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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

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

IDAHO GROUND WATER APPROPRIATORS, INC.; Petitioner, vs. **CITY OF POCATELLO;** Petitioner, vs. **TWIN FALLS CANAL COMPANY, NORTH SIDE CANAL COMPANY, A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT#2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT,** and **MINIDOKA IRRIGATION DISTRICT,** Petitioners,	**Case No. CV-2010-382** (consolidated Gooding County Cases CV-2010-382, CV-2010-383, CV-2010-384, CV-2010-387, CV-2010-388, and Twin Falls County Cases CV-2010-3403, CV-2010-5520, CV-2010-5946, CV-2012-2096, CV-2013-2305, CV-2013-4417, and Lincoln County Case CV-2013-155) **SURFACE WATER COALITION'S RESPONSE IN OPPOSITION TO IDAHO DEPARTMENT OF WATER RESOURCES' MOTION TO REMAND METHODOLOGY ORDER**

vs.

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

Respondents.

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR 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, Petitioners, A&B Irrigation District ("A&B"), American Falls Reservoir District #2 ("AFRD#2"), Burley Irrigation District ("BID"), Milner Irrigation District ("Milner"), Minidoka Irrigation District ("MID"), North Side Canal Company ("NSCC"), and Twin Falls Canal Company ("TFCC") (collectively hereafter referred to as the "Surface Water Coalition", "Coalition", or "SWC")[1], by and through their undersigned counsel, and hereby file this *Response in Opposition to Idaho Department of Water Resources' Motion to Remand Methodology Order* ("*IDWR Motion*") in the above-captioned matter. The Coalition respectfully requests the Court deny IDWR's motion for the reasons set forth below.

[1] The term "Surface Water Coalition" is a shorthand reference to the seven individual canal companies and irrigation districts that requested conjunctive administration of hydraulically connected ground water rights in 2005. Each entity holds and relies upon their individual natural flow and storage water rights to deliver water to their respective shareholders and landowners. The "Coalition" does not own water rights collectively or share water supplies.

INTRODUCTION

The Department asks this Court for a temporary remand to revise the Methodology Order[2] for two reasons: 1) to correct clerical errors; and 2) to address "legal issues" identified by recent Idaho Supreme Court decisions. In essence, the Department seeks to step into the Court's shoes and judge the validity of the Methodology Order. Idaho law forbids such a request.

First, the Department does not have "good cause" for the proposed remand required under I.A.R. 13.3(a). The Department has not identified the specific actions the Court would designate be taken in the order of remand. The Department has not identified all the legal errors in the Methodology Order and exactly how those errors would be resolved. Instead, the Department indicates it wants the parties to "brief" the Director on how the Methodology Order should conform to the Idaho Supreme Court decisions. *IDWR Motion* at 6. Contrary to the Department's perception, that is this Court's responsibility on judicial review as required by law. As Respondents, the Department and Director will have the opportunity to brief this Court on whether the Methodology Order conforms with Idaho law, including recent Idaho Supreme Court decisions. The agency record is complete and the Court, not the Department, is the proper forum to take the next step and set a briefing schedule on the consolidated appeals.

Furthermore, judicial economy will not be served by a limited temporary remand at this point. Additional briefing and the creation of a "new" or supplemental record in front of the Department will only delay inevitable judicial review. The Coalition has a statutory right to present its case based upon the existing agency record. A revised Methodology Order would only confuse the record and the Director's actions taken the last three years in its

[2] Reference to the Director's *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (June 23, 2010).

implementation. Moreover, the Court, not the Department, is the forum to address legal issues concerning the Methodology Order and the additional orders in this consolidated appeal.

Second, the requested temporary remand violates the Idaho Administrative Procedures Act. As described below, temporarily interrupting the current appeal and sending the matter back for the Department to revise the Methodology Order or take additional unknown actions stands to prejudice the Coalition and its statutory right to judicial review. No additional fact-finding is necessary or allowed, and the Department has not shown any procedural irregularities that would provide for a remand at this stage of the litigation. Since the Department has failed to meet the standard for a temporary remand under either Idaho's Appellate Rules or APA, the Court should deny the motion.

ARGUMENT

I. The Department Does Not Have "Good Cause" for a Temporary Remand Pursuant to I.A.R. 13.3.

The Department seeks a temporary remand to allow the Director to correct the Methodology Order pursuant to I.R.C.P. 84(r) and I.A.R. 13.3(a), which provide that remand may be ordered where a party demonstrates good cause. In such cases, the remand is expressly limited to only "further action as designated in the order of remand." I.A.R. 13.3(a). Here, the Department argues that intervening decisions of the Idaho Supreme Court justify revising certain portions of the Methodology Order and that this satisfies the "good cause" standard. The Department only identifies two examples, the irrelevance of I.C. § 42-226 and the requirement to apply the "clear and convincing" evidence standard.[3] *IDWR Motion* at 4. Simply noting these examples does not specify the "further action" to be designated in the order of remand.

[3] These issues can be stipulated to by the parties (I.A.R. 13.5) or, if still disputed, can be briefed to the District Court. The Department's interpretation of the recent Idaho Supreme Court decisions, and any dispute thereof, should be addressed by this Court, not the Director.

Moreover, intervening court decisions that invalidate portions of a rule or order do not constitute good cause for remand.

For example, during a challenge to a U.S. Fish and Wildlife Service final rule in *Home Builders Ass'n of N. Cal. v. United States Fish & Wildlife Serv.*, 268 F. Supp 2d 1197, 1204-1205 (2003), the Service filed a motion for a voluntary remand after a 10th Circuit opinion had invalidated a portion of the challenged rule. There, the Service conceded that the rule was not promulgated in compliance with ESA and asked the court to vacate the rule and remand the matter to it so that the agency could promulgate a new rule. *See id.* at 1205. The Service also "refer[red] to 'its duty to abide by recent judicial interpretations of the ESA'" as a basis for the remand. The federal district court declined to remand the matter "without making a determination on the merits[.]" *Id.* The court decided the case on the merits, taking into account any necessary intervening legal authority, and then remanded the matter with instructions. *See id.*

The same situation exists here. This Court, in reaching a resolution on the merits of the challenged agency orders, has the authority and duty to take into account the intervening legal authority that the Director believes he must follow in a revision to the Methodology Order. However, if remanded prior to a resolution of the merits on judicial review, the Director will be without the benefit of this Court's legal analysis concerning any disputed issues that were not before the Supreme Court in its decisions concerning the CM Rules and the present Methodology Order.

Moreover, the Coalition has identified specific issues for the Court to address that would be prejudiced by the Department's ability to issue a revised Methodology Order in the middle of this consolidated appeal. *See Notice of Appeal and Petition for Judicial Review* at 5 (Case No.

2010-384) (July 21, 2010); *Notice of Appeal and Petition for Judicial Review* at 4-5 (Case No. 2010-3403) (July 21, 2010); *Notice of Appeal and Petition for Judicial Review* at 4-5 (Case No. CV-2010-5520) (November 19, 2010); *Notice of Appeal and Petition for Judicial Review* at 4 (Case No. 2010-5946) (December 20, 2010); *Notice of Appeal and Petition for Judicial Review* at 5-6 (Case No. 2012-2096) (May 18, 2012); *Notice of Appeal and Petition for Judicial Review* at 5 (Case No. 2013-2305) (June 4, 2013); *Notice of Appeal and Petition for Judicial Review* at 5 (Case No. 2013-155) (August 12, 2013) Furthermore, the Coalition identified specific constitutional issues that the Director has no authority to decide[4]:

> d. Whether the Director's methodology is unconstitutional and arbitrary and capricious where it establishes a mitigation obligation threshold early in the irrigation season (April) that may be adjusted downward based on precipitation and water use during that irrigation season but cannot be adjusted upward regardless of the exigencies of the irrigation season demand?
>
> e. Whether the establishment of a methodology that allows mitigation obligations to be adjusted downward based on precipitation and water use during the irrigation season but not upward based on the same criteria violates the Equal Protection Clause of the Constitution?

Notice of Appeal at 5 (Case No. CV-2010-384) (July 21, 2010).

> d. Whether the Director's denial of the Petitioners' request for a hearing violates their constitutional right to due process and the statutory right to a hearing pursuant to I.C. § 42-1701A(3)?

Notice of Appeal at 6 (Case No. CV-2012-2096) (May 18, 2012).

Without identifying a full list of the specific errors to correct in the Methodology Order, the Department reveals it does not know what modifications it intends to actually make. The agency essentially asks for a "blank check" to go back and redo its prior decision. The Department admits as much by arguing that "a limited remand would also allow other parties to brief the Director on any other legal issues that they believe must be addressed for the

[4] *See Owsley v. Idaho Industrial Comm'n*, 141 Idaho 129, 134 (2005); *Kolar v. Cassia County Idaho*, 142 Idaho 346, 351 (2005).

Methodology Order to conform to the Idaho Supreme Court's decisions." *See IDWR Motion* at 6. Yet the Department cites no authority to allow this procedure.

Not only does the Department wish to amend the Methodology Order stating it wants to conform to the Supreme Court's decisions, it is apparent that the Director wishes to in some manner fundamentally alter the record already on judicial review by permitting parties to introduce new arguments, and potentially, evidence in support of the party's interpretation regarding modification of the Methodology Order. Again, this type of action is not the "good cause" required for a remand contemplated under I.A.R. 13.3(a). Therefore, the Court should deny the Department's motion.

Moreover, remand to correct or augment the administrative record is appropriate only where "the record is inadequate to permit the reviewing court to determine whether or not an agency's action is supported by substantial competent evidence," not to allow the agency to preempt the reviewing court from finding that the agency's action is not supported by substantial and competent evidence or is otherwise deficient. *Mercy Medical Center v. Ada County*, 146 Idaho 226, 232 (2008), *quoting In re Application of Hayden Pines Water Co.*, 111 Idaho 331, 336 (1986). As *Home Builders*' makes clear, remand to an agency that has voluntarily determined that its prior order is legally insupportable because of intervening case law is not a proper remedy.

By contrast, the Idaho Supreme Court's decision in *Mercy Med. Ctr. v. Ada County* demonstrates where such a remand would be warranted, which is not the case here. In *Mercy Med. Ctr.* the district court remanded the petitioner's application for indigent medical assistance to the Ada County Board of Commissioners to make "further findings on the essential elements of the application." 146 Idaho at 231. The Court specifically observed that "the Board

summarily concluded that the Patient was not a resident . . . it did not make findings of the type normally considered when making a determination of residency . . . the Board made no findings as to the other factors of eligibility . . . The absence of these critical findings requires us to consider the proper procedure for filling the lacunae." *Id.*

The appellant contended that due to the Board's failure to fulfill its duties the application should be deemed approved without remand. The Court held that when a "board fails to make a factual determination on a necessary issue, the district court must not make its own factual determinations but must rather remand the case to the board to make that determination." 146 Idaho at 232. The Supreme Court further noted that in "the absence of findings that are appropriate for judicial review, the district court's decision to vacate the Board's order and remand for further proceedings was within the outer boundaries of its discretion and consistent with applicable legal standards before it." *Id.*

Unlike the facts in *Mercy Med. Ctr.*, here the Department makes no allegations that it failed to make "critical factual findings" or that the final order lacks "findings that are appropriate for judicial review."[5] Instead, the Department admits the Methodology Order "does not conform to the Idaho Supreme Court decisions" and that a remand should be allowed to "address legal issues" which would allegedly "promote judicial economy and efficiency." *IDWR Motion* at 5. Contrary to the Department's claim, it is this Court's role, not the agency's, to decide where the Methodology Order does or does not comply with Idaho law. No efficiency will be gained by a round of briefing to the Director, particularly where the Court will have to

[5] The Department references certain clerical errors in the Methodology Order. *IDWR Motion* at 5-6. Any such errors can be corrected by stipulation without the need for a remand. *See* I.R.C.P. 84(r); I.A.R. 13.5. The Department has not yet proposed any such stipulation to the parties.

ultimately review and judge the Department's decision.[6] Accordingly, there is no "good cause" under I.A.R. 13.3(a) to remand the case back to the Department to revise and re-write an order already on appeal to the District Court.

Finally, this is not the first time the Department has requested a temporary remand to revise a final order that the Director has determined was in error after a petition for judicial review was already pending. In *A&B Irr. Dist. v. IDWR*, Minidoka County Dist. Ct., Fifth Jud. Dist. (Case No. CV-2011-512), the Department requested the same relief arguing similar bases for a remand to rewrite a final agency order. As noted in A&B's response in opposition in that case, similar to the Coalition's position here, if the Department wishes to amend the Methodology Order it can do so pursuant to I.A.R. 13.5, which provides for vacation, reversal or modification of the agency's order, "upon stipulation of all affected parties." The Department has yet to propose such a stipulation. Moreover, A&B identified a key error in the Department's request in that case that is also relevant here:

> 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 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.

A&B Opposition to Motion to Remand to IDWR at 5-6, (Case No. CV-2011-512) (Nov. 9, 2012).

Although the Department identifies a clerical error and two issues it needs to correct, it does not admit the Methodology Order will change in substance. Reissuing a modified order with substantially the same terms is no reason, let alone "good cause," for a remand. Accordingly, the errors the Department will not identify or admit at this point will not be

[6] The lengthy stay of these consolidated appeals, from 2010 to 2014, further warrants against forcing the Coalition to undergo further administrative process at this point. Although the parties stipulated to the stay and the delay was not the fault of any party, the fact remains certain cases in this appeal have been pending for four years.

reviewed in a timely manner with the existing record by this Court. This reason further warrants denial of the Department's motion.

Indeed, as the Department's argument makes clear, the Director wishes to take additional "briefing" and evidence on what constitutes error in the Methodology Order, frustrating any stipulation or timely judicial review of all the issues. In *A&B,* the District Court declined to grant the Department's motion seeking remand. *See Order Granting Motion to Strike, and Order Denying Motion to Remand,* Minidoka Dist. Ct., Fifth Jud. Dist., Case No. CV-2011-512 (Nov. 16, 2012). The same reasoning and result should apply to the Department's present motion.

In sum, the Department does not have "good cause" to demonstrate why the Court should temporarily remand the matter to the agency. Any and all legal issues, including the application of recent Idaho Supreme Court decisions, will be presented and addressed by this Court. Additional process before the agency is simply unnecessary at this point and not warranted under the law. As such, the Court should deny the Department's motion.

II. The Requested Remand is Impermissible Pursuant to the Idaho Administrative Procedures Act.

In addition to the failure to show "good cause" under I.A.R. 13.3, the Department's requested temporary remand is vague and would violate the Idaho APA. The Department has moved this Court for an order remanding this matter, a consolidated case of several appeals that were stayed pending an opinion from the Idaho Supreme Court in *In The Matter of Distribution to Various Water Rights Held by and for the Benefit of A&B Irrigation District et al.* (S. Ct. Docket Nos. 38191/38192/38193) (SWC Appeal). The Supreme Court issued its decision on December 17, 2013. The Department argues that remanding this matter for the purpose of allowing the Director to revise his Methodology Order to conform to the guidance issued by the

Supreme Court, without specifying the revisions to be made, will provide an "efficient and economical resolution of the remaining matters" before this Court. *See IDWR Motion* at 3.

To the contrary, this Court should not accept the Department's invitation to remand the matter for the limited purpose of making unspecified revisions to the Methodology Order. Such an alteration of the record upon which this Court must rely to make its determination of the merits of the Coalition's petitions is legally impermissible at this point. Fundamentally altering the Methodology Order upon which the petitions for judicial review are based would not lead to an economical and efficient resolution of the remaining issues. Such an alteration would require the court to review the Coalition's and other parties' briefing in light of the application of an altered order on which the petitions were initially based. This would lead to a confusing and contorted proceeding, likely leading to protracted additional costs and briefing in light of an altered Methodology Order. Moreover, the modified order would not cure the Director's errors in implementing the original decision that occurred over the last four years. The Coalition has a right to have the Court address those issues on judicial review.

A district court's review under the Administrative Procedure Act is limited to the record on appeal. I.C. § 67-5275. An appeal from an agency decision is reviewed based on the record created before the agency. *Idaho Power Co. v. Idaho Dept. of Water Resources*, 151 Idaho 266, 279 (2011). A reviewing court "is bound by the record and cannot consider matters or materials that are not part of the record or not contained in the record." *Chisholm v. State Dept. of Water Resources*, 142 Idaho 159, 162 (2005), *citing State ex rel. Ohman v. Ivan H. Talbot Fam. Trust*, 120 Idaho 825, 827 (1991). Allowing limited remand in order to make unspecified revisions to the Methodology Order, from which all of the orders in the consolidated case are based, constitutes an impermissible modification of the factual record currently before the district court.

While "the court may require corrections to the record," in accordance with I.C. § 67-5275(3), allowing the Director to modify the Methodology Order is not the sort of "correction" contemplated. A district court is permitted to allow corrections to the record only where it is demonstrated that additional *fact-finding* is required, or to correct procedural errors. I.C. § 67-5276. Here the Department has represented that it is not seeking a remand in order to conduct additional fact-finding or to correct procedural errors.[7]

Instead, the Department seeks to re-write the Methodology Order to make it consistent with recent Idaho Supreme Court decisions. The Department admittedly does not believe its Order complies with Idaho law, a position taken by the Coalition when seeking judicial review, but does not state with any specificity corrections that need to be made to the Order to comply with the decisions of the Idaho Supreme Court. In effect, the Department is attempting to intercept the duties of the district court on judicial review, a procedure not authorized by Idaho law. Therefore, under the Idaho Administrative Procedure Act, there is no supportable reason articulated by the Department that would allow the Court to grant the limited remand requested.

Furthermore, the Idaho Supreme Court has rejected attempts to include extra-record evidence in regards to reviewing a final agency action. In *Wohrle v. Kootenai County*, 147 Idaho 267, 271-272 (2009), the Supreme Court determined that the district court had improperly allowed introduction of additional extra-record evidence because the additional evidence admitted was merely intended to "support the petitioners claims that the [challenged decision] was arbitrary, capricious, and abuse of discretion and not supported by substantial evidence in the record." *Id.* The extra-record evidence was not material to the Court's determination of the

[7] Again, any clerical errors can be corrected through stipulation by the parties, although the Department has never requested such a stipulation. I.A.R. 13.5. No remand is necessary to address that problem.

matter on the merits and did not correct procedural irregularities in the proceedings. *Id.* Similarly, in this case the Department is seeking a remand to modify its own Order, but has not alleged procedural irregularity or that there was a good reason the Department failed to issue a final order that complied with Idaho law in the first place. I.C. § 67-5276. Attempting to correct the very Order that is being appealed from is not the sort of additional fact-finding that justifies a limited remand pursuant to the Idaho Administrative Procedure Act.

"In situations where no procedural irregularities before the agency are alleged and the case is heard as an administrative appeal, the hearing must be confined to the record." *Peterson v. Franklin County*, 130 Idaho 176, 186 (1997). Allowing the Department, at this stage in the proceedings to fundamentally alter, and potentially create, an entirely new record is impermissible under the Idaho APA. Rather such a process would result in undue delay and additional undue cost to all parties involved. It is especially inappropriate, where, as in this case, this Court has the benefit of the Supreme Court's guidance and a complete agency record. The Coalition has filed timely appeals and has requested the District Court to rule on the merits of the Director's actions that have fundamentally violated existing law and have injured the Coalition's private property rights.

There is no procedural barrier to this Court issuing a final decision on the remaining issues on the merits, and then remanding the matter to the Department with specific direction for further actions in compliance with the law, including recent Supreme Court decisions.

CONCLUSION

The Department has failed to show "good cause" for a temporary remand under I.A.R. 13.3. Good cause does not exist to remand the action because intervening court decisions invalidating a portion of the agency order on appeal do not divest this Court of the duty to

determine the case on the merits. The Coalition has a statutory right to judicial review and there is no basis to alter the current proceeding. Moreover, where these consolidated cases have been pending before the District Court for four years, there is no need to delay inevitable judicial review.

In addition, such a remand is impermissible under the Idaho APA, as it would result in either a substantially modified or a potentially new record not properly before the Court in this case. Furthermore, the remand would not result in a more efficient resolution of the issues, and instead would result in confusion, undue delay and cost and would prejudice the Coalition's ability to properly present their issues before the District Court on judicial review.

THEREFORE, the Surface Water Coalition hereby respectfully requests that the Court **DENY** the Department's *Motion to Remand Methodology Order to Idaho Department of Water Resources*.

DATED this 14th day of February, 2014.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of February, 2014, I served true and correct copies of the foregoing **SURFACE WATER COALITION'S RESPONSE IN OPPOSITION TO IDAHO DEPARTMENT OF WATER RESOURCES' MOTION TO REMAND METHODOLOGY ORDER** upon the following by the method indicated:

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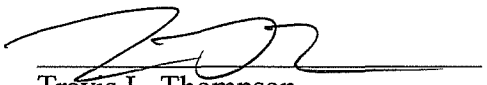

Travis L. Thompson