includes a remark that provides; "The operation, use and administration of this water right is subject to a private water right agreement effective December 21, 2011, among Sunset Heights Water District, Cecil and Judith Bailey Jackson, Michael Tyacke, and the State of Idaho, and recorded in the Lemhi County Recorder's Office as Instrument No. 288625."

2. The reference to the Private Agreement was not intended to make the Director and other water users parties to the private agreement or to bind the Director and other water users to the contents of the private agreement.

The City suggests the intent behind the remark referencing the Private Agreement was to incorporate the Private Agreement into 01-181C and thereby makes its terms and provisions binding on the Director and other water users. *Opening Brief* at 15. The language of the remark suggests otherwise. The language of the remark states the agreement is only "by and between" NSID, the City and the Coalition. Ex. at 93. There are no other parties to the agreement. This reference does not suggest a broader intent to make the Private Agreement binding on others but just the opposite – that it is "by and between" NSID, the City and the Coalition and it only affects the rights and obligations of those parties. Furthermore, enforcement of the agreement is limited to the parties to the agreement. *See Id.* (The agreement is "enforceable by the parties thereto.") This further emphasizes that the Private Agreement only governs the relationship between the parties to the agreement. The inclusion of language referencing the Private Agreement does not suggest an intent to incorporate the agreement into the water right.

The City cites to *Phillips v. Phillips,* 93 Idaho 384, 462 P.2d 49, (1969); *Borley v. Smith,* 149 Idaho 171, 233 P.3d 102 (2010); and *Davidson v. Soelberg,* 154 Idaho 227, 296 P.3d 433 (Ct. App. 2013), divorce cases, to support its reasoning that the Private Agreement is incorporated into 01-181C. *Opening Brief* at 14-15. The City uses the divorce cases "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." *Opening Brief* at 14.

In *Phillips,* the Idaho Supreme Court held that a separation agreement is presumed merged into a divorce decree absent clear and convincing evidence to the contrary. *Phillips*, 93

Idaho at 387, 462 P.2d at 52. The Idaho Supreme Court in *Borley* went further saying the analysis of whether a separation agreement is merged into the divorce decree begins with the "four corners of the divorce decree." *Borley*, 149 Idaho at 177, 233 P.3d at 108. Once a separation agreement is merged into a divorce decree, "the right to enforce the contract through an action for breach of contract is supplanted by the divorce court's authority to enforce its orders." *Davidson*, 154 Idaho at 230, 269 P.3d at 436. The merged separation agreement is enforceable as a part of the divorce decree and "if necessary may be modified by the court in the future." *Phillips*, 93 Idaho at 387, 462 P.2d at 52.

The City erroneously relies on the concepts of merger within divorce law. The Idaho Supreme Court in *Phillips* explains that the justification for considering agreements merged is the strong policy interest the courts have in maintaining jurisdiction in divorce cases. Specifically, the Court points to the "just and equitable disposition" of matters concerning the "care, custody and support of the minor children of the parties" and also states "[o]ther matters of importance in a divorce action are the disposition and division of the community property of the parties and the award of alimony or support to the wife. Our statutes place the same jurisdiction, responsibility and duty on the district courts in the disposition of these matters." *Phillips* 93 Idaho at 387, 462 P.2d at 52. In essence, merger of separate agreements into a divorce decree is justified because of a policy to provide enforcement of all agreements within one court. Because water administration does not take place through the SRBA Court, there is no similar policy in recognizing merger of the Private Agreement. Once a water right has been decreed it is up to the Department to enforce and administer the provisions of the water right. *See* Idaho Code §§ 42-220 and 42-602. With a divorce decree, the court maintains a more active role. A water right decree and a divorce decree are two very different decrees and as such

merger under a divorce should not be the body of law used to determine if the Private Agreement is incorporated into 01-181C.

To the extent the Court concludes that the doctrine of merger is applicable, the more appropriate body of law involving merger would be the doctrine of merger developed within property law. A water right is "a valuable right which is entitled to protection as a property right." *Murray v. Pub. Utilities Comm'n*, 27 Idaho 603, 619, 150 P. 47, 50 (1915). Since a water right is afforded the same protection as a property right, property law would be more appropriate in determining whether the Private Agreement is merged with 01-181C.

The Idaho Supreme Court has a generally recognized that "[w]here the covenants in the contract do not relate to the conveyance, but are collateral to and independent of the conveyance, they are not merged in the deed. . . ." *Jolley v Idaho Securities, Inc.*, 90 Idaho 373, 384, 414 P.2d 879, 885 (1966). The Private Agreement is not merged or incorporated with the decree for 01-18C because it is collateral and independent of 01-181C.

The Private Agreement is collateral to and independent of 01-181C because it does not relate to the elements of 01-181C but focuses on the rights and duties of the signatories outside of the current administration of the water right. In *Jolley*, the parties agreed to trade properties and provide each other with an abstract of title to the real property being transferred. *Id.* at 378-379, 881. The court determined that the agreement to provide an abstract was not merged with the deed, stating "[a]n abstract does not relate to the title, possession, quantity, or emblements of the land. It is a graphic history of the title, but has nothing to do with the title itself." *Id.* at 384, 885. The Private Agreement does not relate to the elements of 01-181C in the same way an abstract of title doesn't relate to the title possession, quantity or emblements of the land. The Private Agreement details the obligations the City has if it wants to change the elements of 01-

181C but does not govern any of the elements of 01-181C. Therefore the Private Agreement is collateral to and independent of the partial decree.

Further, the terms of the Private Agreement are not inhered to the very subject matter of 01-181C and it is therefore collateral to the partial decree. In *Sells v. Robinson,* Sells and Robinson executed a Real Estate Purchase and Sale Agreement ("REPSA"), which discussed timber rights on an easement. *Sells v. Robinson*, 141 Idaho 767, 770, 118 P.3d 99, 103 (2005). A deed was executed three days later with different language describing the easement and timber rights. *Id.* The court held the terms of the REPSA were merged into the deed because they "inhere in the very subject matter with which the deed deals – the timber on the Sell's remaining property." *Id.* at 772, 104 (internal quotations omitted). The Private Agreement addresses the rights and responsibilities of the City concerning use of 01-181C and permissions needed from the Coalition, while a water right decree defines the nature and extent of a water right and directs the use and administration of that right. The Private Agreement does not affect current administration nor does it define the nature and extent of 01-181C and therefore is not inhered in the very subject matter of the water right.

In *Fuller v Dave Callister*, a seller and a buyer entered into a purchase agreement and subsequently executed an addendum where the seller agreed that it would deed over a portion of the property to ACHD through a condemnation and transfer the proceeds of the conveyance to the sellers. *Fuller v. Dave Callister*, 150 Idaho 848, 850, 252 P.3d 1266, 1268 (2011). The buyer then executed a warranty deed conveying the property to a third party which did not mention the addendum or the anticipated condemnation. *Id.* In analyzing whether the purchase agreement and addendum were merged into the warranty deed the court stated, "[b]y the very nature of the obligation established in Addendum # 1, it is clear that the parties expected that provision to

continue in effect after the execution of the warranty deed." *Id.* at 854, 1272. The Court went on to hold that the doctrine of merger did not apply stating "[w]here the relevant conditions of a contract could not have been performed prior to execution of the warranty deed, merger is inappropriate." *Id.* The Private Agreement outlines how the signatories will interact concerning use of 01-181C after the Transfer. This discussion about the terms of the Private Agreement indicates the City and the Coalition intended it to continue after the elements of 01-181C were finalized in the Transfer. The Private Agreement even contemplates continuing on after 01-181C was partially decreed. Ex. at 21. The Private Agreement is a separate agreement beyond the elements of a water right and therefore merger into the partial decree would be inappropriate.

The Private Agreement does not relate to the elements of 01-181C nor is it inhered to the very subject matter of the water right. The signatories to the Private Agreement intended for the agreement to continue past the Transfer and partial decree making it a separate agreement beyond the elements of the water right. Because the Private Agreement fits into all of the exceptions of the doctrine of merger it is collateral to and independent of 01-181C and is therefore not merged.

3. In order for the Department to properly administer water right 01-181C it must be able to rely on the face of the decree.

The Director must be able to rely on face of decree. To determine the authorized purposes of use, the Director must first look to the purpose of use element on the face of the water right. In this case, the purpose of use element for 01-181C does not include recharge or mitigation. The only authorized purposes of use of 01-181C are: diversion to storage, irrigation, irrigation storage, irrigation from storage, and recreation storage. Ex. at 92. The elements on the face of the water right are conclusive as to the nature and extent of the water right. Idaho Code § 42-1420. Like a judgment, a water right must outline with certainty the nature and extent of

beneficial use of the water. *See* Rangen Decision at 19 (The purpose of SRBA was to provide certainty and finality to water rights.); *see Sinnett v. Werelus,* 83 Idaho 514, 524 (1961) ("A judgment must be definite and certain in itself... It must fix clearly the rights and liabilities of the respective parties to the cause and be such as the parties may readily understand their respective rights and obligations thereunder."). The provisions in a partial decree must be set forth with "the certainty required for a decree which will have application in perpetuity." *A&B Irrigation Dist. v. Idaho Conservation League,* 131 Idaho 411, 423, 958 P.2d 568, 580 (1997) *vacated in part on reh'g* (1998).

The City's argument leads to unacceptable uncertainty of water rights. Here, the City is asking the Court to adopt a rule that requires the Director to go beyond the face of the decrees and interpret private agreements referenced in the decrees. Often times, the Director does not have copies of the private agreements. Moreover, many of these private agreements are subject to change by the signatories. The agreement here highlights the uncertainty that would be injected into water rights.

The Private Agreement provides that it "may [be] amended or modified" by agreement of NSID, the City, and the Coalition. Ex. at 21. The City poses a hypothetical asking the Court to assume that the City and the Coalition amend the Private Agreement and agree "to allow 01-181C to be applied to mitigate a third party's water right." *Opening Brief* at 16. The City suggests it would then be inequitable to not make that agreement binding on the Director and other water users. *Id.* The opposite is true. Not only would it be inequitable to require that the Department and other water users be bound by agreements decided by only the City and the Coalition, it would also be contrary to law.

The hypothetical presented by the City focuses the issue. The hypothetical is premised on the City and the Coalition making an agreement that modifies the elements of the 01-181C. If the Court were to accept the City's argument and conclude that parties to a private settlement agreement are allowed to modify the express elements of a water right, and that those changes would be binding on the Director and all other water users, the parties to the agreement could make a private agreement to change any element of the water right. Taken to its logical conclusion, the City and the Coalition could agree to change the priority date, place of use, point of diversion or any other element and then say that change is binding on the Director and other parties. Idaho Code provides strict processes for changing water rights (Idaho Code § 42-222) and changes that result in enlargement are contrary to law. *See Cf. Jensen v. Boise-Kuna Irr. Dist.*, 75 Idaho 133, 142, 269 P.2d 755, 760 (1954) (A contract that is contrary to law is ultra vires and void.). While the signatories are free to change their agreement, that change cannot affect or modify the elements of the water right.

Furthermore, allowing a private agreement to change a water right is contrary to the notice rights of other water users. In water right permitting (Idaho Code § 42-203A), in the transfer process (Idaho Code § 42-222), and in water right decrees (Idaho Code § 42-1412), third parties have the opportunity to object to elements of the proposed water right that may affect their interests. If private agreements could alter express elements of a water right third parties would be deprived of their right to receive notice of changes. Moreover, the Department would not know with certainty the nature and extent of water rights thereby severely inhibiting the Department's ability to administer water rights.

To be clear, the signatories are free to change their Private Agreement, thereby changing their own rights, duties and obligations. They are also then entitled to seek to have those

changes enforced among the signatories. But they are not entitled to change the elements of a water right simply by agreement among the signatories. Since the Private Agreement cannot change the express elements on the face of the water right and is only binding on the signatories, the Director correctly determined he did not need to look to the settlement agreement when evaluating 01-181C.

B. The plain language of the Private Agreement does not authorize the use of 01-181C for recharge or mitigation.

The City suggests that if this Court concludes the Director erred in failing to engage in the contractual interpretation of the Private Agreement, the Court "should thereafter itself engage in contractual interpretation and rule on this issue" because it is a question of law. *Opening Brief* at 12. Idaho Code § 67-5279(3) is clear: "If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary." Thus, if the Court does not affirm the Director, the Court should not engage in contractual interpretation but rather should remand the matter back to the Director.

Even if the Court were to evaluate the Private Agreement, the plain language of the sections at issue does not authorize use of 01-181C for recharge or mitigation without the City filing a transfer. The City argues sections 1(a), 1(b), and 1(e) of the Private Agreement indicate the City can accrue benefit from ground water recharge. *Opening Brief* at 21. However, the Private Agreement merely mentions the City needs permission from the Coalition to pursue use of Jensen Grove for ground water recharge. And specifically section 1(e) of the Private agreement states "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 20. This language indicates the City does not get recharge credit for the seepage at Jensen Grove without some affirmative action

either an application for permit or transfer. Therefore the Private Agreement supports the Department's position that 01-181C does not have ground water recharge or mitigation as a purpose of use.

The City also points to paragraph 1(e) of the Private Agreement and argues the City only had to file an "application for permit" to use 01-181C for recharge or mitigation. *Opening Brief* at 22. The City suggests that this provision means that to add mitigation and recharge as purposes of use to 01-181C, all the City had to do was file Application for Permit 27-12261. This is an illogical argument and ignores an important qualifier in the paragraph. The paragraph states that the City must file "the *appropriate* application for permit and/or transfer." It is clear that the City can file a transfer to add recharge or mitigation to 01-181C. But it is also possible for the City to file an application for permit to establish a new water right for recharge or mitigation specifically at Jensen Grove. This would result in the City being able to use water in Jensen Grove for recharge and mitigation purposes. This is clearly the type of application for permit contemplated in the Private Agreement. This would be the appropriate application for permit for the City to file if it wants to use water in Jensen Grove for mitigation or recharge purposes without filing for a transfer to 01-181C.

C. The reference to seepage in the quantity element of 01-181C does not authorize the City to use the water right for mitigation or recharge.

The City argues in its *Opening Brief* that since seepage is expressly mentioned in 01-181C, the City can claim the seepage as recharge to offset the Application. *Opening Brief* at 29. While there is a reference to seepage in a condition under the quantity element, its inclusion was not intended to expand the authorized purpose of use for 01-181C to include recharge or mitigation. The relevant condition states:

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

Ex. at 92.

The reference to seepage in the quantity element of 01-181C is to make clear that an additional volume of water was authorized for storage to make up for losses from both evaporation and seepage. This condition in no way suggests its inclusion was to authorize additional purposes of use that were not included under the purpose of use element. The mention of seepage does not mean recharge or mitigation are authorized uses under 01-181C. To imply otherwise goes against the plain reading of water right 01-181C. The City's argument that seepage is an express element of 01-181C is a just a backdoor attempt by the City to add uses to 01-181C that are not currently authorized under the water right.

Since 01-181C does not contain recharge or mitigation as a purpose of use, the seepage from Jensen Grove is merely incidental recharge and cannot be "used as the basis for claim of a separate or expanded water right." Idaho Code § 42-234(5). Incidental recharge is unintended recharge that is secondary to the express purpose of use of a water right. *See Memorandum Decision and Order on Challenge*, subcase nos. 01-23B et al., Abeerdeen-Springfield Canal Co., at 15, fn 8 (April 4, 2011). The City recognizes this definition. *Opening Brief* at 29 ("incidental recharge is for recharge not included anywhere on the water right."). The water seeping out of Jensen Grove into the aquifer is secondary and incidental to the stated purposes of use listed in 01-181C. If the City wants to use 01-181C as mitigation for the City's Application it should file a transfer. Since incidental recharge cannot be the basis for a new water right the City cannot use 01-181C to mitigate for its new ground water diversion without a transfer.

D. The Court may consider the documents from the earlier transfer proceeding when interpreting the partial decree for 01-181C if the Court concludes the decree is ambiguous.

The City argues that the Private Agreement authorizes the use of water under 01-181 for mitigation or recharge purposes. While the Department believes both the Decree and the Private Agreement are clear and do not authorize the use of water under 01-181C for mitigation or recharge purposes, should the Court determine the Private Agreement introduces ambiguity into decree, it is appropriate for the Court to consider the approval documents related to the Transfer. The rules of interpretation applicable to contracts also generally apply to the interpretation of a water right decree. *A & B Irr. Dist. v. Spackman*, 153 Idaho 500, 523, 284 P .3d 225, 248 (2012). If a court finds the language of a contract ambiguous, parol evidence can be reviewed to ascertain intent behind the contract. *Bilow v. Preco, Inc.*, 132 Idaho 23, 27, 966 P.2d 23, 27 (1998).

In this case, the Transfer documents show that recharge was expressly rejected as an authorized use for 01-181C. The Department originally circulated a draft transfer approval that included "ground water recharge" and "ground water recharge storage" as purposes of use. Ex. at 72. The Coalition informed the Department that inclusion of "ground water recharge" and "ground water recharge storage" were not part of the agreement between it and the City and requested the Department remove them. Ex. at 46. The Department approved the Transfer in February of 2007 without ground water recharge and ground water recharge storage as purposes of use. Ex. at 88.

E. The doctrine of *res judicata* does not preclude the Director from concluding that the City must file a transfer application to add mitigation or recharge as an authorized use to 01-181C.

Finally, the City argues the doctrine of *res judicata* precludes the Director from requiring the City file a transfer application to add mitigation or recharge as an authorized use to 01-181C. *Opening Brief* at 30 ("[U]nder the principles of *res judicata*, the City should not be required to file a transfer application. . . "). The City argues that "[b]ecause the issue 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*." *Id.* The City states "[i]t would be improper to now give the Coalition a second bite at the apple to assert other bases of injury in a transfer proceeding." *Id.* at 31. The City argues "the Department may not arbitrarily ignore *res judicata* and require the City to give the Coalition multiple chances to protest 27-12261." *Id.* at 32.

Claim preclusion, part of *res judicata*, will bar a subsequent action only if three requirements are met: 1) the subsequent action involves the same parties, 2) the action raises the same claims and 3) there was a final judgment on the merits. *Andrus v Nicholson*, 145 Idaho 774, 777-778, 186 P. 3d 630, 633-634 (2008). *Res judicata* is an affirmative defense and the party asserting it must prove all of the essential elements by a preponderance of the evidence. *Ticor Title Co. v. Stanion*, 144 Idaho 119, 122, 157 P.3d 613, 616 (2007).

Because the City seeks to apply the doctrine to preclude the Director requiring a transfer, the City must point to a final judgment on the merits in a previous action that resolved the same claim. The City has failed to meet its burden in this case because it has failed to point to any final judgment on the merits in a previous action that in any way addresses whether the City is required to file a transfer.

The City points to the proceedings before the hearing officer in this case and discusses the Coalition's arguments related to injury, *Opening Brief* at 31-32, but the doctrine applies only to subsequent actions. *Andrus v Nicholson*, 145 Idaho at 777, 186 P. 3d at 633. Moreover, the Department is not a party to the proceeding but rather decides the contested case. *See* IDAPA 37.01.01.005.2; *see also* IDAPA 37.01.01.150.

Furthermore, the Coalition's arguments related to injury have no bearing on whether Idaho law requires the City to file a transfer to add a new purpose of use to a water right. The City's assertion that the prior Transfer proceeding is binding on the Department is without merit. The fact that there was "no final judgment on the merits" in the Transfer proceeding and the Department was not a party does not preclude the Director from requiring a transfer to add recharge as a purpose of use to 01-181C. The City has failed to meet its burden to show how the doctrine of *res judicata* applies.

The City also seems to be suggesting that the Coalition should not be allowed to raise issues of injury in any future proceeding involving 01-181C. *Opening Brief* at 31. To the extent the City is arguing that this Court should rule that the Coalition is precluded from raising issues of injury in a future proceeding, such a request must be rejected as a request for an advisory opinion. *Taylor v. AIA Servs. Corp.*, 151 Idaho 552, 569, 261 P.3d 829, 846 (2011) (Courts are "not empowered to issue purely advisory opinions.").

The Director denied the City's Application "for failure to submit sufficient information for the Department to consider the City's mitigation plan." R. at 273. He did so without prejudice and suggested a path forward that would allow the City to accomplish its goals with the Application. Denying the application and directing the City to file a transfer to 01-181C in conjunction with a new application for permit does not, as the City suggests, implicate principles

of *res judicata*, causing an error that was arbitrary, capricious and an abuse of discretion.[4] This Court should affirm the Director's Final Order.

F. The City's substantial rights have not been prejudiced.

Idaho Code § 67-5279(4) provides that an "agency action shall be affirmed unless substantial rights of the appellant have been prejudiced." The City claims its substantial rights were prejudiced because the Director failed to consider the Private Agreement when considering whether recharge and mitigation are authorized purposes of use under 01-181C. *Opening Brief* at 33. As discussed above, the Director applied the correct legal standards in evaluating the City's plan to use 01-181C to mitigate for its new ground water use. Because the Private Agreement did not need to be considered, the City's substantial rights have not been prejudiced.

CONCLUSION

Neither recharge nor mitigation are an authorized purposes of use identified on the face of 01-181C. Without recharge or mitigation as a purpose of use, the City cannot use 01-181C to mitigate for the proposed new ground water diversion in its Application. If the City wants to use 01-181C to mitigate for the Application, it needs to file a transfer for 01-181C.

The City has not demonstrated the Director's findings, inferences, conclusions, or decisions are in violation of constitutional or statutory provisions; in excess of the statutory

[4] While the Director has conditionally approved conjunctive management mitigation plans (*see Order Approving IGWA's Fourth Mitigation Plan* filed in *Rangen Inc. v Spackman*, CV-2014-4970, (http://idwr.idaho.gov/files/legal/CM-MP-2014-006/CM-MP-2014-006_20141029_Order_Approving_IGWA's_Fourth_Mitigation_Plan.pdf)) the Director rejected the hearing officer's proposed approach of conditionally approving the Application because of the uncertainty associated with the "yet-to-be-filed" transfer and the possible conflicting provisions that may occur as a result of the transfer. R. at 273. Without seeing the transfer application, it is difficult to impossible to determine how much water is available for mitigation. The hearing officer issued the permit with a diversion rate of 9.71 cfs but did not identify the authorized diversion volume under the quantity element. Instead, the hearing officer drafted a condition that would result in a variable annual diversion volume and in a diversion rate potentially less than 9.71 cfs depending on the outcome of the transfer. R. at 215. Because this condition could result in a confusion and potential conflict within the decree depending on the outcome of the transfer, the Director decided the "the better approach" in this case is to deny the application and provide the City the opportunity to resubmit the application for permit along with the transfer so that they can be considered together. R. at 273.

authority of the agency; made upon unlawful procedure; unsupported by substantial evidence in the record; or arbitrary, capricious, or an abuse of discretion. The Court should affirm the Director's Final Order.

RESPECTFULLY SUBMITTED this 11th day of February 2016.

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
CHIEF, NATURAL RESOURCES DIVISION

MEGHAN CARTER
Deputy Attorney General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of February 2016, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the following parties by the indicated methods:

Original to:
SRBA DISTRICT COURT
253 3RD AVENUE NORTH
PO BOX 2707
TWIN FALLS ID 83303-2707
Facsimile: (208) 736-2121

- ☐ U.S. Mail, postage prepaid
- ☒ Hand Delivery
- ☐ Overnight Mail
- ☐ Facsimile
- ☐ Email

ROBERT L HARRIS
LUKE H MARCHANT
HOLDEN KIDWELL HAHN & CRAPO
PO BOX 50130
IDAHO FALLS ID 83405
rharris@holdenlegal.com
lmarchant@holdenlegal.com

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Overnight Mail
- ☐ Facsimile
- ☒ Email

GARRETT H SANDOW
220 N MERIDIAN
BLACKFOOT ID 83221
gsandowlaw@aol.com

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Overnight Mail
- ☐ Facsimile
- ☒ Email

JOHN K SIMPSON
TRAVIS L THOMPSON
PAUL L ARRINGTON
BARKER ROSHOLT & SIMPSON LLP
195 RIVER VISTA PLACE STE 204
TWIN FALLS ID 83301-3029
jks@idahowaters.com
tlt@idahowaters.com
pla@idahowaters.com

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Overnight Mail
- ☐ Facsimile
- ☒ Email

W KENT FLETCHER
FLETCHER LAW OFFICE
PO BOX 248
BURLEY ID 83318
wkf@pmt.org

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Overnight Mail
- ☐ Facsimile
- ☒ Email

Meghan Carter
Deputy Attorney General