IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

Docket No. CV-2015-1687

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

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,

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,**
Intervenors.

SURFACE WATER COALITION'S RESPONSE BRIEF

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STATEMENT OF THE CASE

I. Nature of the Case

This is an appeal of the *Order Addressing Exceptions and Denying Application for Permit* (the "*Final Order*"), issued by the Director of the Idaho Department of Water Resources ("IDWR" or "Department") on September 15, 2015.

II. Course of Proceedings/Statement of Facts

This matter involves an attempt by the City of Blackfoot to use the incidental seepage of water in Jensen Grove to mitigate for new groundwater depletions under Application for Permit No. 27-12261. The facts stated in the City's brief are largely undisputed in this matter. However, the City does not tell the entire story and does not properly frame the Coalition's[1] interests. As such, the following factual information is provided to assist the Court.

A. Stipulations at the Hearing

Following the hearing on this matter, there was very little in dispute. The parties stipulated to the elements of section 42-203A(5)(b) through (f). The parties also stipulated that the modeling performed by the City's experts showed that recharge in Jensen's Grove could offset the impacts resulting from the new consumptive uses contemplated under this application. That modeling showed a slight deficiency in the mitigation proposed, and the Coalition stipulated that leaving a small portion of additional water in the Snake River would offset that mitigation deficiency. R. 203-04.

[1] The "Surface Water Coalition," "Coalition" or "SWC" is comprised of A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company.

In light of these stipulations, the only remaining issues, which was briefed for the Hearing Officer, was whether water right 01-181C could be used as mitigation for the new permit. The Coalition did not stipulate that water seeping in Jensen's Grove, which is diverted pursuant to water right 01-181C, constitutes "groundwater recharge" that can be used to mitigate a new water right. To the contrary, the Coalition asserted, and continues to maintain, that such water is incidental recharge – in that it is incidental to the recreational storage beneficial use authorized under the water right. As confirmed by the City's representative testifying at hearing, the seepage supports and makes it possible for the City to use water right 01-181C for recreational purposes. *See generally* Tr. 26-31 (Mayor Loomis testifying that water must be continually diverted to Jensen's Grove to maintain recreational water levels).

B. Application for Permit No. 27-12261

According to testimony at hearing, at some point during the 1960's, the City's growth required the relocation of the Miner's Ditch. An arrangement was made to remove the portion of the Miner's Ditch that interfered with the City's growth. Water that had historically been diverted through the Miner's Ditch was now pumped directly from the Blackfoot River by the City and injected into the Miner's Ditch at a different location. *See, generally* Tr. at 9-11. From there, the water was conveyed to the private water users – identified as "users of the Miner's Ditch east of Interstate 15 ... shareholders from the Corbett Slough Irrigation Company and shareholders from the Blackfoot Irrigation Company." Ex. 1; *see also Id.* at Att. #2 (providing list of water rights and identifying owners of those water rights).

Since the above operation was instituted, sediment in the Blackfoot River has caused high operation and maintenance costs for the pump in the river. According to the City:

> The City of Blackfoot currently provides delivery of several surface water rights (hereinafter, "Rights") through a pump in the Blackfoot River. ... The Blackfoot

> River is heavily laden with sediment and requires high maintenance on the pump and delivery system.

Id. As such, the City has determined that it will be more cost effective to divert groundwater.

The City filed Application for Permit No. 27-12261 on September 2, 2014, seeking to divert 9.71 cfs of groundwater for irrigation and conveyance loss. *See* Ex. 1, at 1.[2] Through the application, the City seeks to effectively move its point of diversion from the river to a groundwater well, and from the groundwater well into the Miner's Ditch. *See, generally* Tr. at 9-11. With the exception of a small portion of water that will be left in the river for mitigation, the surface water rights currently diverted from the Blackfoot River would then be available for sale or lease by the owners of those water rights.

C. Proposed Mitigation/The Jensen Grove Water Right (01-181C)

There is no dispute that diversions under application number 27-12261 will result in new consumptive uses of the aquifer and will require mitigation pursuant to Idaho law. To mitigate for the new consumptive uses associated with the application, the City proposed to use the seepage from Jensen's Grove presently occurring as a result of the diversion and use of water right 01-181C for other purposes (i.e. "recreational storage"). *See, generally,* Exs. 1 & 2. In essence, the "recharge" contemplated by the mitigation plan is incidental recharge already occurring at Jensen Grove as part of a recreational storage water right (i.e. 01-181C). *Id.*

Water right 01-181C includes a number of elements and conditions that are relevant to these proceedings. For example, the right authorizes "Recreational Storage" in the amount of 2,266.8 afa and a season of use identified as "01/01 to 12/31." Ex. 106. "Diversion to Storage," in the amount of 46 cfs, is authorized from "4/01 to 10/31." *Id.* When approved, it was recognized that the water

[2] The water diverted is not actually used by the City and the real property on which it is applied is not owned by the City. Rather, the City intends to pump the water into the Miner's Ditch so that it may be delivered by other third party private irrigation entities to real property owned by third party private water users. Tr. 21-23.

right would have significant seepage losses resulting from the use of the right, and as a result the water right includes the follow condition under the "Quantity" element:

> 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 are 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.

Id. The water right also contains an irrigation purpose of use – authorizing a diversion of 1 cfs and storage of 200 af for this purpose. *Id.*[3]

During his testimony at hearing, Mayor Loomis testified that Jensen's Grove is very leaky. *See* Tr. at 25-29. He testified that, but for consistent diversions into Jensen Grove, all of the water would seep and there would be no water in the Jensen's Grove pond for recreational purposes. *Id.* In its briefing here, the City again confirms that water right 01-181C was acquired "to fill ***and maintain*** water levels in Jensen's Grove." *City Br.* at 4 (emphasis added). In other words, in order to enjoy the recreational storage water rights and maintain water levels, water must be regularly diverted into the pond. *See also* Ex. 102 ("The lake loses large amounts of water due to seepage into the ground, so a constant flow into the lake is needed to maintain the lake level"). Water seeping from Jensen's Grove provides "a benefit to the flows in the Snake River and the Eastern Snake Plain Aquifer." *Id.* at 2; *see also Id.* ("The water provided for Jensen Grove Lake under this transfer, should benefit the Snake Plain Aquifer and also benefit the flows of the Snake River below Blackfoot").

D. The Jensen's Grove Transfer & Settlement Agreement

Water right 01-181C has not always been used for recreational storage purposes in Jensen's Grove. Prior to 2005, the water was a relic irrigation water right located within the New Sweden

[3] No evidence was presented that the right has ever been used for irrigation purposes at Jensen Grove and there was testimony that the right is not now being used for irrigation.

Irrigation District boundaries. Ex. 100. On October 27, 2005, the City filed an application for transfer, seeking to move water right 01-181C into Jensen's Grove. *Id.* As originally filed, the application sought to use water right 01-181C for "Diversion to Recharge" and "Storage" – defined as including "Irrigation, Recreation, Fish & Wildlife, Aquifer Recharge & Aesthetics." *Id.* The application further provided that the use would be "systematically non-consumptive" and that "recharge simply moves surface storage to groundwater storage." *Id.* at 6.

The Coalition protested the transfer application. In response, the City, again, confirmed that the use proposed by the transfer (i.e. storage in Jensen's Grove) would be "non-consumptive." Ex. 101 at 2 ("The change proposed in this transfer is non-consumptive").

The Department reviewed the application for transfer and, in a memo dated October 2, 2006, made the following relevant conclusions:

- "The lake loses large amounts of water due to seepage into the ground, so a constant flow into the lake is needed to maintain the lake level. Water that flows into Jensen Grove Lake sinks and returns back to the Snake River and/or sinks into the aquifer." Ex. 102 at 1.

- "Changing an irrigation water right into a recreational storage right will reduce the consumptive use and increase the groundwater recharge and improve Snake River flows." *Id.*

- "The new use of this water right in Jensen Grove Lake will be for the most part non-consumptive and a benefit to the flows in the Snake River and the Eastern Snake Plain Aquifer. The consumptive uses of this water right, after the transfer, would be the 50 acres of irrigation and some evaporation from the lake." *Id.* at 2.

- "The water provided for Jensen Grove Lake under this transfer, should benefit the Snake Plain Aquifer and also benefit the flows in the Snake River below Blackfoot." *Id.*

The parties began negotiations to address the Coalition's protest. To that extent, an agreement was reached between the Coalition and City to allow for the transfer's approval. The resulting "Settlement Agreement" provides:

1. Conditions to Water Right After Transfer:

The City and NSID agree that the following terms and conditions be included in the Water Right ("Conditions") after transfer:

a. After approval of the pending Transfer, the CITY shall not, temporarily or permanently, thereafter transfer the Water Rights, 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 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.

...

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 diversion under the Water Right including any incidental groundwater recharge that may occur as a result of such diversion. 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. 4.

The initial draft of the proposed transfer order included "Groundwater Recharge" and "Groundwater Recharge Storage" as purposes of use. Ex. 103. The Coalition challenged the inclusion of these purposes of use as being contrary to the settlement agreement – reinforcing, as the agreement required, that the City must obtain the Coalition's prior approval and file the necessary applications with the Department in order to seek "recharge" as a purpose of use. Ex. 8. In that letter, the Coalition repeated its position on the issue of "recharge" at Jensen's Grove:

> The Agreement is specific about the transferred purpose of use (irrigation and recreation) and period of use (4/1 to 10/31). *See* Agreement, ¶¶ 1.b, l.c. By agreement, the parties have stipulated to these elements which modifies the original application for transfer filed by the City. Contrary to the Agreement, the draft approval includes "ground water recharge" and "ground water recharge storage" as new purposes of use for water right 1-181C. These proposed uses should be

> removed. ... Further, under paragraph l.e of the Agreement, ***only incidental recharge will be recognized*** and the City is required to file a new application if it desires to change the nature of use to "recharge." Paragraph 1.b of the Agreement further requires the City to obtain approval from the Protestants to change the nature of use of water under this right.

Id. (emphasis added).

Although, at the time, the City asserted that the Coalition's request was "not consistent with our June agreement," Ex. 9, the Director's final transfer order removed any reference to "recharge," Ex. 105. The City did not appeal the transfer order. Finally, water right 01-181C was subsequently decreed in the Snake River Basin Adjudication consistent with the transfer order – without any reference to "recharge" as an authorized beneficial use. Ex. 106. The partial decree represents a final judgment that, like the transfer order, was not appealed by the City.

STANDARD OF REVIEW

Any party "aggrieved by a final order in a contested case decided by an agency may file a petition for judicial review in the district court." *Sagewillow, Inc. v. IDWR*, 138 Idaho 831, 835 (2003). The Court reviews the matter "based on the record created before the agency." *Chisholm v. IDWR*, 142 Idaho 159, 162 (2005).

An agency's decision must be overturned if it (a) violates "constitutional or statutory provisions," (b) "exceeds the agency's statutory authority," (c) "was made upon unlawful procedure," (d) "is not supported by substantial evidence in the record as a whole," or (e) is "arbitrary, capricious or an abuse of discretion." I.C. § 67-5279(3); *Clear Springs Foods, Inc.*, 150 Idaho at 796.

ARGUMENT

The Director rejected the City's application because the City had failed to file a transfer application to add "recharge" and/or "mitigation" as an authorized use of water right 01-181C. R.

273. Absent any transfer to add these uses, the proposed mitigation failed. On appeal, the City asserts that the Director should not have rejected the application because the Settlement Agreement effectively added "recharge" as an authorized use of water right 01-181C.

In order for the City to prevail on its appeal, it must convince this Court that a private agreement, that does not include the Department of Water Resources, can change the elements of a water right such that the water right can be used for purposes other than those identified on the face of the partial decree. The City contends that the Settlement Agreement between the City and the Coalition allow the City to use water right 01-181C for "groundwater recharge"[4] even though that use is not identified as an authorized use of the water right. The law does not support such a contention. Therefore, the Director's decision should be affirmed.

I. The Law Requires that a Transfer be Filed to Change the Use of a Water Right. The City Must File a Transfer in Order to Use Water Right 01-181C as Mitigation For this New Consumptive Use Groundwater Right.

A. The Elements of a Water Right Cannot Be Changed without A Transfer.

Since the Settlement Agreement was reached, the Coalition has maintained that water seeping as a result of diversions under 01-181 is "incidental recharge" and that any reference to recharge "should be removed" from the right. Ex. 8. The Coalition's assertions are important here, as this case involves the interpretation of the City's partial decree.

A water right is defined by its elements. The elements of the water right specify the authorized use of that water. *See* I.C. § 42-1411(2)(f); *see also* I.C. § 42-1412(6) ("The district court shall enter a partial decree determining the nature and extent of the water right which is the

[4] The City repeatedly, and incorrectly, refers to seepage from Jensen's Grove as "groundwater recharge" – as though the mere repetition of the phrase would make the statement true. *See, e.g., City Br.* at 18. However, testimony at hearing confirmed the undisputed fact that water seeping in Jensen's Grove is incidental recharge. *See also* Ex. 8. Water must continually be diverted into Jensen's Grove in order to maintain the level sufficient for the desired recreational activities. *Supra.*

subject of the objection or other matters which are the subject of the objection. The decree shall contain or incorporate a statement of each element of a water right as stated in subsections (2) and (3) of section 42-1411"); I.C. § 42-1420 (once entered, the decree is "conclusive as to the nature and extent of all water rights in the adjudication"). Where water is diverted for multiple purposes, the water right must identify all such uses. *See* Ex. 106 (identifying multiple authorized uses of water right 01-181C). For example, a water right with a use for "irrigation" cannot be used for "fish propagation" unless that use is also identified on the water right. Similarly, without additional acknowledgement on the water right, a water right with a purpose of use identified as "recreation storage," such as water right 01-181C, cannot be used for "mitigation" or "groundwater recharge." These uses are not the same. *See* I.C. § 42-234 (identifying groundwater recharge as a beneficial use). The water right identifies the uses for which it may be used and the law prohibits a water user from unilaterally changing those uses.

Importantly, the City knows that groundwater recharge is a *separate and distinct* use from the uses identified on water right 01-181C. *See City Br.* at 28 (recognizing that mitigation is not one of the "listed elements of the water right"). Indeed, when filing the transfer of water right 01-181C, the City specifically identified "recharge" as a separate and distinct use of the water right. Ex. 100. When the Department initially included "groundwater recharge" on the draft transfer approval order, Ex. 103, the Coalition challenged that decision explaining that any reference to "recharge" "should be removed" because the Settlement Agreement only recognized "incidental recharge." Ex. 8. In the final transfer order, all reference to "recharge" use was removed from the water right. Ex. 105; *see also* Ex. 106 (SRBA Decree). The City never ap-

pealed the agency's final decision or the subsequent SRBA Partial Decree. Accordingly, the elements are established and cannot now be collaterally attacked by the City. Tr. 44-45 (Former Mayor Reese testifying that the uses for the water right are recreation storage and irrigation).

Any water user seeking to change the purpose of use of a water right must "make application to the department of water resources:"

> Any person, entitled to the use of water whether represented by license issued by the department of water resources, by claims to water rights by reason of diversion and application to a beneficial use as filed under the provisions of this chapter, or by decree of the court, who shall desire to change the point of diversion, ***place of use***, period of use or nature of use of all or part of the water, under the right ***shall first make application to the department of water resources for approval of such change***.

I.C. § 42-222 (emphasis added).

To assist with the transfer process, the Department has issued "Administrator's Memorandum, Transfer Process No. 24."[5] That memo explains when a transfer is required, as follows:

> Section 42-222, Idaho Code, requires the holder of a water right to obtain approval from the department prior to changing: (1) the point of diversion, (2) the place of use, (3) the period of use, or (4) the nature of use of an established water right. An established water right is a licensed right, a decreed right, or a right established by diversion and beneficial use for which a claim in an adjudication or a statutory claim has been filed. Approval is sought by filing an application for transfer with the department.
>
> Changes to Elements of a Water Right. An application for transfer is required if a proposed change would alter any of the four elements of the water right listed above that can be changed pursuant to Section 42-222, Idaho Code, as recorded with the department or by decree.

Transfer Memo at 2-3.[6]

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[5] *See* http://www.idwr.idaho.gov/WaterManagement/WaterRights/PDFs/ESPA_Transfer_Memo.pdf.

[6] The Transfer Memo does provide a brief list of actions that do not require a transfer. *Id.* at 3-5 (listing change in ownership, split rights, replacement of point of diversion, refined descriptions, generally described place of use, municipal places of use, instream stock watering and intensified use of water). However, none of these actions apply to these proceedings and the City does not claim that any apply here.

Both the transfer decision and SRBA decree include a section identifying the "Purpose and Period of Use" for water right 01-181C. Exs. 105 & 106. There is no dispute that neither identify "groundwater recharge" or "mitigation" as authorized purposes of use for the water right. *Id.*

Given the lack of any such authorized use on the face of the water right, the City is forced to point to a *private* settlement agreement to justify its assertion that recharge is authorized under water right 01-181C. The City asserts that the law requiring a transfer does not apply because of the Settlement Agreement. *City Br.* at 17-25. It contends that the *private* agreement, between two *private* parties, that does not include the Department, has the effect of altering the uses authorized under the water right. *Id.* The City even asserts that the Coalition and City could "properly amend the Settlement Agreement to allow 01-181C to be applied to mitigate a third party's water right" and that such an amendment would "settle the issue" – even without the Department's involvement. *Id.* at 16.

Rather than provide legal support for this novel theory, the City spends much of its brief analyzing whether a condition on a water right that references the Settlement Agreement is valid and enforceable. *City Br.* at 12-17. Claiming that this case is more "nuanced" than other water right issues, the City compares the matter to a divorce decree with a merged settlement agreement and concludes that reference to the Settlement Agreement on water right 01-181C is sufficient to alter the elements stated on the face of the water right decree. *Id.*

Even though the condition on the water right references the Settlement Agreement, it does not mean that the Settlement Agreement is binding on, or will be enforced by, the non-Party Department. This is made clear from the law on divorce decrees cited by the City. In *Davidson v. Soelberg*, 154 Idaho 227 (Ct. App. 2013), the Court recognized that the merger of any agreement is based on the language of that merger. There, the stipulated decree provided that it "merged

and incorporated [the settlement agreement] into this decree of divorce, except for Paragraph L which is not merged and shall remain a separate contract between the parties." *Id.* at 231. Since Paragraph L was not merged, it was a matter of contract between the parties and not part of the divorce decree. *Id.* Therefore, the statutes providing for the enforcement of a child support provision in a divorce decree did not apply. *Id.*

In this case, the Department is not a party to the Settlement Agreement. As such, the agreement is only referenced in a condition on the water right. Importantly, the condition referencing the Settlement Agreement provides that it is only "enforceable by the parties thereto." Ex. 106. In other words, the Department is not a party to the Settlement Agreement and does not enforce the terms of that agreement.

The City's arguments miss the point. There is no dispute that the condition is valid and enforceable, that the Coalition and City are bound by the terms of the Settlement Agreement or that the Settlement Agreement provides "additional conditions and limitations" regarding the "diversion and use" of water right 01-181C. Ex. 106. Further, the partial decree is binding on the State, City and the Coalition. I.C. §42-1420. The fact that the condition is binding, however, does not mean that the private Settlement Agreement alters the authorized uses of water right 01-181C and does not somehow force the Director to recognize incidental recharge as mitigation for a new groundwater right. This is particular true, here, where "recharge" was included on both the application for transfer and draft approval, but was removed upon agreement between the Coalition and City. *Supra.* Indeed, Mayor Reese, the Mayor at the time the City entered into the agreement with the Coalition, confirmed that water right 01-181C is used for "irrigation and recreation purposes" and that written consent from the Coalition would be required "if you want to

change that." Tr. at 44-45. The City cannot now shoehorn a changed use for water right 01-181C through an erroneous reading of the Settlement Agreement.

The City asserts that the Director "discarded" and "arbitrarily ignore[d]" an element of water right 01-181C because he refused to consider the Settlement Agreement. *City Br.* at 16. Given the clarity of the law, however, even if the Director had thoroughly analyzed the Settlement Agreement, *the result would have been the same*. The law provides only one mechanism for changing the purpose of use of a water right – a transfer under I.C. § 42-222.[7] Any water user desiring to change the authorized uses of a water right must submit an appropriate application to the Department asking to "transfer" or change the elements of that right. There is nothing in this Settlement Agreement, which is only "enforceable by the parties thereto," that accomplishes any change in the use of water right 01-181C. The City has not filed any transfer application – and continues to refuse such a filing. Since the private Settlement Agreement cannot legally change the authorized uses of a water right, the Director was correct to conclude 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. 272.[8]

The Director properly rejected the City's attempt to change the purpose of use of water right 01-181C from what is presently authorized. *See also* R. 215, ¶ 9 (The Hearing Officer also

[7] A transfer may result in a permanent change to an element of a water right, or it may result in a temporary change – such as through the Idaho State Water Supply Bank.

[8] Confusingly, the City asserts that the Director "made this decision on his own, not based on a position taken by the Coalition." *City Br.* at 19-20. This assertion is wrong. *See* R. 256-59 (Coalition response to City's exceptions brief asserting that a transfer must be filed and that the Settlement Agreement cannot, by itself, represent a change in the decreed elements of a water right). That notwithstanding, the City's assertion has no bearing on the validity of the Director's decision. *See* I.C. § 67-5245(7) ("The head of the agency or his designee for the review of preliminary orders shall exercise all of the decision-making power that he would have had if the agency head had presided over the hearing").

rejected the City's attempt to change the purpose of use of the water right without a transfer application). These final orders are supported by Idaho Law and should be affirmed on appeal.

B. The City Cannot Use the Settlement Agreement to Circumvent the Law. Further, the City Must Obtain the Coalition's Written Consent Prior to Changing the Nature of Use of Water Right 01-181C.

The City argues that it is not required to follow the law and file a transfer application because the Settlement Agreement states that the City may file "the appropriate application for permit and/or transfer." *City Br.* at 18-23; *see Id.* at 20 ("Because 27-12261 is an application for permit, and not a transfer application, the provisions of Paragraph 1.a. and 1.b do not require written consent from the Coalition"). Again, this contorted reading of the Settlement Agreement fails.

The City demands that the Director engage in contractual interpretation. *City Br.* at 19-21. In doing so, it points the Court to the following language from the Settlement Agreement:

> 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.[9]

Ex. 4. The City asserts that the application for permit is sufficient to authorize groundwater recharge under 01-181C. The City further claims that this language "specifically states that the City can use the mitigation credits as long as it submits the appropriate application for permit and/or transfer." *City Br.* at 22.

The Agreement's language speaks for itself. However, under even the most strained reading, there is no "specific" statement about the City's use of mitigation credits. Quite the op-

[9] There is no dispute that the Settlement Agreement prohibits the City from attempting to obtain any "right to recover groundwater or mitigation" for any third party. Ex. 4. The only issue here is whether the last provision of section 1.e, quoted above, automatically authorized the City to claim credits for the incidental recharge in Jensen Grove.

posite. *See* Ex. 8 (under the Settlement Agreement "only incidental recharge will be recognized"). The language mandates that the City file an "appropriate application." Ex. 104. Such an application – whether that be an application for permit or transfer – would then be reviewed by the Director and open for protest. I.C. §§ 42-203A & 42-222. Such an application could then be approved, approved with conditions/limitations, or denied by IDWR. *Id.* The City is mistaken in its belief that the above language somehow guarantees that water right 01-181C could be used for groundwater recharge merely as a result of a single sentence from the Settlement Agreement.[10]

Further, even if the Coalition and City attempted to "specifically" authorize groundwater recharge through the Settlement Agreement, such an attempt would be contrary to the law requiring a transfer – thus causing the Settlement Agreement to fail. *AED, Inc. v. KDC Invs., LLC*, 155 Idaho 159, 167 (2013) ("a contract [that] cannot be performed without violating applicable law is illegal and void").

Although it quotes the language of the relevant provisions of the Settlement Agreement, the City's arguments overlook vital aspects of the Agreement. Indeed, in all of its arguments, the City completely skips over the requirement that it must file an "***appropriate***" application with the Department. *Supra.* As discussed above, *supra*, Part I.A, the only mechanism in Idaho for changing an element of a water right – i.e. the only "appropriate" filing in this matter – is an ap-

[10] Through the transfer of water right 01-181C, the City sought groundwater recharge as a purpose of use. Ex. 6. That use was challenged by the Coalition and, through the Settlement Agreement, *was removed from the water right*. Exs. 4, 6, 8, 9, 103 & 105. The resulting water right, which has been partially decreed, Ex. 106, authorizes recreational storage as a beneficial use – it does not authorize groundwater recharge or mitigation as a beneficial use. Although the water right identifies a volume of storage in Jensen's Grove as well as a volume of water for seepage, Ex. 106, it does not provide that that seepage is "groundwater recharge" or "mitigation."

plication for transfer. Neither a private settlement agreement – particularly one that is only "enforceable by the parties thereto," Ex. 106 – nor a separate application for permit can alter the elements of water right 01-181C.

Further, and importantly, the City refuses to recognize that it must obtain the Coalition's written consent prior to changing the use of water right 01-181C.[11] The City points to Paragraphs 1.a and 1.b of the Settlement Agreement – even quoting them in their entirety in its brief – and concludes that, since this is an application for permit and not a transfer application, "there is no legal limitation under these provision that would prohibit the City from pursuing 27-12261 without obtaining written consent from the Coalition." *City Br.* at 20. This argument fails for at least two reasons. First, there is no argument that the City must obtain written permission to pursue 27-12261. The Court should not be confused by the City's effort to cloud this matter by conflating two separate issues. The Settlement Agreement mandates written approval for any effort to change the use of water right 01-181C. It does not speak, in any respect, to the City's Application for Permit 27-12261. To the extent the City seeks to use 01-181C to mitigate 27-12261, the Coalition's written permission is required. However, that permission is required due to the necessary changes to water right 01-181C – not due to the City's efforts in "pursuing 27-12261."

Second, although it repeatedly points the Court to Paragraph 1.b, the City misstates the obligations of the provision. In particular, that provision requires *written consent* from the Coalition whenever the City seeks to "transfer the Water rights ***or change the nature of use*** or place of use of the Water Right." Ex. 1 at ¶ 1.b (emphasis added).[12]

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[11] The City complains that any such attempt would be futile because the Coalition will consent and further hearings would be required – and that, as a result, the City will be held" hostage indefinitely." *City Br.* at 28 & 30-31. Because no such application has been provided to the Coalition for review and/or approval, there is no basis to assume that the Coalition will withhold its consent to that unidentified transfer.

[12] Confusingly, even though the City quotes the entire language of Paragraph 1.b, *City Br.* at 18, it fails to acknowledge this important provision. This is likely because the City recognizes the provision is fatal to its arguments.

Confusingly, although the City argues that written consent is required to add "mitigation" or "groundwater recharge" as a use for water right 01-181C, it admits that written consent would be required if the City were to seek to change the use back to "solely an irrigation right." *Id.* at 28, n.4. Nothing in Paragraph 1.b allows for this types of a dual standard. Rather, the obligation to obtain written consent applies to any attempt to alter, in any way, the decreed uses of water right 01-181C – such as here, where the City seeks to alter the uses from "recreational storage" and "irrigation" to include "mitigation" or "recharge." *Supra* Part I.A.

In the end, the City's argument that the Settlement Agreement authorize the use of water right 01-181C as mitigation for a new groundwater right cannot stand. There is absolutely no basis to contend that the Coalition would protest the original transfer of 01-181C in order to remove any reference to "recharge," challenge the insertion of "recharge" as an authorized use on the draft transfer order, and, at the same time, enter into a Settlement Agreement automatically reinserting that use back on the water right.

The City's failure to read the entire language of the Settlement Agreement presents misleading and confusing arguments to the Court. For example, the City contends that "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" such a requirement. *City Br.* at 23. Yet, that is exactly what the Settlement Agreement states when it requires that the City obtain the Coalition's written consent whenever it seeks to "transfer the Water rights or change the nature of use or place of use" of water right 01-181C. Ex. 104.

In this case, there is no dispute that the City is attempting to use the water for a purpose not listed on the face of the partial decree. Ex. 105 & 106; *see also* Tr. at 44-45 (Mayor Reese testifying that the water rights are used for "irrigation" and "recreation").

The obligation to obtain written approval was important to the Coalition. Indeed, the Coalition was concerned that the City would attempt to use the incidental recharge from Jensen's Grove for mitigation purposes. The Coalition fought to have the "recharge" uses removed from the transfer approval. Exs. 4 & 8. When the Department originally placed "recharge" as an authorized use on the draft transfer order, the Coalition challenged the inclusion, demanding that the use "should be removed" and that the Settlement Agreement only recognized "incidental recharge." Ex. 8.

The Coalition further sought to protect itself should the City ever attempt to add the use back onto the water right by requiring written consent prior to any such attempted change. Ex. 4. The City cannot circumvent that agreement by filing an application for permit rather than a transfer.

C. It is Not the Department's Fault that the City Failed to File a Transfer Application.

As it did in the administrative proceedings, the City again blames the Department for *the City's* failure to file the appropriate application. *City Br.* at 27 ("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 a transfer of 01-181C before it could be used for mitigation purposes"). The City complains that "the Department should have informed the City before proceeding to a hearing" that a transfer would be required. *City Br.* at 28.

The law is clear – a transfer is required to change the purpose of use on any water right. It is not the Department's job to advise the City as to its compliance with Idaho law. The City cannot blame IDWR for its own failures in this case.

II. The Coalition is Not Bound by any Decision in This Case.

It is unfortunate that the City chose not to file a transfer application in association with this application for permit. There are several related issues that could have been addressed in conjunction with both proceedings and this matter may have been resolved without having to resort to judicial action. However, in an effort to avoid seeking the Coalition's written consent, the City proceeded without a transfer application.

Now, the City complains that, if a transfer is filed, and the Coalition decides to protest that transfer, the Coalition should be limited in its arguments in the proceedings for application for permit 27-12261. Citing to the legal principles of *res judicata*, the City asserts that the Coalition cannot have a second opportunity to challenge the City's actions. *City Br.* at 30-32. Since no transfer has been filed and it is not known what issues will be presented in such a transfer, the City's arguments are not ripe. *Noh v. Cenarrusa*, 137 Idaho 798 (2002) ("The traditional ripeness doctrine requires a petitioner or plaintiff to prove 1) that the case presents definite and concrete issues, 2) that a real and substantial controversy exists, and 3) that there is a present need for adjudication").

Furthermore, the arguments are erroneous. The question before the Department in this case involved the City's application 27-12261 – it did not involve any issues relating to a transfer of water right 01-181C. The Coalition stipulated that the modeling showed that water put in Jensen's Grove could mitigate for the new consumptive uses under water right 27-12261. The remaining question, therefore, was whether incidental recharge under water right 01-181C could be used to provide that mitigation. The Director correctly determined that that question could not be answered absent an application to transfer the water right to add recharge or mitigation as an authorized purpose of use. Since no transfer application was filed, the issue of potential injury

associated with transferring water right 01-181C to allow for the addition of "groundwater recharge" or "mitigation" as a purpose of use, was not before the Hearing Officer and has not been addressed.

A transfer proceeding is separate and distinct from an application for permit. Whereas a transfer proceeding speaks to changes to an existing water right, an application for permit addresses proposals for new diversions. The cases are not the same. As such, the City's attempt to rely on proceedings relative to water right 27-12261 as a bar against the Coalition asserting any injury in a future transfer proceeding for water right 01-181C must fail. *See City Br.* at 30-32 (asserting that the Coalition is barred from "subsequent relitigation of a claim previously asserted [and] also subsequent relitigation of any claims relating to the same cause of action which were actually made or which might have been made"). This is particularly the case where, as the Hearing Officer recognized, there are several issues relating to the transfer of water right 01-181C that were not addressed in these proceedings. R. 209, ¶ 19 ("The parties have not had an opportunity to present evidence on the historical consumptive use of water right 01-181C. The question of historical consumptive use, non-consumptive use and incidental recharge are best addressed within an application for transfer").

If any party is barred by *res judicata*, it is the City. As stated above, the original transfer application for water right 01-181C sought to include "groundwater recharge" as a permitted use. Ex. 100. The Coalition protested that use. When the draft transfer order was issued and identified "recharge" as an authorized use, Ex. 103, the Coalition challenged the inclusion of that use as contrary to the Settlement Agreement. Ex. 8. Although the City disagreed with the Coalition's interpretation of the Settlement Agreement at that time, Ex. 9, it did not challenge the final

transfer order removing all references to "recharge" from the face of the decree. Ex. 105. The City is therefore bound by the final agency decision on the transfer.

Moreover, the Coalition's interpretation of the Settlement Agreement at the time of the transfer was crystal clear. Ex. 8. The Department apparently agreed with the Coalition and removed the "recharge" use without further discussion in the record. Had the City believed that to be in error, it was required to challenge the decision at that time. I.C. § 42-222(5) ("any person or persons feeling themselves aggrieved by the determination of the department" may seek judicial review). The City's failure to challenge the decision bars its current attempt to construe water right 01-181C as authorizing any "recharge" or "mitigation." If the City truly believed that such uses were authorized under 01-181C, it should have challenged the transfer order as required by Idaho law. *See Hindmarsh v. Mock*, 138 Idaho 92, 94 (2002) (*res judicata* bars relitigation of issues that should have been raised in prior proceedings).

III. Incidental Recharge from a Water Right Cannot be Used to Mitigate New Consumptive Uses.

On April 30, 1993, the Director entered the *Amended Moratorium Order*, which prohibits processing any applications for new consumptive uses within the Eastern Snake Plain Aquifer without sufficient mitigation to offset the impacts of the new consumptive uses.[13] One way that water users may mitigate for their new consumptive uses is through recharge. *See* I.C. § 42-234(2) (recharge is a beneficial use). However, the use of recharge for mitigation of a new water right has been specifically limited by the Legislature. Indeed, the Legislature has determined that the use of "incidental recharge" to mitigate for "separate or expanded water rights" is prohibited:

> (5) The legislature further recognizes that incidental groundwater recharge benefits are often obtained from the diversion and use of water for various beneficial purposes. ***However, such incidental recharge may not be used as the basis for claim of a separate or expanded water right.*** Incidental recharge of aquifers

[13] http://idwr.idaho.gov/files/legal/orders/19930430_Moratorium_ESA.pdf.

> which occurs as a result of water diversion and use that does not exceed the vested water right of water right holders is in the public interest. The values of such incidental recharge shall be considered in the management of the state's water resources.

I.C. § 42-234(5).

The issue of using incidental recharge was also addressed by the SRBA in subcases concerning water rights claims filed by the Aberdeen-Springfield Canal Company ("ASCC"). *See Memorandum Decision & Order on Challenge*, SRBA Subcase Nos. 01-23B, et al. (Apr. 4, 2011). There, the Department recommended ASCC's irrigation water rights with a purpose of use identified as "Recharge for Irrigation." *Id.* at 2. The "Recharge for Irrigation" recommendation was based on the Department's determination that the ASCC system was extremely leaky. *Id.* As water was diverted for irrigation purposes, it leaked through the ASCC canal system and into the aquifer. *Id.*

The Presiding Judge, in reversing an order granting summary judgment in favor of ASCC, provided valuable guidance for determining whether "recharge" may be considered an authorized use under an existing water right. For example, ASCC claimed that the water seeping through its system should be characterized as "recharge" through an accomplished transfer theory. *See* I.C. § 45-1425. The SRBA Court rejected this theory:

> An assumption that water was diverted for recharge is countered by common practices of carriage or head which is required to operate the delivery system. This is required whether or not all shareholders are diverted the surface water and applying it to their lands. In fact, Idaho Code § 42-1201 requires that a water delivery entity keep its system charged. ***Thus, one inference that can reasonably be drawn from the facts is that the claimed recharge resulting from the use of the 01-23B right is incidental recharge associated with ASCC's delivery practices***.

ASCC Order. at 24 (emphasis added); *see also Id.* at 25 ("These facts do not show whether ASCC was purposefully engaged in recharging the groundwater for use by its shareholders or whether the

recharge was merely incidental to its overall delivery operation").

In this case, the facts are clear – any water seeping into the ground in Jensen's Grove, under water right 01-181C is incidental recharge – i.e. it is "merely incidental" to the recreational storage beneficial use of the water right. The testimony and record clearly shows that Jensen's Grove is a leaky lake feature and that water must constantly be diverted into the lake in order to enjoy recreational uses under water right 01-181C. The Department stated that the "lake loses large amounts of water due to seepage into the ground, so a constant flow into the lake is needed to maintain the lake level." Ex. 102 at 1. Even the water right itself provides 980 acre-feet for seepage losses. Ex. 106. The City's Mayor confirmed that water must be continually diverted into Jensen's Grove in order to maintain the water levels and use the water for recreational purposes. Tr. 27-31 (Mayor Loomis Testimony). Since the City cannot enjoy the benefits of its water right unless it regularly diverts water into the lake, the resulting seepage is incidental recharge and cannot be used for a "separate or expanded water right." Stated another way, but for the losses under the water right, the authorized beneficial uses of the water right could not be supported. Just like an irrigation right that must include conveyance losses to deliver water to a shareholder's headgate, so too are the losses associated with the City's water right at Jensen's Grove.

The City argues that the seepage cannot be considered "incidental recharge" because the Settlement Agreement "is a condition of 01-181C and it allowed the City to claim the groundwater recharge benefits occurring under 01-181C." *City Br.* at 29. It further claims that, since the water right identifies a specific portion of the volume diverted as seepage, there is some "express" recognition that the right may be used for recharge and/or mitigation. *Id.* These arguments do nothing but further illuminate the City's misunderstanding of the law regarding the use of water rights and the nature of incidental recharge.

The law, as discussed above, is clear. The only way to change the use of a water right is through a transfer process – not a private settlement agreement. The fact that the private settlement agreement is referenced in a condition on the water right does not alter that law. Recharge is a statutorily recognized beneficial use of water in Idaho. I.C. § 42-234(2). Any authorized uses of water must be identified on the water right. I.C. §§ 42-1411(2)(f) & 42-1412(6). In this case, it is undisputed that recharge is not identified as a use on the face of the partial decree. The law does not allow the City to simply alter the authorized use of water right 01-181C based on one sentence contained in a *private* settlement agreement that is only referenced in the decree and that is only enforceable between the parties to that agreement.

The City contends that the Department's identification of a specific volume of water needed to maintain the levels in Jensen's Grove, somehow, transmutes the use of that water from "incidental" to "express" recharge. *City Br.* at 29. This argument lumbers under the same legal errors identified above. Further, water rights generally include – whether expressly identified or not – an amount necessary to allow the water user to enjoy the use of the water. For example, the ASCC irrigation rights discussed above, include a sufficient quantity to divert water from the river to the headgate – i.e. the "carriage" water. *Supra*. This is a common practice under Idaho water law. In this instance, however, the same carriage water has been identified with a volume. Ex. 106. Importantly, while water right 01-181C references a volume for "seepage losses," it does not identify those losses as anything other than incidental recharge. The law does not allow the Department – or this Court – to "read between the lines," as the City demands, and presume a use that is not identified on the decree. It is the State's recognition that some water rights require a greater diversion at the river to compensate for seepage that the Legislature enacted the limitations in section 42-234(5). The City's attempt to circumvent the law should be rejected.

CONCLUSION

Any change to the purpose or nature of use of a water right can only be accomplished through the transfer process. Yet, the City failed to file any such a transfer. The Director's order requiring a transfer of water right 01-181C, therefore, should be upheld.

Furthermore, nothing in the Settlement Agreement guarantees that the City will be able to use water right 01-181C for mitigation or groundwater recharge. Such uses were specifically protested and removed in the prior transfer proceedings.

Accordingly, the Director's *Final Order* should be affirmed.

DATED this 11th day of February, 2016.

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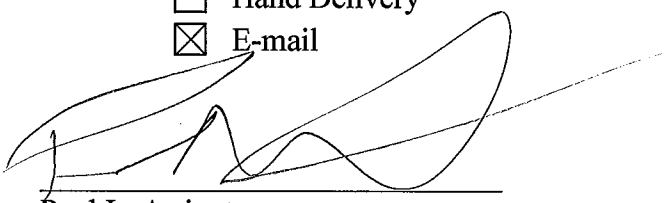

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