IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

THE CITY OF BLACKFOOT, Petitioner, v. GARY SPACKMAN, in his capacity as Director of the Idaho Department of Water Resources, and THE IDAHO DEPARTMENT OF WATER RESOURCES, Respondents.	**Case No. CV-2015-1687**
IN THE MATTER OF APPLICATION FOR PERMIT NO. 27-12261 In the name of the City of Blackfoot.	

PETITIONER'S REPLY BRIEF

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

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

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

Attorneys for the City of Blackfoot

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

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

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

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

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

Attorneys for the Idaho Department of Water Resources

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

CONSTITUTIONAL & STATUTORY AUTHORITY

REGULATORY AUTHORITY AND PROCEDURAL RULES

OTHER

Petitioner, the City of Blackfoot, hereby submits *Petitioner's Reply Brief*.[1] This brief responds to briefs filed by the Director and Department (collectively, "Respondents"), as well as the Coalition, and is filed pursuant to this Court's *Procedural Order* of October 27, 2015; I.R.C.P. 84(p); I.A.R. 35; and I.A.R. 36.

This Court should approve the issuance of a permit for 27-12261, because the uncontroverted facts show that a substantial amount of water seeps from Jensen's Grove into the ESPA and the City is not required to obtain the Coalition's approval before claiming credit for the mitigation provided by that seepage through an application for water right permit. By disregarding the *Settlement Agreement*, which was incorporated as an element of 01-181C, and refusing to acknowledge the mitigation occurring at Jensen's Grove, the Director ruled incorrectly in this case, in violation of statutory provisions; in excess of the statutory authority of the Department; without support of substantial evidence; and arbitrarily, capriciously, and as an abuse of discretion—which has prejudiced the City's substantial rights. By ignoring the *Settlement Agreement*, Respondents have failed to consider all of the elements of 01-181C and, with only that incomplete picture, have erred.

I. THE PROPER INTERPRETATION OF WATER RIGHT NO. 01-181C.

This case demands the consideration and interpretation of 01-181C in order to determine whether the City retained the ability to apply the admitted reality of the situation—that more than 2,000 acre-feet of water annually re-enters the ESPA through Jensen's Grove—as mitigation for 27-12261.

---

[1] Unless otherwise noted herein, all defined terms are used as defined in *Petitioner's Opening Brief*.

A. There is no difference between conditions and elements contained in a water right.

All water right elements and conditions are limitations on how a right to divert water is exercised. These limitations are in place to protect other water right holders from injury. Use of water outside of the limitations set forth in a water right works to the detriment of other water users, and such detriment is often called "enlargement" or "injury." *See, e.g., Barron v. Idaho Dep't of Water Res.*, 135 Idaho 414, 18 P.3d 219 (2001). "[T]here is *per se* injury to junior water rights holders anytime an enlargement receives priority." *City of Pocatello v. Idaho*, 152 Idaho 830, 835, 275 P.3d 845, 851 (2012) (quoting *A&B Irrigation Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 753, 118 P.3d 78, 85 (2005)).

Every water right is made up of elements that determine its nature and extent. The "nature and extent" of a water right is defined by its elements and often such elements are determined in the context of a water rights adjudication, such as the SRBA. *See* Idaho Code §§ 42-1420, 42-1411(2). "[A] decree entered in a general adjudication such as the SRBA is conclusive as to the nature and extent of the water right." *Rangen, Inc. v. Idaho Dep't of Water Res.*, 2016 Opinion No. 21, at *8 (February 29, 2016) (quoting favorably from the underlying administrative decision by the Director of IDWR) (hereinafter cited to as *Rangen*).

01-181C received a partial decree in the SRBA determining and confirming the nature and extent of the water right by defining its elements. R. at 92-93. Idaho's adjudication statutes describe what the elements of a water right are. Each partial decree must include "***each element*** of a water right ***as stated*** in subsections (2) and (3) of section 42-1411, Idaho Code, as applicable." Idaho Code § 42-1412(6) (emphasis added). In turn, Idaho Code § 42-1411(2)

explicitly provides that "[t]he [D]irector shall determine the following ***elements***," which are then listed, including:

> (i) ***conditions*** on the exercise of any water right included in any decree, license, or approved transfer application; and
>
> (j) such ***remarks and other matters*** as are necessary for definition of the right, for clarification of any element of the right, or for administration of the right by the [D]irector.

Idaho Code § 42-1411(2) (emphasis added).

The items outlined in Idaho Code § 42-1411(2)(i) and (j)—conditions and remarks—are elements of a water right defined by statute. Not surprisingly, case law is in accord with these statutory provisions. After quoting the entirety of Idaho Code § 42-1411(2), the Idaho Supreme Court has determined that "[t]he elements listed ***describe the basic elements of a water right*** . . ." *City of Pocatello v. Idaho*, 152 Idaho 830, 839, 275 P.3d 845, 850, 855 (2012) (internal citation omitted). Accordingly, the conditions incorporated into the partial decree of 01-181C—including reference to the "terms and conditions" of the *Settlement Agreement*—are elements of 01-181C.

The two recent Idaho Supreme Court cases of *City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) and *Rangen, Inc. v. Idaho Dep't of Water Res.*, 2016 Opinion No. 21 (February 29, 2016) demonstrate the importance of recognizing all elements of a water right.

In *Pocatello*, the City appealed the SRBA Court's holding on a number of items, including the SRBA's inclusion of the following condition: "To the extent necessary for administration between points of diversion for ground water, and between points of diversion for ground water and hydraulically connected surface sources, ground water was first diverted under

this right from Pocatello well [description] in the amount of ___ cfs." *City of Pocatello v. Idaho*, 152 Idaho 830, 834, 275 P.3d 845, 849 (2012). The condition was included in IDWR's recommendation to the SRBA Court because IDWR "asserted that the ***condition was necessary to avoid injury*** to other water rights and to assist in the administration of water rights in times of shortage." *Id.* at 835, 275 P.3d at 850 (emphasis added). Conditions, or limitations on a water right, avoid many types of injury, including injury that has nothing to do with physical interference of water delivery. On this topic, the Idaho Supreme Court favorably quoted the SRBA Court regarding the possible scope of injury:

> Specifically, injury to an existing water right is not limited to the circumstance where immediate physical interference occurs between water rights as of the date of the change. Injury also includes the diminished effect on the priority dates of existing water rights in anticipation of there being insufficient water to satisfy all rights on a source (or in this case a discrete region of the aquifer) and priority administration is sought. Even though the priority administration may occur at some point in the future, injury to the priority date occurs at the time the accomplished transfer is approved.

Id. Ultimately, the Idaho Supreme Court concluded that the condition Pocatello objected to must be enforced like other elements of a water right, because they serve the dual purposes of "avoid[ing] injury to other water rights and to assist in the administration of water rights in times of shortage." *Id.* at 835, 275 P.3d at 850.

In the *Rangen* case just decided on February 29, 2016, Rangen first argued on appeal that the Director erred in interpreting its partially decreed water rights referencing the "Martin-Curren Tunnel" and referring to a 10-acre tract as its authorized point of diversion. Specifically, Rangen argued the following:

> Rangen contends that the Director erred in interpreting its partial decrees. It argues that the source element in its partial decrees is ambiguous and that in the relevant context 'Martin-Curren Tunnel' refers to the entire spring complex comprised of Curren Tunnel plus the other springs scattered across the canyon wall. Additionally, Rangen argues that it should be entitled to divert water via the Bridge Diversion because the dam is "part of a diversion structure that lies partially within the [decreed] ten acre tract.'

Rangen at *8 (brackets in original). In other words, Rangen argued for administration of its rights based on something other than what was contained in the plain language of its partially decreed water rights. In the underlying administrative proceeding, the Director determined that "[a]dministration ***must comport with the unambiguous terms of the SRBA decrees.***" *Id.* at *10 (emphasis added).

Accordingly, the Director determined that "[b]ecause the SRBA decrees identify the source of the water as the Curren Tunnel, Rangen is ***limited*** to only that water discharging from the Curren Tunnel. Because the SRBA decrees list the point of diversion as SESWNW Sec. 32, T7S, R14E, Rangen is ***restricted*** to diverting water that emits from the Curren Tunnel in that 10-acre tract." *Id.* (emphasis added). The Director's choice of words is consistent with what the City has asserted in this case above, which is that elements of a water right are limitations or restrictions on the use of water no matter how they are documented on a water right. In *Rangen*, the district court upheld the Director's determination on this issue, and on appeal, the Idaho Supreme Court also affirmed: "This Court agrees and affirms the district court's holding that Rangen's partial decrees entitle it to divert only that water emanating from the Martin-Curren Tunnel and only within the decreed ten-acre tract. If Rangen wanted its water rights to be interpreted differently, it should have timely asserted that in the SRBA." *Id.* at *11.

In addition to Rangen's first argument, it argued that it should be permitted to use the so-called "Bridge Diversion" because it lied mostly with the ten-acre tract and was integral to its diversion structure consisting also of the so-called "Farmers' Box" and "Rangen Box." *Id.* The Idaho Supreme Court rejected this argument, and focused on the importance of strict interpretation of elements:

> Logically, if separate and distinct individual diversion structures in different tracts were treated as a single diversion structure, any water right holder could claim an entitlement to divert water in any tract, as long as at least one component of one diversion structure were sited in a decreed tract. ***This approach would render the point of diversion element of a water right meaningless.***

Id.

The *Pocatello* and *Rangen* cases make it clear that elements and conditions are not to be ignored or interpreted loosely. Otherwise, the conditions are meaningless, and the result would be injury, enlargement, and conflict between water users. Elements and conditions are limitations on the exercise of a water right and they cannot later be ignored by the Director in the appropriation (Idaho Code § 42-201, *et seq.*), administration (Idaho Code § 42-601, *et seq.*), or adjudication of water rights (Idaho Code § 42-1401, *et seq.*). Stated another way, any attempt to distinguish between conditions and elements is to argue a distinction without a difference. No matter what they are called, conditions or elements limit how a water right can be exercised, and such limitations are binding upon the water right holder and must be enforced by the Department. See *Petitioner's Opening Br.* at 12-13.

In light of this clear and recent precedent, it is surprising that the Respondents maintain the position that they do not need to recognize the provisions of the *Settlement Agreement* as an element of 01-181C. The City's response to this position is addressed in the next section.

B. The *Settlement Agreement* was incorporated into 01-181 as a condition of the exercise of 01-181C, which cannot be ignored by the Director.

Despite the clear statutory provisions contained in Title 42 of the Idaho Code, as well as Idaho cases concerning elements of a water right, Respondents are unequivocal that the *Settlement Agreement* "is not an element of water right 01-181C." *Respondents' Brief* at 10. Respondents argue that because the reference to a private agreement is under the "Other Provisions Necessary" section of the partial decree for 01-181C, the *Settlement Agreement* is relegated to non-element status, and in support of this argument, footnote a 2004 decision from Special Master Bilyeu.[2] *Id.* at 11. Additionally, the Respondents argue that reference to settlement agreements "is ***only to provide notice*** of private agreements that govern relationships of the parties to the agreements." *Id.* (emphasis added). Therefore, the argument continues, reference to the *Settlement Agreement* was not intended to "make the Director and other water users parties to the private agreement," *Id.* at 12.

---

[2] The facts faced by Special Master Bilyeu in Subcase Nos. 31-7311, 31-2357, and 31-2395 are quite distinguishable from the facts of this case. In that decision, there was ambiguity in the "other provisions necessary" portion of a water right because it authorized water use without a water right or any specific elements of that right. This ambiguity led the Special Master to recommend a deadline for IDWR to file an ADR addressing only the uncultivated land issue "and that IDWR assign a new water right claim number to that portion of the claim." See *Order Recommending Partial Decree Be Set Aside*, In re: SRBA Nos. 31-731131-2357, and 31-2395, at 8 (Jan. 30, 2004) (Special Master Bilyeu). The Special Master held that the "language of that provision is ambiguous because it is unclear whether the language defines a vested water right or not." She did not unequivocally state that "other provisions necessary" are not elements of a water right.

The Respondents arguments are both misplaced and unavailing. Concerning the first "Other Provisions Necessary" argument asserted, Respondents acknowledge the plain language of Idaho Code § 42-1411(2) in their brief, even if it is only in footnote form. *Id.* at 11 (fn. 1). But small font size does not diminish the force of law embodied in this statutory provision. The City has already addressed the argument above that "other provisions necessary" contained in a water right as conditions—limitations—on the exercise of a water right are elements of a water right and are no different than the point of diversion, source element, or any other element of a water right.

In terms of settlement agreements in general, Respondents assert that all references to settlement agreements are informational only and do not implicate the Department because, the argument goes, the Department is not a party to the *Settlement Agreement*. In support of this argument, Respondents seize on the words of the transfer approval and the partial decree to surmise that "enforcement of the agreement is limited to the parties to the agreement." *Respondents' Br.* at 12. From that premise, Respondents incorrectly conclude that the *Settlement Agreement* could not have been incorporated, since it "only governs the relationship between the parties to the agreement." *Respondents' Br.* at 12.

This argument is misleading. The fact that the *Settlement Agreement* "is enforceable by the parties thereto," Ex. 106 at 93 (capitalization modified), is not surprising. Any judgment, decree, or order from any court is not self-effectuating. Its enforcement is dependent on the interested parties. An agreement (whether incorporated into a court order or not) must be

enforced either by a signatory, a party in privity with a signatory, or another plaintiff who can establish standing.

However, while the Department may not be a ***party*** to a settlement agreement, it necessarily becomes a ***participant*** in a water right settlement agreement containing additional limitations on the exercise of the right because of the Director's statutory duty to administer each water right consistent with its elements.

In nearly all cases, the very reason a water right involves a settlement agreement is that it resolved a dispute over either the adjudication of a water right or it outlined other limitations of the water right to resolve injury concerns and/or protests raised in an administrative action involving a water right (such as an application for permit for a transfer application). In fact, settlement both in the SRBA and in administrative proceedings was and is actively encouraged by the SRBA Court and the Department. The proceedings involving 27-12261 illustrate this encouragement from the Department.

Immediately after 27-12261 was protested on October 6, 2014, R. at 66-68, the Department sent two letters each dated October 20, 2014 to the City and to the Coalition as the protestants. The City's letter outlines three options available for resolution of the contested application, and all three include some component of settlement encouragement and one even specifically references "a mediated agreement" (each of which is emphasized below):

> ***-Direct contact with the protestant(s) to determine the nature of the protests(s) and to attempt to resolve the protest. Sincere conversation between the parties prior to initiation of formal proceedings can often resolve protest(s).***

> -Formal proceedings administered by the department pursuant to the Department's Rule of Procedure (IDAPA 37.01.01). ***A pre-hearing conference identifies the protestant's concerns and reviews the resolution possibilities with the parties.*** If the concerns cannot be resolved, a formal hearing will be scheduled.
>
> ***-Mediation through a certified professional mediator can reduce costs and time that are associated with formal proceedings, present the opportunity to address non-water concerns, provide influence over a final settlement, and fast track the processing of the application if a mediated settlement agreement is reached. If you are interested in this option, please contact our office for details.***

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

Most protestants raise injury arguments, and those issues are resolved either through a settlement agreement that resolves those concerns, or the issue is resolved after an administrative hearing on the issue. In counsel's experience, settlement of contested cases to avoid an administrative hearing is never accomplished without some sort of written settlement document. And even after an administrative hearing, the hearing officer will often include conditions to address injury concerns (which he can do under Idaho Code § 42-203A(5)). No matter how the conditions get incorporated into a water right, they are often included to address some form of injury, and they often do not fit easily into one of what the Respondents' would call the "explicit" elements of a water right.[3] Two examples are worth noting.

First, a water right permit for ground water recharge (1-10625) was approved after a stipulation was entered into between the applicant, Peoples Canal & Irrigating Co., and the Coalition, IDFG, BLM, and the Idaho Power Co. The stipulations for withdrawal or protest are

[3] *Respondents' Brief* at 8 ("[t]he beneficial uses of 'recharge' and 'mitigation' are not explicitly authorized under water right 01-181C.").

available at http://www.idwr.idaho.gov/apps/ExtSearch/RelatedDocs.asp?Basin=1&Sequence=10625&SplitSuffix=. The issued permit included stipulated conditions which further limit the exercise of 1-10625. A copy of the permit is available at http://www.idwr.idaho.gov/apps/ExtSearch/ DocsImages/lz1g01_.PDF. This is an example of a water right permit which includes conditions agreed to by the parties.

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

Importantly, in either instance where a condition is included in a water right, the Respondents were not parties to the proceeding that led to the condition being included in the water right. But Respondents do not have to be a party to a settlement agreement to be impacted or bound by the conditions. The Respondents are not bound ***by contract*** to a settlement agreement, but they are necessarily participants in a settlement agreement ***by statute*** because of the Director's statutory obligation to distribute water according to water rights. The Director's obligation to distribute water according to water rights was recently well explained by this Court:

> The IDWR has a statutory duty to allocate water. The Idaho legislature gave the IDWR's Director the power to make appropriation decisions in Idaho Code section 42–602: "[t]he director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the ... facilities diverting therefrom." The Director also "shall distribute water in water districts in accordance with the prior appropriation doctrine." *Id.* ***This means that the Director cannot distribute water however he pleases at any time in any way; he must follow the law.***
>
> Idaho Code section 42–602 gives the Director broad powers to direct and control distribution of water from all natural water sources within water districts. *In re Idaho Dep't of Water Res. Amended Final Order Creating Water Dist. No. 170,* 148 Idaho 200, 211, 220 P.3d 318, 329 (2009). That statute gives the Director a "clear legal duty" to distribute water. *Musser v. Higginson,* 125 Idaho 392, 395, 871 P.2d 809, 812 (1994) (*abrogated on other grounds by Rincover v. State Dep't of Fin.,* 132 Idaho 547, 976 P.2d 473 (1999)). However, "the details of the performance of the duty are left to the director's discretion." *Id.* ***Therefore, from the statute's plain language, as long as the Director distributes water in accordance with prior appropriation, he meets his clear legal duty. Details are left to the Director.***
>
> . . .
>
> Similarly, this Court has stated that the Director "is charged with the duty of direction and control of distribution of the waters from the streams to the ditches and canals." *DeRousse v. Higginson,* 95 Idaho 173, 179, 505 P.2d 321, 327 (1973). More recently, this Court further articulated the Director's discretion: "Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director." *AFRD#2,* 143 Idaho at 880, 154 P.3d at 451. Thus, the Director's clear duty to act means that the Director uses his information and discretion to provide each user the water it is decreed. And implicit in providing each user its decreed water would be determining when the decree is filled or satisfied.

In re SRBA, Case No. 39576, Subcase 00-91017 (Basin-Wide Issue 17—Does Idaho Law Require a Remark Authorizing Storage Rights to 'Refill', Under Priority, Space Vacated for Flood

Control), Nos. 40974 and 40975, 157 Idaho 385, 393-94, 336 P.3d 792, 800-01 (2014) (hereinafter cited to as "*BW 17*").

In short, it is a red herring to argue that because the Director is not a party to a settlement agreement, he is not bound to honor it and distribute water diverted under the conditioned water right accordingly.[4] He certainly is bound by such conditions as he exercises his statutory duties to distribute water, even if such conditions do not "explicitly" fit into one of the standard elements of a water right. To use a real world example, IDFG would certainly object if Peoples diverted water under 1-10625 in an amount that reduced flows in the Snake River below 2,070 cfs measured in the Snake River at Blackfoot U.S.G.S. Gage No. 13062500 and the Director did nothing to enforce this provision against Peoples or otherwise initiate an enforcement action under Idaho Code § 42-1701B. Permit No. 1-10625 (Condition No. 4). And the Coalition would certainly object if water was diverted under 1-10625 if less than 2,700 cfs was flowing past Minidoka Dam and the Director did nothing to enforce this provision against Peoples or otherwise initiate an enforcement action under Idaho Code § 42-1701B. *Id.* (Condition No. 5). These conditions were included to protect against local public interest impacts and injury to an existing unsubordinated hydropower water right. IDFG and the Coalition should expect that the Director will honor these provisions and ensure compliance by Peoples accordingly because the Director "cannot distribute water however he pleases at any time in any way; he must follow the law." *BW 17*, 157 Idaho at 393, 336 P.3d at 800

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

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

> The Director has the authority and discretion to determine how water from a natural water source is distributed to storage water rights pursuant to accounting methodologies he employs. ***The Director's discretion in this respect is not unbridled, but rather is subject to state law and oversight by the courts.*** See *American Falls Reservoir Dist. No. 2*, 143 Idaho at 880, 154 P.3d at 451 (addressing court oversight on a properly developed record). When review of the Director's discretion is this respect is brought before the courts in an appropriate proceeding, and upon a properly developed record, the courts can determine whether the Director has properly exercised his discretion regarding accounting methodologies.

Memorandum Decision, Basin Wide Issue 17, Subcase No. 00-91017, at 11-12 (emphasis added). The protestants could sue privately for damages for the non-compliance, Idaho Code § 42-1701B(7), but would have no ability to assume the role of the Director in water distribution. The protestants could only challenge the exercise of his discretion. This further supports the City's position that the Director is a participant in the *Settlement Agreement* because he is duty-bound to ensure compliance with any limitations in the water right, even though he is not a party to the *Settlement Agreement*.

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

Respondents and the Coalition would like to categorize the language in the approval and the partial decree of 01-181C as just such a "reference" to the *Settlement Agreement*. *See Respondents' Br.* at 11; *Surface Water Coalition's Joint Response Br.* (hereinafter "*Coalition's Resp. Br.*") at 11-12.

However, in contrast to the examples provided by Respondents, *Respondents' Br.* at 11, n. 2 and 3, the conditions on 72385, which transferred 01-181C to Jensen's Grove, provide more than mere "notice" of the *Settlement Agreement*. The language in the transfer approval and the partial decree for 01-181C states that the terms of the *Settlement Agreement* provides "conditions and limitations" in 01-181C. This is a textbook case of incorporation, which is explicitly authorized by Idaho Code § 42-1412(6).

Additionally, in the *Settlement Agreement*, the parties stated that they "understood and agreed that any subsequent partial decree issued by the Snake River Basin Adjudication District Court should ***contain the terms and Conditions*** of this Agreement." Ex. 4 at 4 (paragraph 4 of the *Settlement Agreement*) (capitalization in original, emphasis added). In entering into the *Settlement Agreement* to resolve the Coalition's protest, the parties recited: "It is the Parties' understanding that [the Department] is prepared to grant the proposed Transfer providing: . . . 4) ***the conditions agreed to below are incorporated in the Water Right through the transfer approval***" and "The Parties have . . . ***agreed upon certain conditions to be included in the Water Right after its transfer***." Ex. 4 at 1-2 (recitals D and E of the *Settlement Agreement*) (emphasis added).

Accordingly, the approval of 72385, which transferred 01-181C to Jensen's Grove, and the corresponding partial decree both include the following language:

> ***The diversion and use of water under this transfer is subject to additional conditions and limitations contained in a Settlement Agreement***-IDWR Transfer of Water Right, Transfer No. 72385, dated June 2006, including any properly executed amendments thereto, entered into by and between the New Sweden Irrigation District, [the City], [and the Coalition]. 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. 105 at 90, ¶ 9 (emphasis added); *see also* Ex. 106 at 93. The Department's approval classifies this as one of the "Conditions of Approval." Ex. 105 at 90. The partial decree classifies this language under the heading "other provisions necessary for definition or administration of this water right." Ex. 106 at 93 (capitalization modified). Neither example provided by Respondents does anything but state that each water right is "subject to a private agreement." *Respondents' Br.* at 11, n. 2 and 3; *see also* SRBA Subcases 75-5 and 75-14608.[5] As described above, and in clear contrast to these examples, 01-181C's condition is explicit that the *Settlement Agreement* was intended to be considered "additional conditions and limitations."

Moving on to Respondents' next argument, in determining whether the *Settlement Agreement* is incorporated into 01-181C, "the intent of including" the above-quoted language,

---

[5] Counsel for the City was directly involved in 75-14608 (Tyacke), and drafted the settlement agreement that was recorded. A copy is available at http://www.idwr.idaho.gov/apps/ExtSearch/DocsImages/hrhq01_.pdf. The agreement addresses distribution issues from the South Fork of Sevenmile Creek and from a spring used to service the Sunset Heights Subdivision, both natural water sources, which would likely involve the Department's involvement in water distribution because these are natural water sources. It also involved other diversion system issues, which are not matters over which the Department has jurisdiction. But it is evident that this agreement contains provisions that further limit exercise of the water rights outlined in the agreement, and reference to it was not merely for informational purposes.

Respondents' Br. at 11, in the approval and the partial decree is completely immaterial. The recent *Rangen* decision explains how water decrees are to be interpreted:

> Idaho courts interpret water decrees using the same interpretation rules that apply to contracts. *A & B Irrigation Dist.*, 153 Idaho at 523, 284 P.3d at 248. 'Whether an ambiguity exists in a legal instrument is a question of law, over which this Court exercises free review.' *Knipe Land Co. v. Robertson*, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011). Ambiguity may be either patent or latent. *Id.* 'A latent ambiguity exists where an instrument is clear on its face, but loses that clarity when applied to the facts as they exist.' *Id.* Idaho law permits '[f]irst, the introduction of extrinsic evidence to show that the latent ambiguity actually existed; and, second, the introduction of extrinsic evidence to explain what was intended by the ambiguous statement.' *Snoderly v. Bower*, 30 Idaho 484, 487, 166 P. 265, 265 (1917). Interpreting an ambiguous term is an issue of fact. *Knipe Land Co.*, 151 Idaho at 455, 259 P.3d at 601 (citing *Potlatch Educ. Ass'n v. Potlatch School Dist. No. 285*, 148 Idaho 630, 633, 226 P.3d 1277, 1280 (2010)).

Rangen at *12.

Additionally, "[t]he interpretation of decrees or judgments is generally subject to the same rules applicable to construction of contracts." *McKoon v. Hathaway*, 146 Idaho 106, 109, 190 P.3d 925, 928 (Ct. App. 2008) (citation omitted). Therefore, where a contract, judgment, or water right is unambiguous, the document's "meaning and legal effect are questions of law to be decided by the court." *Bondy v. Levy*, 121 Idaho 993, 996, 829 P.2d 1342, 1345 (1992). It is only when the document is ambiguous that "the interpretation of the document presents a question of fact which focuses upon the intent of the parties." *Id.*

Here, Respondents agree that a water right is like a judgment. *Respondents' Br.* at 16-17 ("Like a judgment, a water right must outline with certainty the nature and extent of beneficial use of the water"). But Respondents have made ***no showing*** that the *Settlement Agreement* is

ambiguous and, therefore, any inquiry into intent is premature and improper. *See Respondents' Br.* at 11 ("Since the remark only references the agreement, the question becomes what was the intent of including this information in the water right") and 22 (providing argument "should the Court determine the [Settlement Agreement] introduces ambiguity into decree [sic]"). While Respondents repeatedly return to the issue of intent extrinsic to the *Settlement Agreement*, their failure to demonstrate ambiguity negates those arguments.

The text of 01-181C is clear and unambiguous. The *Settlement Agreement* says what it says: the conditions agreed to in the *Settlement Agreement* will be "incorporated" and "included" in 01-181C. Ex. 4 at 1-2 (recitals D and E of the *Settlement Agreement*). As a preface to the most specific conditions imposed on 01-181C, the *Settlement Agreement* again provides that "the following terms and conditions be included in the Water Right . . . after transfer." Ex. 4 at 2 (paragraph 1 of the *Settlement Agreement*). Likewise, the partial decree says what it says: 01-181C is "subject to additional ***conditions and limitations contained in***" the *Settlement Agreement*. Ex. 106 at 93 (capitalization modified, emphasis added). That is enough to unambiguously answer the question of whether the *Settlement Agreement* was incorporated into the partial decree.

Because incorporation of water right elements pursuant to a settlement agreement is contemplated by Idaho Code § 42-1412(6), but has rarely been analyzed in the water law context, the City and Respondents have each provided analogous bodies of law to which the Court can look for guidance. *Petitioner's Opening Br.* at 14-15 (looking to divorce jurisprudence); *Respondents' Br.* at 13-16 (looking to the property law doctrine of merger). But

Respondents' analogy to the doctrine of merger in property law, while coming from an admittedly more closely related body of law, is a poor analogy for the situation faced by the Court here. The doctrine of merger deals with the warranties made in a sales contract, between a buyer and a seller, merging into the deed between the buyer and seller. *Fuller v. Dave Callister*, 150 Idaho 848, 853, 252 P.3d 1266, 1271 (2011). In broad terms, the doctrine is that only those warranties or covenants that are collateral, or not related to, the property itself will survive the sale of the property at issue, which is manifested by the execution and acceptance of the deed. *Jolley v. Idaho Sec., Inc.*, 90 Idaho 373, 382, 414 P.2d 879, 884 (1966). However, it is not helpful because of factual distinctions and legal differences.

Factually, the incorporation of a private contract into a court order is an entirely different situation from the merger of covenants into the final performance of the contract. First, this case does not deal with a conveyance of property; it deals with the determination of the nature and extent of a property right. *See* Idaho Code § 55-101 (defining a water right as real property). Second, this case does not deal with one contract between private parties being merged into another contract between those parties; the documents at issue here are one private contract and a decree issued by the SRBA Court. Third, this case does not deal with the satisfaction of one contract by the consummation of another; it deals with an agreement between litigants that facilitated the entry of a court order in the form of a partial decree.

In addition to being factually distinct, the doctrine of merger, which occurs automatically in property transfers, provides very little insight into explicit incorporation. First, incorporation is an exception to the doctrine of merger. *Belstler v. Sheler*, 151 Idaho 819, 823, 264 P.3d 926,

930 (2011) (noting "a generally recognized exception to the [doctrine of merger,] which exception relates to collateral stipulations of the contract, ***which are not incorporated in the deed***" (citation and quotation marks omitted, emphasis added)). Because incorporation is an exception to merger, the doctrine of merger provides little help in determining when an extrinsic document is incorporated into a judgment—as is the question here. Further, merger deals with the dissolution of the covenants contained in the prior agreement into the warranties of the deed, because the delivery and acceptance of the deed is the purpose of those covenants. The purpose of the conditions in the *Settlement Agreement* was not just to obtain 01-181C, but to restrict the City's ability to use 01-181C in certain ways. In other words, there is nothing in the water right for the *Settlement Agreement* to dissolve into, but they are included in the water right to describe the limitations imposed. Finally, Respondents' arguments that the *Settlement Agreement* "is collateral to and independent of 01-181C and is therefore not merged" make little sense. *Respondents' Br.* at 16. Besides the language in the partial decree incorporating (or merging) the *Settlement Agreement*, it is impossible to accept Respondents' contention that the *Settlement Agreement* "does not relate to the elements of 01-181C nor is it inhered to the very subject matter of the water right." *Respondents' Br.* at 16. To argue that the conditions in the *Settlement Agreement* are not elements is unsupportable, but it is frivolous to maintain that the *Settlement Agreement* does not even relate to the elements of 01-181C. For these reasons, the doctrine of merger, borrowed from property law, makes a poor analogy and provides little useful guidance for the Court in this case.

Divorce law, while different factually from water law, deals with the issue of incorporation frequently. *See Petitioner's Opening Br.* at 14-15. As the partial decree determined the nature and extent of 01-181C in this case, divorce decrees incorporate private agreements between the litigants to determine the parties' rights to child custody, support, and other property. As the partial decree is a court order that integrates the *Settlement Agreement*, divorce decrees that incorporate settlement agreements are court orders that include a private contract as a term of the order. As the partial decree was facilitated by the *Settlement Agreement*, divorce decrees are aided by the entry of private agreements between the parties.

Respondents argue that the policy considerations underlying incorporation in divorce cases are not present in water disputes. *Respondents' Br.* at 13-14. First, this argument fails to account for the statutory language that explicitly mandates that a partial decree "shall contain ***or incorporate*** a statement of each element of a water right," Idaho Code § 42-1412(6) (emphasis added), in contrast to divorce law where incorporation is a common law doctrine that requires the support of policy. This Court cannot ignore incorporation, which is a statutory principle of water law, merely on the basis of policy arguments. *Saint Alphonsus Reg'l Med. Ctr. v. Gooding Cnty.*, 159 Idaho 84, 356 P.3d 377, 382 (2015). The Idaho Supreme Court has explained that "[t]he wisdom, justice, policy, or expediency of a statute are questions for the legislature alone," and therefore the Court is "reluctant to second-guess the wisdom of a statute." *Id.* (citations and quotation marks omitted, brackets in original). Because incorporation is specifically allowed by statute, this Court must consider whether the partial decree incorporated the *Settlement Agreement* and, upon the appropriate analysis, the Court should conclude that it did.

Further, Respondents' policy argument[6] is misplaced. Whether the Department or a court maintains an "active role" in the administration of a water right does not matter, since the partial decree dictates how each water right is to be administered by the Department. *See* Idaho Code § 42-1412(6).

Finally, Respondents again emphasize the false distinction between elements and conditions by arguing that the *Settlement 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." *Respondents' Br.* at 14. Aside from again trying to distinguish an "element" from a "condition" (*see above*), Respondents mischaracterize the *Settlement Agreement*. It ***does not*** merely "focus[] on the rights and duties" of the City and the Coalition. *Respondents' Br.* at 14. Rather, the *Settlement Agreement* substantively limits how the City can divert and use 01-181C and informs the Director through his statutory duty to administer water how the right is limited and should be administered.

In sum, the *Settlement Agreement* was incorporated into the partial decree. Incorporation is authorized by statute for describing elements of a water right. The partial decree does more than provide notice of the *Settlement Agreement*, but incorporates it by describing its terms as "conditions and limitations" on 01-181C. As an element of 01-181C, the *Settlement Agreement* clarifies how 01-181C may and may not be used by the City. Respondents erred by failing to consider the *Settlement Agreement* at all.

---

[6] Respondents' policy argument is that the policy in divorce law of "provid[ing] enforcement of all agreements within one court" has no relation to water law since "water administration does not take place through the SRBA Court" and "it is up to the Department to enforce and administer the provisions of the water right." *Respondents' Br.* at 13.

II. 01-181C MAY BE CONSIDERED AS MITIGATION.

A. Mitigation does not have to be listed as an express beneficial use of a water right in order for such water right to be used for mitigation purposes.

Mitigation is not explicitly defined or described by statute, but use of mitigation associated with water is implied from the Department's ability to approve any application "upon conditions." Idaho Code § 42-203A(5). The Department has specified that "[a]n application that would otherwise be denied because of injury to another water right may be approved upon conditions which will mitigate losses of water to the holder of an existing water right, as determined by the Director." IDAPA 37.03.08.045.01.a.iv. This singular mention of mitigation in the context of a water right application suggests that it is broad and involves analysis of the actual utilization of water rather than only looking at the beneficial uses listed on the face of the water right.

Contrary to the Department's rules, the Director, in this case, ***refused*** to consider compliance with the *Settlement Agreement* as a "condition[] which will mitigate losses of water" to other water users. There is no factual dispute that 2,080.8 AF of water seeps from Jensen's Grove into the ESPA each year. *See Coalition's Resp. Br.* at 1 (noting that the City and the Coalition "stipulated that the modeling performed by the City's experts showed that recharge in Jensen's Grove could offset the impacts resulting from" 27-12261). This amount of water re-entering the aquifer provides mitigation for 27-12261 and nothing prevents Respondents from considering those facts in mitigation.

Non-use of one water right can, ***without the filing of a transfer***, mitigate for another water right. The reasoning for this principle is that the non-use of an existing water right is a

condition for the approval of the permit for the new water right, which the Department can impose. Idaho Code § 42-203A(5). In this case, the non-use is a "condition[] which will mitigate losses of water," and allows the Department to approve the subsequent water right. IDAPA 37.03.08.045.01.a.iv. In doing so, the Department takes reality into account, and is not constrained by the black-and-white details on the face of each water right, because these are situations where mitigation is not required to be explicitly listed as a beneficial use.

It is noteworthy in this case that the Coalition has not protested that portion of the City's other water rights in the Blackfoot River which the City proposes to hold unused. *See* R. at 204 ("The Coalition did not challenge the City's proposal to hold 6.2 acres of Blackfoot River right unused to offset depletions to the Snake River downstream of Blackfoot"). In fact, "the Coalition stipulated that leaving a small portion of additional water in the Snake River [system] would offset [the] mitigation deficiency." *Coalition's Resp. Br.* at 1. This is important, because the City has not filed any transfer application to use these Blackfoot River water rights as mitigation for 27-12261, nor was the City requested to do so by the Coalition. This fact alone defeats the Coalition's own argument.

Yet here, Respondents and the Coalition seek to ignore reality and exalt form over substance. The Coalition's repeated emphasis that "the elements of a water right cannot be changed without a transfer," *Coalition's Resp. Br.* at 8 (capitalization modified and emphasis omitted), is an oversimplification. Recently, this Court ruled on an appeal in *In the Matter of Application for Permit No. 35-14402*, a case in which the Coalition was involved. In that matter, the Cooks were allowed to proceed with 35-14402 using their proposed mitigation plan that

included a reduction of volume of their other base water rights. *See Memorandum Decision and Order*, CV-42-2015-2452 (filed December 14, 2015). The Cooks did not file a transfer application to amend their other base water rights (Water Right Nos. 35-7280, 35-7281, 35-13241, 35-14334, 34-14335, and 35-14336). Based upon the action taken in relation to their application for water right 35-14402, the Department administratively amended the Cooks' other water rights to add the applicable volume limitations contained in 35-14402 to the other base water rights. The Cooks were informed by letter of the Department's amendment of the base water rights and it contains no mention of the need to file a transfer. See *Letter to Cook from Shelley Keen*, February 5, 2016, *available at* http://www.idwr.idaho.gov/apps/ExtSearch/DocsImages/ncv901_.pdf (a copy of which is included as **Exhibit 1** for the convenience of the Court). The Cooks' case demonstrates that, contrary to the Coalition's assertion and the Respondents' position, it is unnecessary to file transfer applications for water rights that are utilized in a mitigation plan for a separate application for a water right permit. The Department can, and ***does***, modify the elements of water rights administratively without a transfer application. The City has sought the same procedure employed by the Department in the Cooks' case, and the City's application in 27-12261 is sufficient to claim the benefits associated with the elements of 01-181C in accordance with the City's mitigation plan.

It also makes sense that mitigation or ground water recharge was not listed as a beneficial use on the face of 01-181C since the mitigation could only be sought or claimed under certain strict conditions. Therefore, it is nonsensical to look for mitigation on the "face" of any water

right in a vacuum. The 2,080.8 AF that annually seeps into the ESPA was not, and could not be, claimed as mitigation until the City applied for 27-12261.

Respondents' contention that they are entitled to rely solely on the "face of the water right" to determine how the water is used or employed, *Respondents' Br.* at 16-19, fails to consider mitigation at all in any circumstances where mitigation is not listed as a beneficial use and there is no transfer application concurrently filed—which the Cooks' case demonstrates is not how the Department normally operates. *See Memorandum Decision and Order*, CV-42-2015-2452 (filed December 14, 2015).

The City has used the correct procedure in this application, *i.e.*, the ***appropriate*** application, to claim the mitigation credit for the 2,080.8 AF of annual seepage from 01-181C. Respondents erred by failing to even consider the admitted reality of the mitigation provided by 01-181C by solely looking at face of 01-181C where mitigation is not listed as a beneficial use.

B. The *Settlement Agreement* restricts certain abilities with regard to 01-181C, but not the City's ability to claim, nor the Department's ability to consider, the admitted substantial seepage occurring as mitigation.

"[I]ncidental ground water recharge . . . may not be used as the basis for claim of a separate or expanded water right." Idaho Code § 42-234(5). Both the Coalition and Respondents argue that the 2,080.8 AF that annually seeps into the ESPA from Jensen's Grove is merely incidental recharge and therefore cannot be used as mitigation for 27-12261. *See Coalition's Resp. Br.* at 21-24; *Respondents' Br.* at 21.

The City has already argued that "incidental recharge is for recharge not included anywhere on the water right." *Petitioner's Opening Br.* at 29; *see also* BLACK'S LAW

DICTIONARY 830 (defining incidental as an adjective, meaning "[s]ubordinate to something of greater importance; having a minor role"). The Coalition has stipulated that the City's mitigation plan and modeling shows that 01-181C provides sufficient water to the ESPA to mitigate for 27-12261, but merely challenges whether the City is entitled to claim credit for the seepage, which the Coalition categorizes as incidental.

As previously asserted, as a legal matter, both the *Settlement Agreement* and the reference to seepage losses on the face of 01-181C expressly acknowledge the ground water recharge that occurs under 01-181C. As a factual matter, and in terms of the ***quantity*** of the recharge, it is anything but incidental. The 2,080.8 AF is more than 678 million gallons of water that seeps into the ESPA. It is almost 92% of the annual portion of 01-181C allocated to Recreation Storage (the remainder is lost to evaporation). It is more than 72% of 01-181C's total water. The sheer volume of water and the context of that quantity in relation to 01-181C belies the conclusion that the City's proposed mitigation is merely "incidental." The movement of such a large amount of water was never minor or just of subordinate importance to the City.

It is for that reason that the *Settlement Agreement* deals extensively with the issue of mitigation, delving into the minutiae of various circumstances to specify the City's rights. The *Settlement Agreement* does not categorically deny mitigation. Instead, the *Settlement Agreement* treats the issue of mitigation with a scalpel rather than a cleaver.

In attempting to interpret the *Settlement Agreement*, both the Coalition and Respondents accentuate what is arguably their best fact: that ground water recharge was included on the draft approval for 72385, but was excluded from the final approval. *See Coalition's Resp. Br.* at 18;

Respondents' Br. at 22. However, these documents are parol evidence, meaning it is only helpful to interpret the 01-181C if the text of the water right is found to be ambiguous. *See Respondents' Br.* at 22 ("If a court finds the language of a contract ambiguous, parol evidence can be reviewed to ascertain intent behind the contract") (citing *Bilow v. Preco, Inc.*, 132 Idaho 23, 27, 966 P.2d 23, 27 (1998)). Yet, Respondents only present this argument for consideration in the event the Court concludes 01-181C is ambiguous, without any argument or analysis on the issue of ambiguity. *Respondents' Br.* at 22. Further, the Coalition does not even categorize this fact as parol evidence, and encourages the Court to consider it to determine the parties' intentions in the *Settlement Agreement*. *Coalition's Resp. Br.* at 18. First and foremost, this parol evidence should not be considered by the Court because 01-181C is not ambiguous.

Even if the Court were to find 01-181C or the *Settlement Agreement* ambiguous, this evidence is not as helpful as it seems. Respondents contend that the evidence shows "that recharge was expressly rejected as an authorized use for 01-181C." *Respondents' Br.* at 22. However, the record does not disclose the procedure upon which the Department addressed the Coalition's letter concerning the draft approval that included recharge. *See Coalition's Resp. Br.* at 21 ("The Department apparently agreed with the Coalition and removed the 'recharge' use ***without further discussion in the record***" (emphasis added)). But there is ***no record of a formal adjudication of the issue***, but merely the letter and the comparative differences between the draft approval and the final approval. In fact, it is equally probable that the Department determined that with the limitations contained in the *Settlement Agreement*, ground water recharge should not have been explicitly listed on the face of the water right because it could be interpreted to

authorize recharge by the City for mitigation ***without limitation***. The safer route for the Department, which it followed, was to not include it as an express beneficial use, but to simply incorporate the *Settlement Agreement* and its provisions to dictate when the recharge water could be claimed as mitigation. The competing inferences highlight why the law is to first look at the plain language of the document being interpreted before moving on to parol evidence.

Finally, it bears repeating that the majority of the record in this case was submitted by the City. The City elicited testimony from its witnesses at the hearing before the Department, while the Coalition chose not to do so. So if this Court does consider parol evidence, most of the parol evidence supports the City's position that the *Settlement Agreement* was never meant to totally prevent the City's ability to claim the 2,080.8 AF of annual seepage as mitigation for other water rights. *See Petitioner's Opening Br.* at 24-25. As a result, the *Settlement Agreement* and, if it is considered ambiguous, the parol evidence related to the *Settlement Agreement* show that the seepage into the ESPA from Jensen's Grove under 01-181C was never completely given up by the City, and therefore may be claimed as mitigation for 27-12261.

III. 01-181C'S SEEPAGE MITIGATES FOR 27-12261, REGARDLESS OF THE STATUS OF THE *SETTLEMENT AGREEMENT*.

The City unequivocally believes that the *Settlement Agreement* is a part of 01-181C that describes certain "limitations and conditions" on the water right's use that constitute elements of 01-181C. However, the Respondents' failure to consider the *Settlement Agreement* is only one error committed in this case. Ultimately, whether the *Settlement Agreement* is an element of 01-

181C or not affects the Coalition's arguments much more than the City's, as Respondents should have considered the reality of 01-181C's 2,080.8 AF of seepage as mitigation for 27-12261.

A. As the Coalition appears to have argued, the *Settlement Agreement* possibly fails as a contract.

The Coalition's brief raises two alternative reasons why the *Settlement Agreement* may fail as a contract. Since there is no severability clause in the *Settlement Agreement* and no apparent intention that it be severable, if one provision is void for either reason, the entire contract will fail. First, because the *Settlement Agreement* may "be contrary to the law requiring a transfer—thus causing the *Settlement Agreement* to fail." *Coalition's Resp. Br.* at 15 (italics added). Second, as has become increasingly apparent (though limited by the brevity of the record created by the Coalition on its behalf), the Coalition and the City may have never had a meeting of the minds, in which case no bargain was created and no contract formed.

1. According to the Coalition's argument, at least one of the provisions of the *Settlement Agreement* violates Idaho law and, since it is not severable, the entire contract possibly fails.

With regard to severability of a contract, the Idaho Supreme Court has explained that, in the absence of a severability clause:

> [w]hether a contract is entire or severable depends on the intention of the parties which is to be ascertained and determined, when the contract is unambiguous, from the subject matter of the agreement and the language used therein, taking the agreement as a whole and not its separate parts without regard to one another. . . .
>
> The test chiefly relied upon is whether the parties have apportioned the consideration on the one side to the different covenants on the other. If the consideration is apportioned, so that for each covenant there is a corresponding consideration, the contract is severable. If, on the other hand, the consideration is not apportioned, and the same consideration

> supports all the covenants and agreements, the contract is entire. A contract is entire when by its terms, nature, and purpose, it contemplates and intends that each and all of its parts and the consideration shall be common to each other and interdependent. On the other hand, it is the general rule that a severable contract is one which in its nature and purpose is susceptible of division and apportionment.'

Vance v. Connell, 96 Idaho 417, 419, 529 P.2d 1289, 1291 (1974) (internal quotation marks and citations omitted). If a contract is entire, it "is indivisible, [and] must stand or fall in its entirety." *Morgan v. Firestone Tire & Rubber Co.*, 68 Idaho 506, 514, 201 P.2d 976, 980 (1948).

Here, the *Settlement Agreement* has no severability clause. *See* Ex. 4. The consideration provided by the Coalition (the resolution of its protest) is not apportioned, but supports all of the City's covenants, which became conditions of 01-181C. *See, e.g.*, Ex. 4 at 3 (paragraph 3 of the *Settlement Agreement*, providing that "[i]n the event [the Department] does not approve the Transfer of the Water Right with the above Conditions, the Coalition reserves all rights to protest the application"). The *Settlement Agreement* is "entire," because "it contemplates and intends that each and all of its parts and the consideration shall be common to each other and interdependent." *Vance*, 96 Idaho at 419, 529 P.2d at 1291. The Coalition and the City intended the *Settlement Agreement* to be an all-or-nothing agreement that resolved the Coalition's protest ***only*** if it was incorporated in its entirety in the Department's approval and the associated partial decree.

The language of the *Settlement Agreement* allows the City to employ 01-181C as mitigation if it will "file the appropriate application for permit and/or transfer." Ex. 4 at 3 (paragraph 1.e of the *Settlement Agreement*). The use of "and/or" in this clause permits the City

to claim mitigation credit for 01-181C by filing (a) an appropriate application for permit, (b) an appropriate transfer, or (c) both. *Id.*

If the Court accepts the Coalition's argument (which the City disputes), that the only mechanism in Idaho to claim mitigation is to file a transfer, to any degree, then option (a) from the preceding sentence is unlawful. In the Coalition's words, the *Settlement Agreement* may "be contrary to the law requiring a transfer – thus causing the *Settlement Agreement* to fail." *Coalition's Resp. Br.* at 15 (citing *AED, Inc. v. KDC Invs., LLC*, 155 Idaho 159, 167, 307 P.3d 176, 184 (2013) ("a contract [that] cannot be performed without violating applicable law is illegal and void"). Therefore, because the *Settlement Agreement* is entire, the failure of one section causes the whole contract to fail, *see Morgan*, 68 Idaho 506, 201 P.2d 976, and a contested case regarding 01-181C should reconvene as a protested application.

2. Given the divergent expressions of intent on the part of the City and the Coalition in entering into the *Settlement Agreement*, it appears the *Settlement Agreement* was never formed.

For a contract to be formed, "there must be a meeting of the minds," which "must occur on all material terms to the contract." *Barry v. Pac. W. Const., Inc.*, 140 Idaho 827, 831, 103 P.3d 440, 444 (2004). At least based on the arguments in this proceeding involving 27-12261, there was never a meeting of the minds between the Coalition and the City as to at least a portion of the *Settlement Agreement*, which is entire. *See* Section III.A.1, *supra*. The testimony of Mayor Reese demonstrates what the City believed the bargain to be with regard to claiming credit for the mitigation provided by 01-181C. Tr., p. 38, l. 5–p. 40, l. 19. Despite presenting no evidence, the Coalition has argued strongly that, in essence, it never shared Mayor Reese's

understanding. As demonstrated by the adversarial proceeding and this litigation, the City's ability to claim mitigation credit for the 2,080.8 AF of seepage is material to both the City and the Coalition. Again, because the *Settlement Agreement* is entire, the failure of one section causes the whole contract to fail. *See Morgan*, 68 Idaho 506, 201 P.2d 976.

B. Even if the *Settlement Agreement* is not a part of 01-181C, the City is still entitled to claim 01-181C's seepage as mitigation for 27-12261.

The effect of the complete failure of the *Settlement Agreement* is more profound on the Coalition than on the City. Before the Director's *Final Order*, the Coalition centered its argument on the *Settlement Agreement* and objected to the City's ability to file 27-12261 without the Coalition's consent, as it claimed was required by the *Settlement Agreement*. While that argument has understandably evolved, given the course of this adversarial proceeding and litigation, the Coalition continues to argue the substance of the *Settlement Agreement*, which puts limits and conditions on the City's use of 01-181C.

While the City is not required by the *Settlement Agreement* to obtain the Coalition's permission before filing 27-12261, *see* Ex. 4 at 3 (paragraph 1.e.), if the *Settlement Agreement* were void for either of the above-described reasons, the realities of the use of 01-181C should still have been considered by the Respondents and the City should have been allowed to claim credit for 01-181C. *See* Section II.A., *supra*.

IV. CONCLUSION.

By the terms of the approval and the partial decree, the *Settlement Agreement* imposes "conditions and limitations" on the City's use of 01-181C, and therefore constitutes an element

of 01-181C. The language of the approval and the partial decree do more than provide notice of the *Settlement Agreement*; by subjecting 01-181C to the "conditions and limitations" of the *Settlement Agreement*, the approval and partial decree incorporated the *Settlement Agreement*.

When considering mitigation for a new water right permit, the circumstances of reality, and not just the black-and-white of the face of a water right must be considered—as demonstrated by the Department's common practice of allowing non-use or limited use of one water right to provide mitigation for a new water right permit. In this case, neither the Coalition nor the Respondents argue against the City's voluntary limitation of use of its Blackfoot River water rights being applied as mitigation for 27-12261, despite "mitigation" not being listed as a beneficial use on any of those water rights.

The City is allowed to claim credit for the mitigation provided by the annual seepage of 2,080.8 AF under 01-181C. The *Final Order* was made in violation of statutory provisions; in excess of the statutory authority of the Department; without support of substantial evidence; and arbitrarily, capriciously, and as an abuse of discretion. The errors have violated the City's substantial right in the proper adjudication of this matter by the application of correct legal standards.

Where, as here, "there is no indication in the record that further findings of fact could be made from the paucity of evidence that would affect the outcome of this case," remand to the Department is unnecessary. *Bonner Gen. Hosp. v. Bonner Cnty.*, 133 Idaho 7, 11, 981 P.2d 242, 246 (1999); *see also* I.C. § 67-5279(3). The Coalition has only ever made a legal argument in this case, which can be answered by this Court upon the record already established because

contract interpretation is a matter of law. This Court should issue an order approving the issuance of a permit for 27-12261 because there are no legal impediments to using ground water recharge under 01-181C to mitigate for 27-12261.

Dated this 2nd day of March, 2016.

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

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the following described pleading or document on the parties listed below by hand delivery, email, mail, or by facsimile, with the correct postage thereon, on this 2nd day of March, 2016.

DOCUMENT SERVED: PETITIONER'S REPLY BRIEF

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

ATTORNEYS AND/OR INDIVIDUALS SERVED:

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

Robert L. Harris

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

G:\WPDATA\RLH\18653-000 CITY OF BLACKFOOT\PLEADINGS\REPLY BRIEF V5.DOCX:SM

State of Idaho
DEPARTMENT OF WATER RESOURCES
322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098
Phone: (208) 287-4800 • Fax: (208) 287-6700 • Website: www.idwr.idaho.gov

C.L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

February 5, 2016

JEFFREY M COOK
KARL T COOK
C/O ROBERT L HARRIS
PO BOX 50130
IDAHO FALLS ID 83405-0130

RE: Water Rights 35-7280, 35-7281, 35-13241, 35-14334, 34-14335, and 35-14336

Dear Water Right Owners:

On December 14, 2015, Fifth Judicial District Judge Eric Wildman affirmed the issuance of Permit 35-14402 with the following condition:

> Rights 35-7280, 35-7281, 35-13241, 35-14334, 34-14335, 35-14336, and 35-14402 when combined shall not exceed a total diversion rate of 8.20 cfs, a total annual maximum diversion volume of 1,221 af at the field headgate, and the irrigation of 560 acres.

Because each of the listed water rights is bound by the condition, IDWR has added the condition to the record for each.

If you have any questions, please call me at 208-287-4947, or email me at shelley.keen@idwr.idaho.gov.

Sincerely,

Shelley W. Keen

Shelley W. Keen, Manager
Water Rights Section

EXHIBIT
tabbies
1