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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**

IDAHO GROUND WATER
APPROPRIATORS, INC.,

Petitioner,

vs.

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

Respondents,

and

AMERICAN FALLS RESERVOIR DISTRICT
#2, MINIDOKA IRRIGATION DISTRICT,
A&B IRRIGATION DISTRICT, BURLEY
IRRIGATION DISTRICT, MILNER
IRRIGATION DISTRICT, NORTH SIDE
CANAL COMPANY, TWIN FALLS CANAL
COMPANY, CITY OF POCA TELLO, CITY

Case No. CV01-23-13173

**SURFACE WATER COALITION'S
OPPOSITION TO IGWA'S MOTION
TO AUGMENT AGENCY RECORD
OR PRESENT ADDITIONAL
EVIDENCE**

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, CITY OF WENDELL, BONNEVILLE-JEFFERSON GROUND WATER DISTRICT, and BINGHAM GROUND WATER DISTRICT,

Intervenors.

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY AND FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT NO. 2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY.

COME NOW, 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 (hereinafter collectively referred to as the “Surface Water Coalition” or “Coalition”), by and through counsel of record, and hereby submit this response in opposition to *Motion to Augment the Agency Record or Present Additional Evidence* (“Motion”) filed by the Petitioner Idaho Ground Water Appropriators, Inc. (“IGWA”).

As discussed below, the Court should deny IGWA’s Motion because it is both procedurally and substantively deficient. In short, IGWA cannot meet the criteria to have the materials submitted into the agency record in this proceeding and the Court should deny the Motion accordingly.

PROCEDURAL HISTORY

On April 21, 2023, the Director of the Idaho Department of Water Resources (“IDWR”) issued the *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Fifth Methodology Order”) and the *Final Order Regarding April 2023 Forecast Supply (Methodology Steps 1-3)* (“As-Applied Order”) in IDWR Docket No. CM-DC-2010-001. On the same day, the Director issued a *Notice of Hearing, Notice of Prehearing Conference, and Order Authorizing Discovery* in anticipation of a request for hearing from the parties. Following various requests for hearing, on April 28, 2023, the Director held a prehearing conference identifying the scope of the hearing and proceeding. On May 2, 2023, IGWA submitted its *Petition for Reconsideration and Request for Hearing*. On May 5, 2023, the Director issued two prehearing orders, the *Order Denying the Appointment of Independent Hearing Officer and Motion for Continuance and Limiting Scope of Depositions* (“Order Limiting Depositions”) and *Notice of Materials Department Witnesses May Rely Upon at Hearing and Intent to Take Official Notice* (“Order Limiting Evidence”) under his authority as the Hearing Officer. The administrative hearing was then held on June 6-9, 2023 and the parties were provided one week to submit post hearing briefs. IGWA submitted its *Post Hearing Brief* on June 16, 2023.

On July 19, 2023 the Director issued his *Post-Hearing Order Regarding Fifth Amended Methodology Order and Sixth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover*. IGWA filed its *Petition for Judicial Review* of these orders and others issued by the Idaho Department of Water Resources on August 16, 2023. On August 30, 2023, IDWR filed notice that it lodged the agency record and transcript in this matter. On September 13, 2023, IGWA filed its *Objection to*

the Agency Record and Transcript, requesting the inclusion of five additional documents and requesting certain changes to the transcript. On September 27, 2023, IDWR filed its *Order Settling the Agency Transcript and Record*, declining to supplement the record with the additional documents that the agency declined to take as evidence at the hearing or through motion practice. IDWR lodged the agency record and transcript with this court on the same day.

On October 16, 2023, IGWA filed its present Motion in which it seeks to add the following documents to the agency record: (1) *Ground Water Districts' Brief in Support of Motion for Stay, Motion for Injunctive Relief, Motion to Compel, Motion for Expedited Decision, and Application to Show Cause*, filed May 19, 2023, in Ada County Case No. CV01-23-08187 (“Ada County Brief”), and (2) *Declaration of Thomas J. Budge in Support of Ground Water Districts' Brief in Support of Motion for Stay, Motion for Injunctive Relief, Motion to Compel, Motion for Expedited Decision, and Application to Show Cause*, filed May 19, 2023, in Ada County Case No. CV01-23-08187 (“Budge Declaration”).

LEGAL STANDARD

Under the Idaho Administrative Procedure Act (“APA”), “judicial review of disputed issues of fact must be confined to the agency record for judicial review as defined in [the APA], supplemented by additional evidence taken pursuant to section 67-5276, Idaho Code.” Idaho Code § 67-5277. In turn, section 67-5276(1) provides that additional evidence may only be taken if the additional evidence is: (1) material; (2) relates to the validity of the agency action; and (3) there were either good reasons for failure to present [the evidence] in the proceeding before the agency” or “alleged irregularities in procedure before the agency.” *Id.* § 67-5276(1)(a)-(b). If “there were good reasons for failure to present” the evidence before the agency, the remedy is that the court may remand the matter to the agency with directions that the

agency receive additional evidence and conduct additional factfinding, and if “there were alleged irregularities in procedure before the agency” the remedy is that “the court may take proof on the matter.” The decision to grant or deny a motion to augment an agency record is a matter of discretion. *Wohrle v. Kootenai County*, 147 Idaho 267, 271 (2009) (citing *Crown Point Dev., Inc. v. City of Sun Valley*, 144 Idaho 72, 75 (2007)).

Additionally, Idaho Rule of Civil Procedure 84(e)(1)(B) provides: “When the authorizing statute provides that the district court may take additional evidence on judicial review, the district court may order the taking of additional evidence on its own motion or motion of any party to the judicial review.” The rule further states that “[a] motion to augment the transcript or record may be filed within 21 days of the filing of the settled transcript and record” and that the “motion is filed in the same manner and pursuant to same procedure as provided in the Idaho Appellate Rules.”

Idaho Appellate Rule 30(a) defines the procedure for a motion to augment the record:

Such a motion [to augment the agency record] ***shall be accompanied by a statement setting forth the specific grounds for the request and attaching a copy of any document sought to be augmented*** to the original motion which document must have a legible filing stamp of the clerk indicating the date of its filing, or the moving party must establish by citation to the record or transcript that the document was presented to the district court. In order for augmented pages to be easily identified whether the motion is granted entirely or in part, each page of any document attached to the motion must be separately and sequentially numbered in the following format: Aug. p. 1... The motion and statement shall be served upon all parties. Any party may within fourteen (14) days after service of the motion, file a brief or memorandum in opposition thereto.

I.A.R. 30(a) (emphasis added).

Finally, a court may also “require corrections to the record.” Idaho Code § 67-5275(3).

ARGUMENT

IGWA seeks to augment the agency record by seeking to correct the record under section 67-5275(3) or by presenting additional evidence under section 67-5276(1). However, IGWA's argument fails because: (1) the Motion does not satisfy the requirements of Idaho Appellate Rule 30(a); (2) the record cannot be "corrected" because the evidence IGWA seeks to admit was not part of the underlying contested case and is properly excluded from the record; and (3) IGWA cannot meet the requirements of section 64-5276(1) to present additional evidence on appeal.

First, IGWA's motion to correct or augment the record is flawed because it does not comply with Appellate Rule 30(a). Pursuant to the rule, the moving party "shall" state "the specific grounds for the request," attach "a copy of any document sought to be augmented," and either (a) show that each document "ha[s] a legible filing stamp of the clerk indicating the date of its filing" in the case on appeal¹ or (b) "establish by citation to the record or transcript that the document was presented to the district court" or, by analogy, the agency. I.A.R. 30(a).

Here, IGWA did not attach a copy of the documents sought to be included in the agency record nor did it present the documents to the agency below. Notably, IGWA never even mentioned the Budge Declaration until filing the present Motion with this Court on October 16, 2023, months after the final order issued in the underlying contested case. Further, IGWA's Ada County Brief was never presented to IDWR; instead, it was only vaguely referenced in *IGWA's Post Hearing Brief* on June 16, 2023. In short, the documents were never filed or presented to

¹ Two considerations support limiting the "filing stamp" option to documents filed in the case on appeal. First, without such a limitation, Rule 30(a) would be an open invitation to augment any appellate record at any time before the issuance of an opinion with any legibly file-stamped document from any case whatsoever. The problems with such a procedure, including but not limited to evidentiary gamesmanship, are obvious. Second, the other option—a citation establishing the document was "presented to the district court"—is clearly limited to documents presented in the case on appeal. The rule of *in pari materia*, therefore, supports also reading that limitation into the filing stamp option. See *Saint Alphonsus Reg'l Med. Ctr. v. Elmore Cnty.*, 158 Idaho 648, 653, 350 P.3d 1025, 1030 (2015) ("Statutes that [relate to the same subject] are construed together to effect legislative intent.").

the agency and no copies were submitted to this Court and the parties with the present Motion. Therefore, the Court should deny the Motion to Augment for failure comply with the plain requirements of Idaho Appellate Rule 30.

Second, and independently, IGWA's efforts to correct the record fails because the Director properly excluded the Ada County Brief on IGWA's objection to the agency record and IGWA never sought to include the Budge Declaration until the filing of its present Motion. The Director, as the Hearing Officer, had the right to limit the scope of evidence to be presented at the hearing by prehearing order. *See* I.C. § 67-5242(3)(b). At the April 28th pre-hearing conference and in the two subsequent prehearing orders, *Order Denying the Appointment of Independent Hearing Officer and Motion for Continuance and Limiting Scope of Depositions* ("Order Limiting Depositions") and *Notice of Materials Department Witnesses May Rely Upon at Hearing and Intent to Take Official Notice* ("Order Limiting Evidence") the Director, in his discretion, limited the scope and timing of discovery and witness testimony to address concerns about the compressed schedule before the hearing.

At the contested case hearing, the Director reiterated that testimony would "be limited to the *factual* components that were part of the development and writing of the Fifth Methodology Order." Tr. Vol. I, 22:9-11 (emphasis added). At the conclusion of the hearing, the Director discussed the scope of the Post-Hearing Briefing. The topics to be discussed in the Briefing were substantive issues with the Fifth Methodology Order and the As-Applied Order including "how the methodology operates within the broader realm of water administration." Tr. Vol. IV, 201:3-204:16. The Director specifically stated that discussion of due process should be raised through reconsideration and/or judicial review. Tr. Vol. IV, 205:20-22.

After the Order Limiting Evidence, IGWA could have moved for reconsideration of the scope of the evidence to be presented at the hearing, but it did not. IGWA's inclusion of constitutional and APA challenges were therefore outside the scope of the allowed post-hearing briefing. Further, IGWA could have also properly included the challenge in a post-hearing motion for reconsideration, but it did not. Because neither the Ada County Brief nor the Budget Declaration were properly presented to the agency below, there is no basis for the Court to "correct" the record to add these documents now on judicial review.

Third, IGWA seeks to augment the agency record though section 67-5276, but IGWA fails to meet the requirements of this provision. To augment the record, IGWA must first successfully prove to the court that the documents it seeks to introduce are both material and relate to the validity of the agency action. If IGWA succeeds on these issues, it must also show either (a) that there were good reasons for its failure to present the evidence before the agency or (b) that there were procedural irregularities in the administrative proceeding. *See* I.C. § 67-5276(1)(a)-(b).

IGWA fails to show how the documents are either material or relate to validity of the agency action. IGWA asserts augmentation is proper because the documents are material and relate to the validity of the first issue listed in its *Petition for Judicial Review*, whether the Director violated IGWA's constitutional right to due process and/or the APA; however, IGWA only alleges that the documents indicate (1) that IGWA notified the Director that the procedures must comply with due process and the APA, obligations which the Director would have regardless of notice by IGWA, and (2) that the Director "intentionally" refused to hold a hearing before issuing the Fifth Methodology Order. These documents are in fact immaterial to IGWA's due process and APA claims because whether the Director received notice or whether he

intentionally did not hold a hearing has no bearing on the outcome of those claims. The questions of what process was due either under the constitution or under the APA are legal questions irrespective of the factual record below, and the actual process afforded to IGWA is captured by the existing record. Neither notice to the Director nor the fact of whether he intentionally or unintentionally failed to hold a hearing before issuing the order bear any weight on IGWA's constitutional or APA claims. Moreover, IGWA already filed a separate judicial action in Ada County based on those theories where the Court denied IGWA's request for preliminary injunctive relief.

Furthermore, IGWA's alleged "good reasons" and procedural irregularities are that the Director limited discovery and hearing testimony to factual issues through prehearing orders which is within his discretion as the Hearing Officer.

Specifically, IGWA alleges that its "good reasons" for failing to present the evidence below are (a) that "it would not be appropriate to call the Director as an evidentiary witness in a hearing over which he presided as a hearing officer," (b) that "[t]he Director issued two pre-hearing orders on May 5, 2023, that functioned to prevent the parties from calling Department staff as witnesses to address procedural errors by the Department," and (3) that "during the June hearing the Director refused to consider evidence of procedural errors."

IGWA's first reason is a red herring; the Director served as the presiding officer over the hearing that was held for the purpose of addressing the updated Fifth Methodology Order and the April As Applied Order. IGWA's alleged evidence regarding the Director's decision on the scope of the hearing would have been rejected regardless of who was called as an evidentiary witness. Additionally, IGWA provides no reason why another witness could not have been called to present the evidence.

IGWA's second and third reasons for failing to present the evidence are related and will be addressed together. The Director has discretion to limit the scope of hearings and discovery. *See* I.C. § 67-5242(3)(b). The hearing was about the facts and data used to update the delivery call methodology, not about procedure. IGWA was and is afforded the opportunity to challenge the procedure through other means – namely motion for reconsideration and judicial review. Moreover, IGWA filed a separate judicial action in an attempt to stop the hearing that was held before the agency. The Director was not obligated to admit evidence on issues outside the scope of the hearing, yet that is what IGWA claims now. IGWA also could have sought to either expand the scope of the hearing or sought a separate hearing on procedural issues. Instead, IGWA improperly sought to admit evidence outside the scope of the hearing. This is not a “good reason” for a failure to present evidence.

Finally, the Director's decision to limit the scope of discovery and issues presented at the hearing is not a “procedural irregularity;” it is a normal function of the Hearing Officer to ensure that the hearing proceeds in a timely and orderly manner. The Director acted within his authority limiting the scope of the hearing, and IGWA has the opportunity to make its claims.

CONCLUSION

Ultimately, either the Director was required to hold a hearing before modifying the Methodology Order, or he was not. This can be properly determined on the expansive agency record totaling nearly 3,000 pages and the four volumes of hearing transcript presently before the Court. For the reasons set forth above, the Coalition respectfully requests that this Court deny IGWA's Motion to Augment Agency Record or Present Additional Evidence.

Dated this 30th day of October, 2023.

MARTEN LAW LLP



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for

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, 2023, the foregoing was filed electronically using the Court’s e-file system, and upon such filing the following parties were served electronically.

<p>Director Mat Weaver Garrick Baxter Kayleen Richter Idaho Dept. of Water Resources 322 E Front St. Boise, ID 83720-0098 *** service by electronic mail file@idwr.idaho.gov mat.weaver@idwr.idaho.gov garrick.baxter@idwr.idaho.gov kayleen.richter@idwr.idaho.gov</p>	<p>T.J. Budge Elisheva M. Patterson Racine Olson, PLLP P.O. Box 1391 Pocatello, ID 83204-1391 *** service by electronic mail only tj@racineolson.com elisheva@racineolson.com</p>	<p>Sarah A. Klahn Maximilian C. Bricker Somach Simmons & Dunn 2033 11th Street, Ste. 5 Boulder, CO 80302 *** service by electronic mail only sklahn@somachlaw.com mbricker@somachlaw.com</p>
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