

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

THE CITY OF BLACKFOOT,

Petitioner,

vs.

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

Respondents,

A&B IRRIGATION DISTRICT, BURLEY  
IRRIGATION DISTRICT, MILNER  
IRRIGATION DISTRICT, AMERICAN  
FALLS RESERVOIR DISTRICT #2,  
MINIDOKA IRRIGATION DISTRICT,  
NORTH SIDE CANAL COMPANY and  
TWIN FALLS CANAL COMPANY,

Intervenors.

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

In the name of the City of Blackfoot.

) Case No. CV-2015-1687

)  
) **MEMORANDUM DECISION**  
) **AND ORDER**

**I.**  
**STATEMENT OF THE CASE**

**A. Nature of the case.**

This case originated when the City of Blackfoot (“City”) filed a *Petition* seeking judicial review of a final order of the Director of the Idaho Department of Water Resources (“IDWR” or “Department”). The order under review is the Director’s *Order Addressing Exceptions and Denying Application for Permit* entered on September 22, 2015 (“*Final Order*”). The *Final Order* denies application for permit number 27-12261 filed by the City. The City asserts the *Final Order* is contrary to law and asks this Court to issue an order approving the issuance of a permit pursuant to its application.

**B. Course of proceedings and statement of facts.**

This matter concerns an application to appropriate water filed by the City. The application seeks 9.71 cfs of ground water for the irrigation of 524.2 acres in Bingham County.<sup>1</sup> R., pp.92-105. The City seeks the appropriation for two purposes. *Id.* at 93. First, it currently operates a pump station that diverts water from the Blackfoot River for delivery to irrigators east of I-15. *Id.*; Ex.1, p.1; Tr.,pp.9-10. Due to cost, the City desires to develop a new right to deliver ground water to those irrigators instead of surface water. R., p.98; Ex.1, p.1. Second, the City presently holds water right 27-7577, which permits it to divert ground water for delivery to irrigators west of I-15. Ex.105. To supplement alleged deficiencies with that right, the City desires to develop a new right to deliver additional ground water to those irrigators. R., p.93; Ex.1, p.1.

To compensate potential injury resulting from the appropriation, the City proposes mitigation. Ex.1, pp.2-3. It seeks 1,066 afa of mitigation credit resulting from ground water recharge under water right 01-181C. *Id.* That right permits the City to divert 2,466.80 afa from the Snake River for, among other things, recreation storage at Jensen Grove. Ex.106. Jensen Grove is a recreation area owned by the City which includes a 73-acre reservoir. The reservoir is

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<sup>1</sup> The City’s original application was filed on September 12, 2013. R., pp.1-27. The City subsequently submitted two amended applications. *Id.* at pp.28-58; 92-105.

filled with water from the Snake River under water right 01-181C. Ex.106. The City describes the reservoir operation and alleged recharge as follows:

During the irrigation season, water is continually delivered to the reservoir to maintain its water level. As described in the water right, 1,100 acre-feet remain in the reservoir for recreation storage, 980.9 acre-feet seep into the aquifer, and 186 acre-feet are lost to evaporation. Once delivery of water to Jensen Grove ceases at the end of the irrigation season, the remaining water in the reservoir sinks into the aquifer, adding an additional recharge of 1,100 acre-feet under water right 01-181C. . . . As the water right owner of 01-181C, the applicant proposes to use a portion of this recharge as mitigation for the new application.

Ex.1 p.2. The City seeks an additional mitigation credit of 6.2 afa resulting from the proposed non-use of certain Blackfoot River water rights. *Id.* at 3.

The City's application was protested by the Coalition.<sup>2</sup> R., pp.66-68. Among other things, the Coalition asserts the City failed to establish the new appropriation will not reduce the quantity of water under existing rights. *Id.* An administrative hearing was held before the Department on April 21, 2015. Tr., p.1. Department employee James Cefalo acted as hearing officer. *Id.* at 5. On May 15, 2015, he issued his *Preliminary Order*. R., pp.200-219. He found that the proposed appropriation constitutes a consumptive use of water and, without mitigation, will reduce the quantity of water under existing rights. *Id.* at 207. In evaluating the proposed mitigation, he determined that water right 01-181C does not authorize the City to use water for recharge. *Id.* Notwithstanding, he approved the City's application on the condition that it successfully pursue a transfer to add recharge as an authorized purpose of use under the right. *Id.* at 213-214.

The City filed exceptions to the *Preliminary Order*. *Id.* at 220-245. It challenged the hearing officer's conditional of approval of its application and his requirement that it pursue a transfer of water right 01-181C. *Id.* On September 22, 2015, the Director issued his *Final Order*. *Id.* at 271-277. Like the hearing officer, the Director found that water right 01-181C does not authorize the City to use water for recharge. *Id.* at 272-273. He agreed that a transfer would be required to authorize such use. *Id.* However, the Director disagreed with the conditional approval of the application. *Id.* at 273. Given the uncertainty and complications

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<sup>2</sup> The term "Coalition" refers collectively to the A&B Irrigation District, Burley Irrigation District, American Falls Reservoir District #2, Minidoka Irrigation District, Milner Irrigation District, North Side Canal Company and Twin Falls Canal Company.

associated with a potential transfer, the Director determined that the better approach “is to deny the application, without prejudice, for failure to submit sufficient information for the Department to consider the City’s mitigation plan.” *Id.* The Director therefore rejected the City’s application, and suggested it could refile in conjunction with the pursuit of a transfer of water right 01-181C. *Id.* at 274.

On October 16, 2015, the City filed the instant *Petition*, asserting that the Director’s *Final Order* is contrary to law. The case was reassigned by the clerk of the court to this Court on October 26, 2015. On November 16, 2015, the Court entered an *Order* permitting Coalition members to appear as intervenors. The parties subsequently briefed the issues raised on judicial review. A hearing on the *Petition* was held before the Court on March 10, 2015. The parties did not request the opportunity to submit additional briefing and the Court does not require any. Therefore, this matter is deemed fully submitted for decision on the next business day or March 11, 2015.

## II.

### STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act (“IDAPA”). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1). The court shall affirm the agency decision unless it finds that the agency’s findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). Further, the petitioner must show that one of its substantial rights has been prejudiced. I.C. § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency’s decision that is based on substantial competent evidence in the record. *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency’s decision.



*Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

### III.

#### ANALYSIS

An application for permit to appropriate water is evaluated against the criteria set forth in Idaho Code § 42-203A. One criterion is whether the proposed appropriation “will reduce the quantity of water under existing water rights.” I.C. § 42-203A(5). If so, the Department may reject the application. *Id.* However, an application that may otherwise be rejected 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. The Director held that the appropriation proposed by the City constitutes a consumptive use of water. R., 273. Without mitigation it will reduce the quantity of water available under existing water rights. *Id.* The City contends it presented adequate mitigation to compensate for the consumptive use and asserts that the Director improperly rejected its application. This Court disagrees. For the reasons set forth herein, the Director’s *Final Order* is affirmed.

**A. The Director’s determination that water right 01-181C does not authorize the City to use water for recharge is affirmed.**

Ground water recharge constitutes the lion’s share of mitigation proposed by the City. It asserts recharge is authorized under water right 01-181C. After reviewing the *Partial Decree* for water right 01-181C, the Director held that recharge is not an authorized purpose of use under the right. R., pp.272. This Court agrees. The same rules of interpretation applicable to contracts apply to the interpretation of a water right decree. *A & B Irr. Dist. v. Spackman*, 153 Idaho 500, 523, 284 P.3d 225, 248 (2012). If a decree’s terms are clear and unambiguous, the decree’s meaning and legal effect are questions of law to be determined from the plain meaning of its own words. *Cf., Sky Cannon Properties, LLC v. The Golf Club at Black Rock, LLC*, 155 Idaho 604, 606, 315 P.3d 792, 794 (2013). A decree is ambiguous if it is reasonably subject to conflicting interpretations. *Cf., Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 308, 160 P.3d 743,

747 (2007). Whether a decree is ambiguous is a question of law over which this Court exercises free review. *Id.*

**i. Recharge is not an authorized use under the purpose of use element of the *Partial Decree*.**

The plain language of the *Partial Decree* sets forth the uses authorized thereunder.

Ex.106. The purpose of use element unambiguously provides that water may be diverted for: (1) irrigation storage, (2) irrigation from storage, (3) diversion to storage, (4) recreation storage, and (5) irrigation. *Id.* Notwithstanding, the City asserts it is also authorized to use water for recharge under the right. It relies on the other provisions element of the *Partial Decree*, which provides in part:

The diversion and use of water under transfer 72385 is subject to additional conditions and limitations contained in a settlement agreement-IDWR transfer of water right, transfer no. 72385, date June 2006, including any properly executed amendments thereto, entered into by and between the New Sweden Irrigation District, the City of Blackfoot, A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, Twin Falls Canal Company, and North Side Canal Company. The settlement agreement has been recorded in Bingham County (Instrument No. 575897) and Bonneville County (Instrument No. 1249899) and is enforceable by the parties thereto.

*Id.* The City asserts that the referenced settlement agreement acknowledges its ability to use water for recharge. Further, that the other provisions element, by way of reference to that agreement, authorizes recharge as an additional purpose of use under the right.

The City's argument is untenable. Water rights are defined by elements. I.C. § 42-1411(2).<sup>3</sup> One defining element is purpose of use. I.C. § 42-1411(2)(f). In a general stream adjudication, the court must decree each purpose of use authorized under a state-based claim. I.C. §§ 42-1411 and 1412. The adjudication statutes require those uses be set forth in the purpose of use element of the decree. *Id.* The City's argument that the other provisions element may

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<sup>3</sup> See also *e.g.*, *Olson v. Idaho Dept. of Water Resources*, 105 Idaho 98, 101, 666 P.2d 188, 191 (1983) (providing, "[a] water right is defined, not in terms of metes and bounds as in other real property, but in terms of priority, amount, season of use, purpose of use, point of diversion and place of use").

authorize additional uses of water not identified in the purpose of use element is inconsistent with Idaho law. *Id.*

The other provisions element of a *Partial Decree* serves several purposes. It may set forth conditions on the exercise of a water right. I.C. § 14-1411(2)(i). It may also contain remarks to define, clarify or administer a right. I.C. § 14-1411(2)(j). It may not, however, enlarge another defining element of a water right. For instance, the other provisions element cannot authorize the use of a larger quantity of water than that set forth in the quantity element of a decree. This is because the adjudication statutes specially require the authorized quantity to be set forth in the quantity element of a decree. I.C. § 14-1411(2)(c). Under the same rationale, it cannot enlarge the purpose of use element of a water right by authorizing additional uses of water not identified therein. I.C. § 14-1411(2).

The other provisions element relied upon by the City recognizes this and contradicts its position. It begins, “[t]he diversion and use of water under transfer 72385 is subject *to additional conditions and limitations* contained in a settlement agreement.” Ex.106 (emphasis added). It is appropriate for the other provisions element of a partial decree to contain “additional conditions and limitations” on the exercise of a right. I.C. §§ 14-1411(2)(i) and (j). However, it is the City’s position that the other provisions element of its *Decree* does far more than that. It argues it fundamentally changes how water under the right may be used. It argues it expands the right to authorize a use of water not identified under the purpose of use element. What the City argues is not an additional condition and limitation. It is an impermissible expansion of the purpose of use element of the water right.

There is no ambiguity in the purpose of use element of the *Partial Decree* issued for water right 01-181C. It authorizes the City to divert water for five purposes of use. Recharge is not one of them. The City argues that recharge was not included in the purpose of use element because it would have been too burdensome to list all of the conditions on its ability to use water for that purpose.<sup>4</sup> The Court does not follow the argument. It is not too burdensome to place the term “recharge” under the purpose of use element. This is simply done.<sup>5</sup> If there are numerous

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<sup>4</sup> The City alleges these conditions are set forth in the settlement agreement.

<sup>5</sup> In fact, the Draft Approval of Transfer 72385 prepared by the Department specifically included ground water recharge as a purpose of use and referred to the settlement agreement. Ex. 103. Ultimately, the final transfer still referred to the settlement agreement but omitted recharge as a purpose of use. Ex. 105.

conditions on the exercise of that use, those conditions may be set forth in the other provisions element of the right. That is the purpose of that element. I.C. §§ 14-1411(2)(i) and (j).

Therefore, if the City believed water right 01-181C authorized it to divert water for recharge, it is not burdensome to identify “recharge” under the purpose of use element – it is necessary.<sup>6</sup>

Further scrutiny of the *Decree* reinforces that recharge is not an authorized purpose of use. An examination of the period of use element reveals the absence of any identified period of year wherein the City is authorized to use water for recharge. The adjudication statutes require a decree to include the period of the year when water may be used for each authorized purpose of use. I.C. § 42-1411(2)(g). Likewise, the *Decree* fails to identify the quantity of water which may be used by the City for recharge.<sup>7</sup> For the reasons set forth herein, the City’s argument that it is authorized to use water for recharge is inconsistent with the plain and unambiguous language of its *Partial Decree*.

**ii. This proceeding is not the proper time or place to raise the argument that recharge is an authorized purpose of use.**

If the City believed recharge should be authorized under water right 01-181C, this proceeding is not the proper time or place to raise that argument. Some history is relevant here. Water right 01-181C was acquired by the City in 2005 to fill and maintain the reservoir at Jensen Grove. Ex.5. It was purchased from the New Sweden Irrigation District, which used the right for irrigation purposes. *Id.* To change the nature of use to accommodate Jensen Grove, the City filed an application for transfer with the Department. Ex. 6. In addition to irrigation, it sought to

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<sup>6</sup> In interpreting whether the *Decree* issued for water right 01-181C authorizes recharge, the Director relied upon the plain language of the purpose of use element. R., p.272. He did not engage in an interpretation of the settlement agreement referenced the other provisions element. *Id.* The City argues that the Director erred in this respect. For the reasons set forth herein he did not.

<sup>7</sup> Under the quantity element, the *Decree* authorizes the diversion of 980.80 afa for “seepage losses.” Ex.106. The City appears to argue that 980.80 afa is therefore the quantity of water it is authorized to use for recharge purposes. This Court disagrees. The seepage loss was quantified by the Director, and approved by this Court, to justify a total authorized diversion of water under the right that exceeds the capacity of the reservoir. In this respect it is similar to the Director’s recognition of conveyance loss when quantifying certain irrigation rights. However, seepage loss does not automatically equate to authorized recharge. Here, since recharge is not an authorized purpose of use under the right, neither the Director nor the Court was required to evaluate whether all of the water that is attributed to seepage losses for purposes of quantifying the right indeed acts to, and/or should be authorized as, recharge ground water.

add “recreation,” “storage” and “recharge” as authorized uses under the right. *Id.* at 1 and 4. The Coalition initially protested the transfer, but ultimately withdrew that protest pursuant to a settlement agreement.<sup>8</sup> Ex. 4, p.2. On February 14, 2007, the Director approved the City’s transfer for the following purposes of use:

<u>Beneficial Use</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Volume</u>
Diversion to Storage	04/01 to 10/31		46.00 CFS	
Irrigation	04/01 to 10/31		1.0 CFS	200.0 AF
Irrigation Storage	01/01 to 12/31			200.0 AF
Irrigation from Storage	04/01 to 10/31			200.0 AF
Recreation Storage	01/01 to 12/31			2,266.8 AF

Ex.105., p.2. Notably, he did not approve the City’s request to add recharge as an authorized purpose of use. *Id.* In fact, recharge was deliberately withheld from the approved transfer. Ex.8; Ex.103. If the City believed the Director erred in this respect, it was required to timely exhaust its administrative remedies and, if necessary, seek judicial review. I.C. §§ 67-5271, *et seq.* It did neither.

Then, on May 29, 2009, the SRBA District Court entered a *Partial Decree* for the right in the Snake River Basin Adjudication. Ex.106. When the Director issued his recommendation for the right, he did not recommend a recharge purpose of use. *Amended Director’s Report*, Twin Falls County Case No. 39576, subcase no. 01-181C (April 16, 2007). If the City believed it was authorized to divert water for recharge, it had a duty to timely object to the Director’s recommendation and present evidence to rebut the same in the SRBA. I.C. § 42-1411(5). It did not. The SRBA District Court proceeded to enter a *Partial Decree* for the right consistent with the Director’s recommendation. Ex.106. The uses of water authorized under the *Decree* are ascertainable from a simple reading of the purpose of use element. They did not include recharge. If the City believed the Court erred in failing to identify recharge as an authorized purpose of use, it was required to timely appeal. I.A.R. 14. It is inappropriate to now argue, in the context of this judicial review proceeding, that the *Partial Decree* issued for 01-181C authorizes a use of water not identified in the purpose of use element of that *Decree*.

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<sup>8</sup> This is the settlement agreement reference in the other provisions element of the *Partial Decree*.



**B. The Director's determination that the City must pursue a transfer if it desires to divert water for recharge is affirmed.**

In his *Final Order*, the Director held that "if the City wants to use Right 01-181C as mitigation through ground water recharge, it must file a transfer." R., p.272. The Director is correct. Idaho Code § 42-222(1) requires that any person who desires to make a change to the nature of use of a water right shall make application to the Department for approval of such change. Therefore, if the City desires to add recharge as an authorized purpose of use under 01-181C, it must follow the transfer requirements set forth in Idaho Code § 42-222.

The City argues that the Director has previously approved mitigation for new appropriations in the context of an appropriation proceeding, without requiring the applicant to undergo a separate transfer proceeding. It cites to application for permit number 35-14402 in the name of Karl and Jeffrey Cook and application for permit number 35-14240 in the name of Lance and/or Lisa Funk Partnership, among others. The cases cited are distinguishable. The mitigation proposed in those cases consisted of the non-use of existing water rights. A transfer is not required under Idaho Code § 42-222 to effectuate the non-use of an existing right. Using his authority under IDAPA 37.03.08.045.01.a.iv., the Director can approve such non-use to mitigate losses and memorialize it as a condition of approval of an application for permit. Here, the City does not propose the non-use of water right 01-181C. Rather, it proposes using the right for the additional purpose of recharge in order to mitigate for a new appropriation. To do so, Idaho law requires the City to file a transfer application with the Department to add recharge as an authorized purpose of use under that right. I.C. § 42-222.

A transfer application is necessary to ensure the additional purpose of use satisfies the criteria set forth in Idaho Code § 42-222. When the City transferred the 01-181C right for use at Jensen Grove, among other things, the Director approved a storage volume greatly exceeding the reservoir's capacity of 1100 AF. The transfer authorized storage of 2466.80 AFY, or over twice the reservoir's capacity. The excess volume recognized the extensive seepage loss due to the permeable nature of the reservoir bed. As a general matter, extensive carriage and/or seepage loss can be a basis for the disapproval of a transfer or placing conditions on the transfer so as to reduce carriage or seepage loss. Despite extensive seepage loss, the City's transfer was approved, in part due to the non-consumptive nature of the transfer and the benefits that would accrue to the ESPA and the Snake River. Ex.102. To now use those same considerations as the



basis to support a new consumptive use without going through a transfer proceeding potentially undermines the very considerations that supported the transfer in the first place. A transfer is therefore necessary so that the Director may reevaluate the entire right taking into account the additional purpose to ensure that the criteria set forth in Idaho Code § 42-222 are still being met. As it now stands, if the City's position is to be accepted that the transfer already approved recharge for mitigation, a quantity determination for such a purpose has never been made. As such, would the City be authorized to use the entire non-consumptive portion of the right as recharge to support mitigation or some lesser quantity? Attempting to address the issue in the context of the proceedings for a new groundwater right doesn't resolve the issue of how much water is authorized for recharge under the 01-181C water right.

In its briefing, the City recognizes there are limitations on the ability to claim recharge as the basis for a new or expanded water right. These limitations are set forth in Idaho Code § 42-234(5). The City argues that the recharge it alleges is not subject to the limitations of Idaho Code § 42-234(5). The Director did not reach this issue in his *Final Order*. He was careful not to prejudge any legal issues that may arise in the context of a potential transfer proceeding. R., p.273. The Court affirms the Director in this respect. Whether a transfer of water right 01-181C implicates Idaho Code § 42-234(5) is an issue appropriately raised in the context of a transfer proceeding. As a result, the Court does not address the issue here.

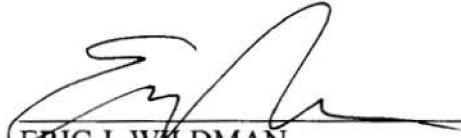
**C. The Director's determination to reject the City's application is affirmed.**

The Director has the authority to reject an application to appropriate water where the appropriation "will reduce the quantity of water under existing water rights." I.C. § 42-203A(5). He did so here, finding that the City's application "will reduce the amount of water available to satisfy water rights from sources connected to the Eastern Snake Plain Aquifer." R., p.273. The Director's finding is supported by the record. It is undisputed that the proposed appropriation constitutes a consumptive use of water, and as discussed above, the mitigation proposed by the City to offset that use is not legally viable at present. Since the Director did not abuse his discretion or act contrary to law in rejecting the City's application, his *Final Order* must be affirmed.

**IV.**  
**ORDER**

Therefore, based on the foregoing, IT IS ORDERED that the Director's *Order Addressing Exceptions and Denying Application for Permit* entered on September 22, 2015 is **hereby affirmed.**

Dated Apr. 16, 2016

  
ERIC J. WILDMAN  
District Judge

**CERTIFICATE OF MAILING**

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER was mailed on April 06, 2016, with sufficient first-class postage to the following:

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