

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

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

**ORDER ADDRESSING EXCEPTIONS
AND DENYING APPLICATION FOR
PERMIT**

PROCEDURAL HISTORY

On September 12, 2013, the City of Blackfoot (“City”) filed Application for Permit No. 27-12261 (“Application”) with the Idaho Department of Water Resources (“Department”). The application was amended on September 2, 2014, and again on January 27, 2015. A joint protest was filed by A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company and Twin Falls Canal Company, represented by attorney Paul Arrington, and American Falls Reservoir District #2 and Minidoka Irrigation District, represented by attorney Kent Fletcher (protestants collectively referred to as the “Coalition”).

An administrative hearing was conducted on April 21, 2015, in Blackfoot, Idaho. A *Preliminary Order Issuing Permit* (“Preliminary Order”) was issued June 30, 2015. The City filed *Exceptions to Preliminary Order Issuing Permit* (“Exceptions”) July 14, 2015. The Coalition filed a *Response to City of Blackfoot’s Exception to Preliminary Order Issuing Permit* on July 28, 2015.

EXCEPTIONS TO PRELIMINARY ORDER

The City takes exception to the following items in the *Preliminary Order*:

1. Findings of Fact ¶¶ 33-34.
2. Evaluation Criteria/Analysis ¶¶ 7-19, 23-24, 31-33, and 42.
3. Conclusions of Law (only one conclusion of law was provided).

Exceptions at 10.

Specifically, the City objects that:

1. The Hearing Officer did not correctly apply principles of contractual interpretation-specifically, the Hearing Officer ignored the plain language of the

Settlement Agreement and considered parol evidence without finding any of the provisions of the *Settlement Agreement* to be ambiguous.

2. The Hearing Officer failed to follow Department policy by requiring a transfer for 01-181 C to be filed to include "mitigation" or "ground water recharge" as beneficial uses. The Hearing Officer was also arbitrary and capricious by treating the mitigation provided by the Blackfoot River water rights-wherein the Hearing Officer allowed the mitigation to be addressed through the permit conditions of 27-12261 only-differently than the mitigation provided by 01-181 C, wherein the Hearing Officer required a transfer to be approved before it can be used to mitigate for 27-12261.

3. Questions of injury were already addressed in this contested case because the Coalition stipulated that the only concerns it had were limitations contained in the Settlement Agreement. Because this issue has already been addressed, under principles of *res judicata*, the City should not be required to file a transfer application to permit the Coalition to have a second bite at the apple.

Exceptions at 11, emphasis in original.

The City's arguments focus on two things 1) interpretation of the Settlement Agreement reached by the parties in connection with Transfer No. 7238 (Ex. 4) and 2) whether the City must file a transfer to use right 01-181C for recharge and use it to mitigate for the proposed new use. First, the Settlement Agreement does not in any way affect the Director's decision in this matter. The decision can be made using principles of Idaho water law without referring to the Settlement Agreement. Therefore, principles of contract interpretation will not be considered or discussed.

Right 01-181C has five beneficial uses listed: diversion to storage, irrigation, irrigation storage, irrigation from storage, and recreation storage. Ex. 105 at 2; Ex. 106 at 2. Nothing in Transfer No. 7238 or the Partial Decree issued by the Snake River Basin Adjudication indicate Right 01-181C can be used for ground water recharge. The City in its *Exceptions*, says the benefits associated with seepage under 01-181C were approved and expressly included as an element in the Settlement Agreement. *Exceptions* at 21. However, ground water recharge and ground water recharge storage were deliberately removed from the beneficial uses listed in Transfer No. 7238. See Ex. 8; Ex. 103; Preliminary Order Findings of Fact Nos. 31-35. Without expressly listing recharge as a beneficial use, any recharge to the aquifer achieved by diversion and use under Right 01-181C, is merely incidental recharge and cannot be "used as the basis for claim of a separate or expanded water right." Idaho Code § 42-234(5). Therefore if the City wants to use Right 01-181C as mitigation through ground water recharge, it must file a transfer. See Idaho Code 42-222.

The City also argues "approval of 01-181C's seepage as mitigation for 27-12261 should be addressed through the conditions of approval for 27-12261. This is something that the Department does routinely, and in fact, the Hearing Officer did so in this very proceeding..." *Exceptions* at 21. What the City ignores with this argument is mitigation through non-use of a water right is not the same as changing the beneficial use of a water right to provide mitigation.

Again, Right 01-181C does not provide for mitigation or ground water recharge as a beneficial use. If the City would like to use Right 01-181C for mitigation through ground water recharge it must file a transfer.

The City also argues that the question of injury has already been addressed and “addressing it again in a transfer proceeding is barred by res judicata. . . .” Exceptions at 22. However the analysis used in approving a new water right under Idaho Code § 42-203A(5) is a different analysis than one made for a transfer under Idaho Code § 42-222. A transfer of beneficial use of Right 01-181C was not and is not before the Department. In order for the Department to do the full and appropriate analysis of a change in beneficial use of Right 01-181C, the City must file a transfer. The doctrine of res judicata does not apply here.

FURTHER ANALYSIS ON REVIEW

The Application constitutes a consumptive use of water and, without mitigation, would reduce the amount of water available to satisfy water rights from sources connected to the Eastern Snake Plain Aquifer. *Preliminary Order Evaluation/Criteria Analysis No. 6*. “An 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 37.03.08.45.01.a.iv (emphasis added).

In the *Preliminary Order*, the hearing officer conditionally approved the application pending approval of a yet-to-be-filed transfer application and pending a determination of how much water is available for recharge/mitigation in that transfer application proceeding. The hearing officer deferred consideration of key issues related to the mitigation plan to the yet-to-be-filed transfer proceeding. *See Evaluation/Criteria Analysis Nos. 12-13*. The hearing officer also deferred analysis of consumptive use and the amount of water available to mitigate using right 01-181C to the yet-to-be-filed transfer proceeding. *See Evaluation/Criteria Analysis Nos. 31-34*.

The hearing officer is correct that, until the transfer application is filed, it is difficult to determine how much water is available for mitigation. However, given the uncertainty and complications associated with the City’s yet-to-be-filed transfer, the better approach in this case is to deny the application, without prejudice, for failure to submit sufficient information for the Department to consider the City’s mitigation plan. The analysis of how much water is being consumptively used, what water is available for mitigation credit, and other information regarding the mitigation plan should not be deferred to future proceedings. The analysis of a transfer application for right 01-181C needs to correspond with an analysis of the proposed mitigation plan, and both analyses should be presented to the Department at the same time so IDWR can fully consider the proposed mitigation.

ORDER

IT IS HEREBY ORDERED that the *City of Blackfoot's Exceptions to Preliminary Order Issuing Permit* are **REJECTED**.

IT IS FURTHER ORDERED that Application for Permit No. 27-12261 is **DENIED** without prejudice. The denial shall not prevent the City of Blackfoot from resubmitting the application along with a transfer application that would allow the Department to fully consider the City's mitigation plan as part of the application for permit process.

Dated this 22nd day of September, 2015

A handwritten signature in black ink, reading "Gary Spackman", is written over a horizontal line.

GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of September 2015, a true and correct copy of the document described below was served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed, to the following:

Document Served: Order Addressing Exceptions and Denying Application for Permit and Explanatory information to accompany a Final Order

City of Blackfoot
c/o Mayor Paul Loomis
157 North Broadway
Blackfoot, ID 83221

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Debbie Gibson
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
 - (a) The petition for reconsideration is disposed of; or
 - (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.
- (7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days: a) of the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.