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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 MATHEW WEAVER in his capacity as the 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 POCATELLO, CITY OF BLISS, CITY OF BURLEY, CITY OF CAREY, CITY OF DECLO, CITY OF DIETRICH, CITY OF	Case No. CV01-23-13173 **RESPONDENTS' MEMORANDUM IN OPPOSITION TO IGWA'S MOTION TO AUGMENT AGENCY RECORD OR PRESENT ADDITIONAL EVIDENCE**

GOODING, CITY OF HAZELTON, CITY OF HEYBURN, CITY OF JEROME, CITY OF PAUL, CITY OF RICHFIELD, CITY OF RUPERT, CITY OF SHOSHONE, AND CITY OF WENDELL, BONNEVILLE-JEFFERSON GROUND WATER DISTRICT, and BINGHAM GROUNDWATER DISTRICT, Intervenors.
IN THE MATTER OF THE DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY AND 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

Respondents the Idaho Department of Water Resources and Mathew Weaver, Director of the Idaho Department of Water Resources (collectively referred to as "Department"), by and through their attorneys of record, hereby submit *Respondents' Memorandum in Opposition to IGWA's Motion to Augment Agency Record or Present Additional Evidence*.

On October 16, 2023, the Idaho Ground Water Appropriators, Inc. ("IGWA"), filed a *Motion to Augment Agency Record or Present Additional Evidence Record* ("*Motion*") in this case. IGWA's *Motion* seeks to augment the agency record in this administrative appeal with a brief and a supporting declaration that were filed in a different court case. For the reasons explained below, the Department opposes the motion.

ARGUMENT

There are two ways a party can unilaterally seek to supplement the record in a judicial review proceeding once the record has been finalized by the agency. The first way is to supplement the record pursuant to Idaho Rule of Civil Procedure ("I.R.C.P.") 84(l) and Idaho Appellate Rule ("I.A.R.") 30. The second method for supplementing the record is if a district court agrees to supplement the record with additional evidence pursuant to I.R.C.P. 84(l) and Idaho Code § 67-5276. For the reasons outlined below, IGWA's *Motion* to supplement the settled agency record cannot be granted under either method.

A. IGWA's *Motion* fails to meet the necessary requirements to augment the settled agency record pursuant to I.A.R. 30.

I.R.C.P. 84(l) states that a motion to augment the record must be filed "in the same manner and pursuant to the same procedure as provided in the Idaho Appellate Rules." I.A.R. 30 states, in relevant part:

> Such a motion 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.

Thus, pursuant to I.A.R. 30, a party seeking to augment the record in a judicial review proceeding: (1) shall include a statement setting forth the grounds for the request; (2) shall attach a copy of any document sought to be augmented; and (3) must show that the document was filed with the administrative agency in the contested case or presented to the administrative agency[1] at the hearing from which the appeal was taken. IGWA fails

[1] I.A.R. 30 states that the documents must have been presented to the "district court." However, because this rule is made applicable through I.R.C.P. 84(l), which governs judicial review from agency proceedings, and

two parts of this test. First, IGWA failed to attach a copy of the documents it is seeking to augment the record with to its *Motion*. Second, IGWA has failed to show (or allege) that the documents were filed with or otherwise presented to the Department in the administrative hearing for this matter. Accordingly, the record cannot be supplemented with the documents pursuant to I.A.R. 30.

B. IGWA's *Motion* fails to meet the necessary requirements for the district court to supplement the settled agency record with additional evidence pursuant to Idaho Code § 67-5276.

I.R.C.P. 84(l) explains when a district court can supplement the record with additional evidence. It states in relevant part: "*Where statute provides for the district court itself to take additional evidence*, the party desiring to present additional evidence must move the court to do so within 21 days of the filing of the transcript and record with the district court." I.R.C.P 84(l) (emphasis added). Idaho Code § 67-5276 is a statute that "provides for the district court itself to take additional evidence." Idaho Code § 67–5276 allows additional evidence when, prior to the hearing date, it is shown to the satisfaction of the court that (1) there were good reasons for failure to present it in the agency hearing or (2) that there were alleged irregularities in procedure before the agency. *Crown Point Dev., Inc. v. City of Sun Valley*, 144 Idaho 72, 76, 156 P.3d 573, 577 (2007). Judicial review must be confined to the agency record except as supplemented by additional evidence taken pursuant to Idaho Code § 67–5276. I.C. § 67–5277; *Crown Point Dev., Inc. v. City of Sun Valley*, 144 Idaho 72, 76, 156 P.3d 573, 577 (2007). A district court is

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because the agency's role in the administrative proceeding is equivalent to that of a district court (i.e., the agency takes evidence and accepts documents filed in the proceeding to build the record), the term "administrative agency" must be substituted for "district court" when applying this rule to a judicial review proceeding. Accordingly, the documents IGWA seek to include must have been presented to the administrative agency.

not empowered to accept additional evidence outside of the agency record beyond the two exceptions in Idaho Code § 67–5276. *Petersen v. Franklin Cnty.*, 130 Idaho 176, 186, 938 P.2d 1214, 1224 (1997).

i. IGWA fails to show that there was a good reason for its failure to present the documents in the agency hearing.

In its Motion, IGWA argues that a partial transcript from a status conference the Director held where he announced his intent to revise the Methodology Order and certain emails between counsel for the Department and counsel for IGWA are "material" and "relate" to the first issue listed in IGWA's petition for judicial review, "namely '[w]hether the Director violated Petitioners' constitutional right to due process and/or the Idaho Administrative Procedures Act by issuing the Fifth Methodology Order *without first providing notice and a hearing*.'" *Motion* at 4 (emphasis added). IGWA argues it needs the partial transcript and emails to support its argument that:

> (1) IGWA notified the Director long before the Fifth Methodology Order was issued that any changes to the Methodology Order must comply with due process and the APA; and (2) the Director intentionally refused to hold a hearing before issuing the Fifth Methodology Order, despite there being no emergency requiring immediate action, thereby violating due process and the APA.

Id.

Thus, the grounds for IGWA's request are that IGWA needs the documents to show that it made the Director aware of IGWA's argument that the Director must provide a hearing before issuing the Fifth Methodology Order.

It is not contested that the Director did not hold a hearing before issuing the Fifth Methodology Order. As articulated in the *Post-Hearing Order Regarding Fifth Amended Methodology Order*, the Director is not required to hold a hearing before issuing a

decision. R. 1094–95. Whether the Director must hold a hearing is a legal question. Whether or not IGWA notified the Director of its belief that the Director must hold a hearing is not relevant to that legal question. But even if it was relevant, IGWA admits it did not even attempt to place the transcript or emails into the record at the hearing. *Motion* at 5. IGWA makes three arguments as to why it failed to make the documents part of the agency record. First, IGWA argues that "the statements had been made to the Director and his attorney, and it would not be appropriate to call the Director as an evidentiary witness in a hearing over which he presided as the hearing office." *Id*. This argument contains a false presumption that the only way to get the documents into the record would have been through calling the Director. This argument fails because calling the Director is not the only way to get the evidence into the record. If IGWA believed that the documents were important to the record, there are numerous other ways IGWA could have introduced the documents in the record. IGWA could have introduced the information into the record by calling one of its own witnesses to testify as to IGWA's position. The reality is that IGWA didn't even try to get the documents into the record before the agency. IGWA's inability to call the Director is not a "good reason" why IGWA failed to introduce the documents at hearing.

Next, IGWA argues that the Director prevented IGWA from calling Department staff to address alleged procedural errors made by the Department. *Motion* at 5. IGWA's argument on this issue does not tell the complete story. The Department held a prehearing conference prior to the administrative hearing on this matter. During the prehearing conference, the Director identified IDWR employees Matthew Anders and Jennifer Sukow as the witnesses he intended to have testify on behalf of the Department at the hearing to

explain the facts and information the Department considered in updating the Methodology Order and As-Applied Order. R. 301. At the prehearing conference, the Director also indicated that the deposition process is not an opportunity for parties to question Department employees about the Director's deliberative process related to legal and policy considerations. The Director limited the *scope of the depositions* to preclude questions regarding the Director's deliberative process on legal and policy considerations. *Id*. But the Director also advised that he would consider enlarging the list of Department employees to testify if the parties could identify issues "outside of those that Matt Anders or Jennifer Sukow could discuss . . . ." R. 876. IGWA did attempt to take the Director up on his offer to make additional staff available by attempting to subpoena then-Deputy Director Mathew Weaver and Department employee Tony Olenichak to testify at the hearing. IGWA submitted a motion for subpoenas just five days before the hearing started. The Director did not block Mr. Olenichak from testifying and only refused to issue a subpoena for then-Deputy Director Weaver because IGWA requested the subpoena just days before the hearing was set to start and Mr. Weaver was already out of the county at the time, was going to be out of the county the entire time of the hearing, and there had been no arrangements made to have Mr. Weaver testify prior to his leaving the county. *Id*. Thus, to suggest that the Director refused to allow IGWA to call Department staff besides Matt Anders and Jennifer Sukow to testify is false. Moreover, as discussed above, there is no reason that IGWA couldn't have attempted to use its own witnesses to get the requested documents into the record. [2]

[2] IGWA also quotes part of the hearing transcript to suggest that the Director was refusing to allow in the testimony related to this issue. *Motion* at 6. However, the quote is taken out of context. The Surface Water

Finally, IGWA points to an example at the hearing where the Director rejected the request of counsel for Bingham Ground Water District to introduce certain emails related to settlement discussions. *Motion* at 6. By the attorney's own statement, the emails did not address the issue IGWA has identified here, which is whether the Director had notice of IGWA's position that the Director must first hold a hearing. The attorney wanted the emails in the record to show that "information from the settlement agreement was used in the amendments of the methodology order." Tr. 1031:12–14. Just because the Director declined to admit this evidence into the record, doesn't mean that the Director would not have been willing to consider the documents IGWA now seeks to add to the record. The Director's rejection of evidence unrelated to the issue IGWA identifies in its *Motion* does not constitute "good reason" for IGWA's failure to present the documents at hearing.

Because IGWA has failed to show that there was a good reason for its failure to present the documents in the agency hearing, the Court must deny IGWA's request to supplement the record pursuant to Idaho Code § 67–5276's first test.

ii. IGWA fails to allege irregularities in procedure before the agency to justify supplementing the record.

IGWA argues that (1) IGWA's inability to call the Director as a witness, (2) the Director's prehearing order limiting the scope of the depositions of Matt Anders and Jennifer Sukow, and (3) the Director's refusal to admit the emails that counsel for

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Coalition had filed a pre-hearing motion to limit scope of testimony. Tr. 16:16–24. During the oral argument on the motion, an attorney for one of the ground water districts indicated that he intended to introduce testimony regarding the economic injury that curtailment causes on the ground water district. Tr. 20:9–12. The Director's comments regarding the scope of the testimony were in the context of that discussion. Tr. 21:18–22:18. In fact, the Director's response shows he was not narrowly limiting the scope of testimony beyond the economic issue and that he would rule on any objection made by the Surface Water Coalition as the testimony presented itself. Tr. 22:19–24.

Bingham Ground Water District sought to introduce into evidence all constitute "'irregularities in procedure before the agency' pursuant to Idaho Code § 67–5276." *Motion* at 7. These arguments fall apart under scrutiny. First, IGWA fails to explain how "IGWA's inability to call the Director" is any sort of an "irregularity." As explained above, if IGWA wanted the documents in the record, they could have introduced the documents though means other than calling the Director. Not being able to call the Director is not in any sense an "irregularity." Second, the Director's order limiting the scope of depositions of Mr. Anders and Ms. Sukow was appropriate because Mr. Anders and Ms. Sukow are technical staff and are not qualified to address whether the Director was legally required to hold a hearing before issuing the Fifth Methodology Order. Moreover, the Director did not preclude IGWA from calling other agency staff as evidenced by the fact that the Director did not preclude the testimony of IDWR employee Tony Olenichak. Furthermore, the Director did not preclude IGWA from seeking to introduce the documents through its own witnesses. The Director's actions regarding the scope of hearing in no way constitute an "irregularity." Finally, IGWA fails to explain how the Director's refusal to admit certain emails that counsel for Bingham Ground Water District sought to introduce relate in any way to IGWA's failure to try to introduce these documents into the record at hearing. IGWA does not allege that the documents were submitted to the Director and were rejected. Because IGWA does not identify any procedural irregularities at the hearing before the agency that would justify supplementing

the record with the requested documents, the Court must deny IGWA's request to supplement the record pursuant to Idaho Code § 67–5276's second test.[3]

CONCLUSION

Because IGWA failed to attach a copy of the documents they seek to augment the settled agency record with to their *Motion* and failed to show that the documents were filed with the administrative agency in the contested case or presented in the agency hearing, IGWA's motion to augment the settled agency record pursuant to I.A.R. 30 must be denied. Additionally, IGWA has failed to show a good reason for its failure to present the documents in the agency hearing and has failed to allege legitimate irregularities made by the Department at hearing, therefore, the Court must reject IGWA's motion to supplement the record pursuant to Idaho Code §67-5276.

DATED this 30th day of October 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

GARRICK L. BAXTER
Deputy Attorney General

[3] IGWA also cites Idaho Code § 67-5275(3) which allows a court to "require correction to the record." A correction is a change that rectifies an inaccuracy in the record. Here, IGWA is asking the Court to supplement the record with additional evidence, not correct an inaccuracy in the record.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of October 2023, I caused to be served a true and correct copy of the foregoing *Respondents' Memorandum in Opposition to IGWA's Motion to Augment Agency Record or Present Additional Evidence*, via iCourt E-File and Serve, upon the following:

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