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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

CITY OF IDAHO FALLS, CITY OF
POCATELLO, CITY OF BLISS, CITY OF
BURLEY, CITY OF CAREY, CITY OF
DECLO, CITY OF DIETRICH, CITY OF
GOODING, CITY OF HAZELTON, CITY
OF HEYBURN, CITY OF JEROME, CITY
OF PAUL, CITY OF RICHFIELD, CITY
OF RUPERT, CITY OF SHOSHONE, and
CITY OF WENDELL

Petitioners,

vs.

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

Respondents,

and

Case No. CV01-23-13238

**PETITIONERS' REPLY IN
SUPPORT OF MOTION
TO AUGMENT THE RECORD**

Fee Category: Exempt
Idaho Code § 67-2301

IDAHO GROUND WATER
APPROPRIATORS INC., A&B
IRRIGATION DISTRICT, BURLEY
IRRIGATION DISTRICT, MILNER
IRRIGATION DISTRICT, NORTH SIDE
CANAL COMPANY, TWIN FALLS
CANAL COMPANY, AMERICAN FALLS
RESERVOIR DISTRICT #2, MINIDOKA
IRRIGATION DISTRICT, BONNEVILLE-
JEFFERSON GROUND WATER
DISTRICT, and BINGHAM
GROUNDWATER DISTRICT,

Intervenors.

IN THE MATTER OF THE
DISTRIBUTION OF WATER TO
VARIOUS WATER RIGHTS HELD BY
AND FOR THE BENEFIT OF A&B
IRRIGATION DISTRICT, AMERICAN
FALLS RESERVOIR DISTRICT #2,
BURLEY IRRIGATION DISTRICT,
MILNER IRRIGATION DISTRICT,
MINIDOKA IRRIGATION DISTRICT,
NORTH SIDE CANAL COMPANY, AND
TWIN FALLS CANAL COMPANY

COME NOW the Cities of Idaho Falls, Pocatello, Burley, Bliss, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell (“Petitioners”), by and through their respective counsel, and hereby file this reply brief in support of their October 20, 2023 *Amended Motion to Augment the Record* (“Motion”) and to specifically address the arguments set forth in the Surface Water Coalition’s (“SWC”) opposition brief (“Opposition”), dated November 2, 2023.

1. **Petitioners’ Motion is not Procedurally or Substantively Deficient**

Contrary to the SWC’s arguments, Petitioner’s *Motion* is not procedurally or substantively deficient. The *Motion* satisfied the alternative requirement, under Idaho Appellate Rule (“I.A.R.”) 30, to attaching the documents requested to be augmented to the *Motion*, which is to “establish by citation to the record or transcript that the document was presented to the district court.”¹ See *Motion* at 2-3 (citing documents). The SWC also overlooks that the *Motion* stated, as grounds for the request, that augmenting the record with the requested documents would “provide context” to the Court on Petitioners’ due process allegations. *Id.* at 3.

2. **Petitioners’ Requested Documents are Material, Relate to the Validity of the Departments’ Action, and There is Good Reason They Were not in the Record**

The SWC also argues that the Court should deny the *Motion* based on the factors in Idaho Code § 67-5276(1). *Opposition* at 6-8. This is incorrect. The documents that Petitioners request be added to the record—the motion, response, and order on reconsideration—corroborate Petitioners’ due process allegations by showing that the Department discovery limitations rendered it “impossible for Petitioners to satisfy certain ‘clear and convincing’ evidentiary standards.” *Notice of Appeal and Petition for Judicial Review* at 4.

The requested documents are material, and directly relate to issues in the *Post-Hearing Order*,² because they paint the full picture of how the Department deprived Petitioners of having their day in court when litigating the *Fifth Methodology Order*.

¹ “[O]r, by analogy, the agency.” *Opposition* at 8.

² The subject of the instant appeal.

Director Spackman unduly limited discovery prior to the June hearing, and denied Petitioners' requests to continue the hearing and allow for sufficient discovery, on the basis that "time is of the essence" *See* R. at 300. Later, when time was not of the essence,³ Petitioners sought permission to conduct discovery on the same aspects in the *Fifth Methodology Order* for which they allegedly had insufficient evidence, but the Director again denied the request. *See* R. at 1169-75. This entire sequence demonstrates that the Department's discovery limitations on the *Fifth Methodology Order* were not to ensure timely administration but to prevent Petitioners from gathering and developing necessary data and information, which is exactly what happened. The requested documents contain discussion that sheds light on this issue.

And, as identified in the *Motion*, there is good reason why the requested documents did not appear in the settled record: they were filed after the Department lodged the initial record and after Petitioners' deadline to object thereto. While the requested documents were subsequent filings, they are direct outgrowths of documents already in the record and provide important details on issues being appealed.

In sum, the Court should augment the record with Petitioners' requested documents based on the factors contained in Idaho Code § 67-5276(1).

3. The SWC Cannot Have it Both Ways

The SWC repeatedly argues that the requested documents be excluded from the record because they relate to a *separate* request and a *separate* order. *Opposition* at 6-8. Before the Department, however, the SWC argued that Petitioners cannot conduct discovery

³ By this time, the Department had already determined that there was no shortfall in 2023. *See* R. at 1061-62.

following the *Sixth Methodology Order* because Petitioners already had their chance to litigate the *Fifth Methodology Order*, and the two orders are effectively one in the same. *See* R. at 1155-63. Here, they argue that the requested documents are “wholly separate” and “wholly independent” from the *Fifth Methodology Order*. *Opposition* at 6, 7. The Court should disregard SWC’s contradictory argument here on principles of judicial estoppel. *See, e.g., Med. Recovery Servs., Ltd. Liab. Co. v. Eddins*, 169 Idaho 236, 243 (2021).

Respectfully submitted this 7th day of November 2023.


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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 2023, I served the foregoing document on the persons below via iCourt and/or email:

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