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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 HEYBURN,
Petitioner,

vs.

THE IDAHO DEPARTMENT OF WATER
RESOURCES,
Respondent.

Case No. CV01-25-19943

CITY OF HEYBURN'S REPLY

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 87938 IN THE NAME OF
THE CITY OF HEYBURN

COMES NOW Petitioner, the City of Heyburn ("City" or "Heyburn"), by and through its
counsel of record, McHugh Bromley, PLLC, and hereby replies to the *Memorandum in
Opposition to Petition for Rehearing* filed by the Idaho Department of Water Resources'
("Department" or "IDWR").

I. ARGUMENT

A. The Relief Requested By Heyburn Is Proper

According to the Department: “Heyburn’s first and second forms of relief requested exceed the Court’s authority on judicial review. In *Idaho Power Co. v. Idaho Dep’t of Water Resources*, the Idaho Supreme Court explained that under I.C. § 67-5279, a reviewing court may only ‘affirm the agency action, or set it aside, in whole or in part, and remand for further proceedings as necessary’; it is not authorized to direct the agency to grant the substantive relief requested by a party. *Idaho Power Co. v. Idaho Dep’t of Water Res.*, 151 Idaho 266, 276, 255 P.3d 1152, 1162 (2011).” *IDWR Opp. Br.* at 8. There, the Idaho Power Company was asking the Court to issue “a license by operation of law . . . and whether IDWR breached its statutory duty by delaying the issuance of the license.” *Idaho Power Co. v. Idaho Dept. of Water Res.*, 151 Idaho 266, 276, 255 P.3d 1152, 1162 (2011). The Court concluded that Idaho law prevented it from doing so: “Idaho Power has failed to cite any legal authority from this Court, nor does there appear to be any, indicating that a water user is entitled to a license by operation of law in the event that the Department delays issuance of the license.” *Id.*

Here, Heyburn does not request a license to issue by operation of law. The relief that Heyburn is seeking is for the Court to reconsider its decision as to the Enlargement Condition, with the Enlargement Condition properly before the Court. I.C. § 42-222(1) (“director . . . shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement”) (emphasis added). If Heyburn is successful, then the Court will issue a decision that requires the Department to do something, with those options ranging from setting aside the Final Order, in whole or in part, or to remand

the matter as necessary, in whole or in part. Heyburn is not asking for impermissible relief or for the Court to act inconsistently with its authority on judicial review.

B. The Volume Of Water At Issue Is 40.30 Acre-Feet

For the first time in these proceedings, IDWR is engaging with the facts, stating that the volume of water that is at issue is not 40.30 acre-feet, but is instead “29.2 acre-feet.” *IDWR Opp. Br.* at 4-5, fn. 1. As testified to by Dr. Brockway, the volume at issue is 40.30 acre-feet, Tr. p. 37, lns. 4-10, with the Hearing Officer further questioning Dr. Brockway regarding the quantity, Tr. p. 40, lns. 18-25, p. 41, lns. 1-13. Neither the Hearing Officer nor Dr. Brockway equivocated as to the proper calculation. Even assuming *arguendo* that IDWR is correct, then the Enlargement Condition will require the City to discharge more water to the Snake River at the wastewater treatment plant, not less. As explained throughout these proceedings, the City has committed to the ongoing discharge of 40.30 acre-feet, with substantial evidence in the record supporting that quantity.

C. The Enlargement Condition Ensures That The Wayside Rights Are Not Enlarged

The Department incorrectly states: “If the Wayside Rights are being used more consumptively after the transfer, they cannot continue supplying the same 40.3 acre-feet of historical return flows the condition requires.” *IDWR Opp. Br.* at 6. Systems with multiple water rights are nothing new for IDWR, with the Department never requiring water right holders to prove which molecules belong to which water rights. The City should not be subjected to a different standard than other water users. To the extent the Department is relying on a new and overly restrictive interpretation of I.C. § 42-222(1) to preserve its position, it should not be entitled to deference. I.C. § 67-5279(5) (“the court shall exercise any remaining doubt in favor of a reasonable interpretation that limits agency power and maximizes individual liberty”); *State*

v. Doe, 140 Idaho 271, 275, 92 P.3d 521, 525 (2004) (“[t]he Court disfavors constructions that would lead to absurd or unreasonably harsh results . . . it is incumbent upon a court to give a statute an interpretation which will not render it a nullity”).

As demonstrated in the record and through testimony, the quantity of water that is pumped by the City from the Eastern Snake Plain Aquifer is authorized by valid water rights with their own unique priority dates, rates of diversion, and volumes. Therefore, when the Wayside Rights are in priority, they may be pumped, and when they are out of priority, then they cannot. In addition, the amount of water that infiltrates into the City’s wastewater collection system is also understood, as well as the amount of water that is treated and then discharged into the Snake River. According to the Department: “Heyburn simultaneously argues that the City can easily continue discharging this amount because it already returns substantially more than 40.30 acre-feet through its wastewater treatment facility. This implies that the replacement water will come from the City’s broader municipal system rather than the Wayside Rights.” *IDWR Opp. Br.* at 7 (internal citation omitted). Not so. Knowledge of infiltration in relation to the City’s overall pumping was presented in order to demonstrate that the City can trace the water that is diverted by the Wayside Rights until the water is discharged by the City into the Snake River, with the ability for the Enlargement Condition to be administered. As testified to by Dr. Brockway, the Enlargement Condition “is just about as simple as they come.” Tr. p. 39, lns. 18-19.

D. The City Consents To Monthly Reporting

According to the Department, finer granularity is needed for the Enlargement Condition to be administrable: “The [Enlargement C]ondition . . . relies on after-the-fact enforcement rather than preventing enlargement in the first place. If the Department determines from an annual

report that the condition has been violated, it must still investigate the violation, provide notice, and pursue appropriate enforcement. By the time this process is complete, the enlargement and resulting injury will have already occurred.” *IDWR Opp. Br.* at 7.

While the Court knows that IDWR relies on after-the-fact reporting and accounting to ensure water right compliance – oftentimes on an annual basis – the Enlargement Condition did propose annual reporting. R. 000213, Ex. 10. However, as testified to by Dr. Brockway, the City keeps “monthly data for well pumping [and] waste water treatment plant discharge” Tr. p. 32, lns. 21-22. The reason the City keeps data in this way is because it is required to submit monthly reporting to the Idaho Department of Environmental Quality (“IDEQ”), as mandated by its National Pollutant Discharge Elimination System (“NPDES”) permit.¹ *See also* Tr. p. 38, lns. 6-19 (discussing IDEQ reporting). Indeed, if the City fails to meet its compliance requirements, it will be subject to “fines or even criminal charges.” Tr. p. 39, lns. 2-3. Because Heyburn is already filing monthly reports with IDEQ, it is well-positioned to do the same when it comes to IDWR, and will do so.

II. CONCLUSION

Heyburn, like many Idaho cities, is growing and will continue to grow and annex land and water rights into its service area. *See City of Challis v. Consent Caucus*, 159 Idaho 398, 361 P.3d 485, 498 (2015) (J. Jones dissenting) (“The framers of the Idaho Constitution were . . . people who looked to the future. They hoped and expected that cities in Idaho would grow, that municipal services for those cities would necessarily expand”). The ability to transfer valid

¹ The Court may take judicial notice of the City’s current NPDES permit, with the reporting requirement shown on page 10: <https://19january2021snapshot.epa.gov/sites/static/files/2017-12/documents/r10-npdes-heyburn-id0020940-final-permit-2001-20pp.pdf> (visited July 15, 2026) (“Monitoring results shall be summarized each month on the Discharge Monitoring Report (DMR) form (EPA No. 3320-1) or an equivalent. The reports shall be submitted monthly and are to be postmarked by the 10th day of the following month”).

water rights into its municipal system is important for the City and its residents because it will assist with growth.

Heyburn is fully cognizant of the Court's decision in *Riverside Irr. Dist. v. Idaho Dept. of Water Res.*, Canyon County Case. No. CV14-21-05008 (Dec. 28, 2021), with the City attempting to work with the decision, not against it. In *Riverside*, the Court stated that a city who elects to treat its wastewater may fully consume its municipal water rights without constituting an enlargement:

The nature and use of the beneficial use of a municipal right is such that the right can be fully consumed without engaging in waste or violating a beneficial use duty of water. One of the authorized uses of a municipal water right is sewage conveyance. Absent treatment, unlike unconsumed water associated with other types of water rights, municipal effluent not meeting specified regulatory standards cannot be conveyed back into a water source for beneficial use by other appropriators.

. . . .

Alternatively, a municipal right holder electing to fully treat, recycle and continuously reuse its effluent within the parameters of its water right may do so under principles of recapture and reuse also without increasing beneficial use or violating a duty of water. The nature of the purpose of use of a municipal right is such that the right can be fully consumed without violating a beneficial use duty of water and without exceeding the authorized scope of the water right.

Riverside at 10 (emphasis added).

The Enlargement Condition is offered as a trade-off. By committing to the ongoing discharge of 40.30 acre-feet into the Snake River, the City cannot fully consume the Wayside Rights; thus, maintaining status quo, while preserving the legitimate element of volume that is associated with the rights. Through the Enlargement Condition, and with monthly reporting to the Department to demonstrate compliance, the Wayside Rights can be administered to accomplish this outcome.

DATED this 16th day of July, 2026.

/s/ Chris M. Bromley
Chris M. Bromley
McHugh Bromley, PLLC
Attorneys for City of Heyburn

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of July, 2026, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by electronic service:

IDAHO DEPARTMENT OF WATER RESOURCES
PO Box 83720
Boise, ID 83720
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/s/ Chris M. Bromley
Chris M. Bromley