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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

A&B IRRIGATION DISTRICT,

Petitioner,

vs.

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

Respondents,

and

THE IDAHO GROUND WATER
APPROPRIATORS, INC., and THE CITY OF
POCATELLO,

Respondents-Intervenors.

CASE NO. CV-2011-512

**A&B IRRIGATION DISTRICT'S
OPPOSITION TO MOTION TO
REMAND PROCEEDING TO IDWR**

IN THE MATTER OF THE PETITION FOR
DELIVERY CALL OF A&B IRRIGATION
DISTRICT FOR THE DELIVERY OF
GROUND WATER AND FOR THE
CREATION OF A GROUND WATER
MANAGEMENT AREA

COMES NOW, the Petitioner, A&B Irrigation District (“A&B”), by and through its undersigned counsel, and hereby submits this memorandum in opposition to the *Motion to Remand Proceeding to IDWR*, filed by the Director and the Idaho Department of Water Resources (“Department” or “IDWR”) (hereinafter collectively referred to as “Respondents”). This memorandum is further supported by the *Affidavit of Travis L. Thompson* filed together herewith.

INTRODUCTION

On April 27, 2011, the Director of IDWR issued his *Final Order on Remand Regarding the A&B Irrigation District Delivery Call* (“*Final Order*”). A&B filed a petition for reconsideration on May 11, 2011. When the Director failed to dispose of A&B’s petition in the time allowed by the Idaho APA, the petition was deemed denied by operation of law. I.C. § 67-5246; *see also, A&B Irr. Dist. v. IDWR*, 2012 WL 4055353 (Idaho 2012). A&B then filed this appeal on June 28, 2011. Two days later, on June 30, 2011, the Director attempted to issue a decision on A&B’s petition for reconsideration and an amended final order. Thereafter, the Director sought to dismiss this appeal – an effort that was recently rejected by the Idaho Supreme Court. *See* 2012 WL 4055353 at *5 (Idaho 2012).

A&B’s appeal remains before this Court to address the various legal and factual errors in the Director’s *Final Order*. Now, however, the Respondents argue that since the Director no longer “supports” the *Final Order* it should be remanded to IDWR for further proceedings. Although the Respondents did not appeal the Director’s *Final Order* and do not admit it is erroneous in total, they nonetheless ask the Court for new affirmative relief to essentially undo the recent Supreme Court decision. *See Affidavit of Travis L. Thompson*.

The Director has no legal basis for the temporary remand other than generic claims about “public policy” and that continued review would be a “poor use of judicial resources.” See *IDWR Motion* at 3. These vague claims do not constitute “good cause” required under I.A.R. 13.3. Moreover, the relief A&B seeks on appeal, to set aside and reverse the Director’s erroneous rulings, is the judicial review process expressly provided by Idaho’s APA. A remand should only be ordered after the Court hears A&B’s petition and issues a final ruling finding error in the *Final Order*.¹

Moreover, if the Director now admits certain errors in the *Final Order*, the Respondents can stipulate to correct those errors and the Court can provide the same relief without further delay or additional administrative process. See I.A.R. 13.5. Since the Respondents’ motion is vague and does not specify whether the entire *Final Order* or only certain parts are no longer supportable, it is clear the requested remand is just an attempted end-around the recent Supreme Court decision. This does not satisfy the “good cause” criteria under Rule 13.3.

In sum, IDWR’s motion should be denied. The Court should follow the established procedure for judicial review provided by the Idaho APA. Contrary to the Respondents’ theory, proceeding on the current appeal will not be a waste of judicial resources. Since the Court’s decision on judicial review may set aside the *Final Order*, in whole or in part, an ordered remand could result in further direction and rulings for the agency to follow. See *Second Amended Notice of Appeal* (listing issues raised by A&B on appeal). Moreover, if parts of the *Final Order* are admittedly in error, the Respondents can stipulate to correct the same before the District Court at this time, without further delay and process before the agency. A&B respectfully requests the Court deny the Respondents’ motion for temporary remand.

¹ IDWR fails to acknowledge that a remand may not be ordered by the Court. As recognized under Idaho’s APA, a court can affirm the agency action regardless of the agency’s position. See I.C. § 67-5279.

ARGUMENT

I. The Respondents Do Not Have “Good Cause” for the Requested Temporary Remand.

I.R.C.P. 84(r) provides that “any procedure for judicial review not specified or covered by these rules shall be in accordance with the appropriate rule of the Idaho Appellate Rules to the extent the same is not contrary to this Rule 84.” Appellate Rule 13.3 provides a district court with the authority to “temporarily” remand a matter to an administrative agency to take further action “as designated in the order of remand.” The rule further provides that a court retains jurisdiction during the time of remand but that the agency “shall have jurisdiction to take all actions necessary to fulfill the requirements of the order of remand.” I.A.R. 13.3.

The Respondents’ motion does not satisfy the “good cause” required under the appellate rule. The Respondents argue that since the Director no longer supports the *Final Order* the Court should “remand the proceeding back to IDWR to issue a final order that is supportable.” *IDWR Motion* at 4. Whether the Director “supports” the *Final Order* now is irrelevant. Determining whether the order complies with Idaho law is now within the province of this Court on appeal. The issuance of the *Final Order*, and the agency’s failure to act on A&B’s petition for reconsideration within 21 days, ended the agency’s jurisdiction over the matter. *See* 2012 WL 4055353 at *4-5. A&B exercised its statutory right to appeal the Director’s order to this Court. A schedule is set and the case should continue as provided by law.

Next, the Respondents’ vague request does not satisfy the rule either. Appellate Rule 13.3 allows the court to remand the case to the agency “to take further action as designated in the order of remand.” I.A.R. 13.3 (emphasis added). The Respondents, without the required good cause, have failed to specifically identify what “further action” that is needed to be taken by IDWR justifying a temporary remand. Instead, they ask this Court to remand the case so that the

agency can “issue a final order that is supportable.” This vague statement refers to the void *Amended Final Order* the Director attempted to issue on June 30, 2011. *See Affidavit of Travis L. Thompson.*

If the agency seeks to remand the case for the sole purpose of reissuing the June 30, 2011 *Amended Final Order*², as represented by counsel, then it is obvious the Respondents do not have “good cause” for temporary remand. *See Affidavit of Travis L. Thompson.* Reissuing the *Amended Final Order*, a void agency action, is not warranted based upon the Idaho Supreme Court’s recent decision. In addition, this is not a case where the agency is admitting complete error in its decision. *See e.g., Mercy Med. Ctr. v. Ada County*, 192 P.3d 1050, 1055-56, 146 Idaho 226 (2008).³ Stated another way, a temporary remand is not necessary “further action” to be taken by the agency, as contemplated by I.A.R. 13.3. Moreover, the Court should not allow the Respondents to use a procedural maneuver to undo the appeal they recently lost before the Idaho Supreme Court. Whether the *Final Order* is legally “supportable” or complies with Idaho law is a question that will be addressed by this Court regardless of the Respondents’ present faith in the Director’s prior decision, or parts thereof.

It is telling that IDWR does not represent the end result would change if a temporary remand was ordered. Therefore, halting the current judicial review process and authorizing a temporary remand to have the Director issue a new order with the same conclusion would be a

² IDWR’s claim that it no longer supports the *Final Order* is misleading since the agency’s ultimate conclusion was to deny A&B’s delivery call and conclude the district’s senior ground water right #36-2080 was not materially injured. If that decision has truly changed, IDWR can stipulate to the same and the entire appeal can be dismissed. However, that finding did not change in the void *Amended Final Order*. As represented by counsel, IDWR seeks to remand the case for the sole purpose of reissuing the *Amended Final Order*. *See Thompson Aff.* Accordingly, there is no reason or legal basis to remand the case to allow the agency to resurrect a void agency action and issue another order with the same ultimate result.

³ Unlike the facts in *Mercy Med. Ctr.*, here the Respondents do not claim the Director failed to make “critical findings” in the *Final Order* that would inhibit or preclude judicial review. *See* 192 P.3d at 1055 (“For the same reason, the Board made no findings as to the other factors of eligibility, i.e., the Patient’s indigency and the medical necessity of the services provided. The absence of these critical findings requires us to consider the proper procedure for filling the lacunae.”).

waste of the parties' and the Court's time. Moreover, the legal and factual errors in the *Final Order* that the Respondents presumably would not admit would never be reviewed.

The relief the Respondents seek would undo the Supreme Court's decision and result in a de-facto dismissal of A&B's current appeal. Nothing in the language of Appellate Rule 13.3 allows a party to seek what amounts to the dismissal of an appeal so that the agency can avoid review of the decision in question.⁴ A final and complete decision by this Court could set aside the Director's order and direct the agency's actions to ensure that A&B is not forced to litigate the same issues over and over again. In this sense obtaining a final decision on judicial review of the *Final Order* is not poor public policy and does not waste resources as the Respondents' suggest. To the contrary, avoiding or delaying a final decision on this appeal, and forcing A&B to make repeated appeals of the same legal and/or factual errors is an unacceptable waste of resources. *C.f. V-1 Oil Company v. Idaho State Tax Commission*, 112 Idaho 508, 510 (1987) (exception to mootness doctrine exists for matters "capable of repetition, yet evading review").

In sum, the Court should deny the Respondents' motion to ensure that A&B receives a timely decision on the legal and factual errors and to guide future administration. The Court has set a briefing and hearing schedule and there is no reason to delay this matter with any further administrative process, such as a temporary remand. The Respondents have not shown the necessary "good cause" required by Rule 13.3, hence there is no basis to remand the case for any further administrative action at this time.

⁴ Such authority is contained in a completely different Appellate Rule. *See* I.A.R. 32 (rule governing motions to dismiss appeal).

II. If IDWR Seeks to Correct Admitted Errors in the *Final Order* the Proper Procedure is to File a Stipulation with the Court Pursuant to I.A.R. 13.5.

Appellate Rule 13.5 states that an administrative judgment may be vacated, reversed or modified “upon stipulation of all affected parties.” A district court is authorized to enter an order accomplishing the stipulated result. The correction of admitted errors does not require a remand back to the agency and further administrative process. If the Respondents now agree with A&B that there are errors in the *Final Order*, a stipulation can be filed to correct the same without further briefing, argument, or an opinion from the Court on those matters. *See* I.A.R. 13.5. Stated another way, those errors do not need to be contested any further on judicial review.

CONCLUSION

The Respondents do not have “good cause” for a temporary remand. The Respondents cannot push the “reset” button and re-issue an order that has been declared void by the Idaho Supreme Court just because they disagree with that decision. A&B is entitled to its statutory right to judicial review of the Director’s *Final Order*. If the agency does not fully support the Director’s *Final Order* now, a stipulation can be filed with the Court to correct those errors on appeal. Further administrative process is not warranted and would only disrupt the established schedule on judicial review. A&B respectfully requests the Court to deny the Respondents’ motion for temporary remand.

DATED this 9th day of November, 2012.

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson
Attorneys for Petitioner A&B Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of November, 2012, I served true and correct copies of **A&B IRRIGATION DISTRICT'S OPPOSITION TO MOTION TO REMAND PROCEEDING TO IDWR** upon the following by U.S. Mail, postage prepaid:

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