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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

RANGEN, INC.,

Petitioner,

vs.

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

Respondents,

IDAHO GROUND WATER
APPROPRIATORS, INC., FREMONT
MADISON IRRIGATION DISTRICT,
BURLEY IRRIGATION DISTRICT,
MILNER IRRIGATION DISTRICT,
AMERICAN FALLS RESERVOIR
DISTRICT #2, MINIDOKA IRRIGATION
DISTRICT, NORTH SIDE CANAL

Case No. CV-2014-1338

(Consolidated Gooding County Case No.
CV-2014-179)

**RESPONSE IN OPPOSITION TO
MOTION TO AUGMENT RECORD**

COMPANY, TWIN FALLS CANAL
COMPANY, AND THE CITY OF
POCATELLO,

Intervenors.

Come now respondents Idaho Department of Water Resources and Gary Spackman, Director of the Idaho Department of Water Resources (collectively referred to as “Department”), and file this *Response in Opposition to Motion to Augment Record* (“Response”). The Response is supported by the affidavit of Jennifer S. Sukow, filed herewith.

On June 17, 2014, the Idaho Ground Water Appropriators, Inc. (“IGWA”) filed a *Motion to Augment Record* (“Motion”) in Gooding County Case No. CV-2014-179.¹ IGWA requests to augment the record in this administrative appeal with the affidavit of Charles M. Brendecke (“Brendecke Affidavit”), a post-hearing affidavit that seeks to introduce evidence related to other delivery calls in the Thousand Springs area. The Department opposes the motion as the additional evidence is not material to this appeal and does not relate to the validity of the Department’s January 29, 2014, *Final Order Regarding Rangen, Inc.’s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* (“Curtailment Order”). Moreover, the evidence is speculative as the other delivery calls present different sets of facts than the Rangen, Inc. (“Rangen”) delivery call and there has been no determination of material injury related to the other delivery calls.

¹ On June 20, 2014, the Court issued the *Order Consolidating Gooding County Case No. CV-2014-179 into Twin Falls County Case No. CV-2014-1338*.

LEGAL STANDARD

Idaho Code § 67-5276 provides:

(1) If, before the date set for hearing, application is made to the court for leave to present additional evidence and it is shown to the satisfaction of the court that the additional evidence is material, relates to the validity of the agency action, and that:

(a) there were good reasons for failure to present it in the proceeding before the agency, the court may remand the matter to the agency with directions that the agency receive additional evidence and conduct additional factfinding.

(b) there were alleged irregularities in procedure before the agency, the court may take proof on the matter.

(2) The agency may modify its action by reason of the additional evidence and shall file any modifications, new findings, or decisions with the reviewing court.

The decision to grant or deny a motion for augmentation of the record on appeal is reviewed under an abuse of discretion standard. *Wohrle v. Kootenai Cnty.*, 147 Idaho 267, 271, 207 P.3d 998, 1002 (2009). A decision within the discretion of the district court will not be disturbed on appeal if the court correctly perceived the issue as one of discretion, acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it, and reached its decision by an exercise of reason. *Id.* Judicial review is generally confined to the record prepared before the agency unless the party requesting the additional evidence can demonstrate that the evidence falls within the statutory exceptions provided for in Idaho Code § 67-5276. *Id.*

ARGUMENT

1. The Brendecke Affidavit seeks to introduce evidence that is immaterial to the Rangen delivery call.

IGWA seeks to expand the scope of this proceeding by introducing evidence related to “four outstanding delivery calls” from water users in the Hagerman area. *Motion* at 3. IGWA’s stated purpose for the information is to argue that the scope of potential curtailment in the

pending delivery calls is “all junior-priority groundwater use within the ‘Great Rift trim line’ ...” *Id.* IGWA fails to explain how this information is material to this proceeding except to say that it is relevant to the Court’s review of issue 5.2 in IGWA’s Petition for Judicial Review. *Motion* at 4. Issue 5.2 states: “Whether the IDWR erred by curtailing beneficial water use where less than 1% of the curtailed water is predicted to accrue to *Rangen* after 50 years of curtailment.” *Petition for Judicial Review* at 2 (emphasis added). By its plain reading, Issue 5.2 relates to water predicted to accrue to *Rangen*, not other surface water right holders with pending delivery calls, nor does this issue speak to the scope of potential curtailment in future delivery calls. Evidence regarding the potential scope of curtailment in future delivery calls is immaterial to this proceeding as it has no effect on the *Rangen* delivery call.

In *Wohrle*, 147 Idaho at 269, 207 P.3d at 1000, Kootenai County challenged a district court’s granting of a motion to augment the record with information related to other variance permit applications. The Idaho Supreme Court reversed the district court, finding:

Respondents did not show that the additional evidence was material. Idaho Code § 67–6516 focuses on the “characteristics of the site” and the statute’s consideration of conflict with the public interest and undue hardship is inherently restricted to a case-by-case analysis. Therefore, evidence regarding the Board’s granting of a variance permit in another case is not material to the Board’s decision based upon the unique characteristics of Respondents’ properties.

Id. at 272, 207 P.3d at 1003.

The Director’s application of the conjunctive management rules is similarly restricted to a case-by-case analysis. Here, the focus is on *Rangen*’s specific water rights. Issues related to other pending delivery calls are not material to the Director’s decision in the Curtailment Order. The issue before this Court is the Director’s determination in this proceeding, not what may be decided in future delivery call proceedings.

2. The Brendecke Affidavit is based on speculation of the outcome in the pending delivery calls.

IGWA seeks to use Table 1 presented in the Brendecke Affidavit to argue that the scope of potential curtailment in other future delivery calls is “all junior-priority groundwater use within the ‘Great Rift trim line’” *Motion* at 3. The request to augment the record should be rejected because the information presented in Table 1 is speculative and based on assumptions of what the Director may hold in future delivery calls. There have not been any hearings related to the pending delivery calls identified in Table 1. *Sukow Affidavit*, ¶ 11. There have been no determinations of material injury for the water rights listed, no determinations of whether the calling parties are using water consistent with the conjunctive management rules, no decisions on whether curtailment of junior groundwater pumping would result in a benefit to the calling party, and no determinations regarding whether full curtailment to the water right priority date would be required to fulfill a given water right. *See id.*

The calculations presented in the Brendecke Affidavit are based on speculative results of pending delivery calls and may ultimately prove faulty. None of the water rights in the pending delivery calls divert water from the Curren Tunnel. They divert from other sources that are represented in the ESPA model by different model cells. *Sukow Affidavit*, ¶¶ 4-8. The Brendecke Affidavit attempts to draw a broad conclusion regarding potential curtailment without sufficient basis to support the conclusion. Until there is a determination made through a hearing for the other pending delivery calls, the number of junior groundwater irrigated acres that may be impacted by these delivery calls is speculative. Determinations of material injury and of other items considered by the Director in the pending delivery calls may be different from the determinations made in the Rangen proceeding given the case-specific nature of the analysis conducted in a delivery call pursuant to the conjunctive management rules and the difference in

the sources for these water rights. *Id.* ¶ 10. The Court should exercise its discretion and reject IGWA's request to insert speculative evidence into the record in this proceeding.

3. IGWA fails to present good reasons for its failure to present evidence related to pending delivery calls in the Rangen matter.

IGWA argues that the "magnitude of the curtailment risk from other pending delivery calls could not be evaluated until after the Rangen Curtailment Order was issued." *Brendecke Affidavit*, ¶ 7. This is factually incorrect. While use of the Great Rift trim line is new, the concept of the potential scope of curtailment related to pending delivery calls is not. The Billingsley Creek Ranch delivery call was made prior to the Rangen delivery call. *See Brendecke Affidavit*, Exhibit B. The most senior water right held by Billingsley Creek Ranch has a priority date of 1933. *Id.* Given that the priority date associated with the water right is senior to the development of nearly all ground water pumping in the state of Idaho, the potential magnitude for curtailment of junior ground water rights under the Billingsley Creek Ranch delivery call is plain. IGWA's failure to anticipate the scope of potential curtailment in pending delivery calls is not justification to allow it to submit new evidence into the record to support a legal argument it wishes to make on appeal in this proceeding. The Court must deny IGWA's request as it fails to meet the statutory standard set out in Idaho Code § 67-5276.

4. Remanding the matter back to the Director for additional development will result in an unjustified delay in the proceeding.

IGWA asks this Court to augment the record with the Brendecke Affidavit and "if the court deems it appropriate, allow the IDWR to revise its decision in light of this evidence if the Director is so inclined." *Motion* at 6. While IGWA seems to suggest that remand is optional, it is not. The Court must remand the matter back to the Director for additional record development. *Wohrle*, 147 Idaho at 272, 207 P.3d at 1003 (The district court "is required to

remand the matter to the agency with directions that the agency receive additional evidence and conduct additional factfinding.”). Once the matter is reopened to receive additional evidence on this issue, other parties will undoubtedly seek to further supplement the record on this issue. Such actions will delay judicial review of this matter. The evidence IGWA seeks to supplement the record with does not justify the additional delay that will be caused. The decision to allow IGWA to supplement the record is discretionary. Idaho Code § 67-5276(1)(a). The Court should exercise its discretion and deny the request to augment the record on the basis the information IGWA seeks to add to the record does not justify the delay in the proceeding it would cause.

CONCLUSION

IGWA fails to meet the statutory standard of Idaho Code § 67-5276. The evidence IGWA seeks to add to the record in this proceeding is not material as it relates to other delivery calls and not the Rangen delivery call. The evidence is also speculative. The result of the other delivery calls may be different from the result here. Until a hearing is held and an order issued, one cannot say with certainty what the impact of another delivery call may be to junior ground water users. Moreover, IGWA has failed to justify its failure to address the potential scope of curtailment question in the Rangen delivery call proceeding. Furthermore, the Court should exercise its discretion to deny the request to supplement the record as it will result in an unjustifiable delay of this proceeding.

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DATED this 25th day of June, 2014.

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Chief, Natural Resources Division



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25TH day of June, 2014, I caused a true and correct copy of the foregoing **RESPONSE IN OPPOSITION TO MOTION TO AUGMENT RECORD** to be filed with the Court and served on the following parties by the indicated methods:

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