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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

JOHN B. KUGLER Petitioner, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his official capacity as Interim Director of the Idaho Department of Water Resources, Respondents.	)	Case No. CV-2011-1567 REPLY MEMORANDUM
IN THE MATTER OF PERMIT TO APPROPRIATE WATER NO. 35-8359 IN THE NAME OF JOHN B. KUGLER & DIANE K. KUGLER	)	

Counsel for respondents asserts that appellant's request for an opportunity to present additional evidence is not sufficiently described as relevant and that it is prejudicial to IDWR. Appellant has specifically identified two witnesses whose testimony is offered as a supplement to the record. Those two witnesses were specifically identified. Additionally, with respect to two of the conversations they were specifically identified as with whom they occurred as well as when they occurred. Those two conversations were with an identified respondent in this proceeding. As to the earliest identified conversation the position of the employee and the general time of happening were also set forth. A potential identification was

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also made with respect as to the name of the person involved and counsel's assertion of prejudice is that Mrs. Gibson and/or her predecessor are no longer employed by the department. Counsel did not inform this court that she knows or could readily ascertain where Mrs. Gibson is now working for a different governmental agency and that most likely she could have identified from IDWR records, if it was a person other than Mrs. Gibson, who and possibly where that employee went. That information was not and is not available to your appellant. No prejudice is established by IDWR and the only prejudice that might occur would be that to the appellant if the request is denied.

Counsel for respondents has correctly set forth the two governing cases of the standard to be utilized by the Court in the exercise of court discretion in consideration of appellant's request for supplementation of the record. Counsel sets forth things that is alleged appellant did not do as a basis to support the objection to admission of parol evidence but fails to assert as to when, how and on what occasion that evidence could become a part of the department record on appeal. Counsel also fails to advise this Court that she received notice of my appellant's communication to her that appellant was not advised that appellant would not receive a printed transcript at the time appellant was provided with and requested to make a large payment for a transcript. Appellant complained that no transcript had been received and counsel then asserted that the disc transmitted was the transcript to which appellant advised counsel that appellant did not have the knowledge nor the equipment to utilize the disc. Appellant did ask for and received from IDWR a copy of the transcript index to enable appellant to understand to some extent what constituted the transcript. It is appellant's position that IDWR also failed to do what it was required to do and that such constitutes fundamental error which can be reviewed and corrected at this hearing including the right to accept parol evidence. *Hamby v. Simplot Co.* , 94 Idaho 794, 498 P.2d 1267, *Herrick v. Leuzinger,* 127Idaho,293, 200 P.2d 201.

Counsel also contends that appellant has not shown the materiality of the requested supplementation with which assertion your appellant denies. With respect to the conversation with the respondent Gary Spackman it was disclosed

that it is material and relevant as it is related to an issue that Mr. Spackman had advised appellant did not exist and was first revealed to appellant on receipt of respondents brief. Certainly no opportunity existed to make it a part of the IDWR record. The same is true of the assertions of respondent's counsel with respect to the second conversation with Mr. Spackman as counsel iterates delays and failures by appellant with respect to lapses of time. Appellant did disclose in the application that that conversation related to a lapse of time in processing as appears in the transcript. It's relevancy is believed to be reflected to the issue of regularity by IDWR in compliance with it's own rules and the rules of procedure. With respect to the first conversation appellant has disclosed that at the time of notification of the necessity to put the farmlands into a CRP program appellant had been advised in respect to appellant's water permit application. Counsel acknowledges in the IDWR brief that IDWR knew that the farmland was enrolled in the federal CRP program but does not set forth when and how that knowledge came to the attention of IDWR. Such evidence is both material and relevant to appellant's claims in this proceeding.

Appellant respectfully requires that the Court deem the proposed evidence to be necessary, material and relevant to these proceedings.

JOHN B. KUGLER

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Memorandum together with a true copy appellant's Affidavit And Offer Of Proof were served on Respondents by faxing the same to Andrea L. Courtney at Fax No. (208) 287-6700 this 20th day of April, 2012.

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