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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**

CITY OF IDAHO FALLS, CITY OF
POCATELLO, CITY 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, and CITY
OF WENDELL

Petitioners,

vs.

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

Respondents,

and

Case No. CV01-23-13238

**SURFACE WATER COALITION'S
OPPOSITION TO PETITIONERS'
AMENDED MOTION TO AUGMENT
THE RECORD**

IDAHO GROUND WATER
APPROPRIATORS, INC., A&B IRRIGATION
DISTRICT, BURLEY IRRIGATION
DISTRICT, MILNER IRRIGATION
DISTRICT, NORTH SIDE CANAL
COMPANY, TWIN FALLS CANAL
COMPANY, AMERICAN FALLS
RESERVOIR DISTRICT #2, MINIDOKA
IRRIGATION DISTRICT, 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 opposition to *Motion to Augment the Record* (“Motion”) filed by Petitioners Cities of Idaho Falls et al. (“Petitioners”). As discussed below, the Court should deny Petitioners’ Motion because it is both procedurally and substantively deficient.

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 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 Hearing was held on June 6-9, 2023 and the parties were provided one week to submit post hearing briefs. Petitioners submitted a joint *Closing Brief* on June 16, 2023.

On July 19, 2023, the Director issued the *Post-Hearing Order Regarding Fifth Amended Methodology Order* (“Post-Hearing Order”) which is the subject of this *Petition for Judicial Review*. That same day the Director also issued the *Sixth Amended Methodology Order* as a final agency order. The Idaho Ground Water Appropriators, Inc. appealed that decision (*IGWA v. IDWR*, Ada County Dist. Ct., Fourth Jud. Dist., Case No. CV01-23-13173), however the Petitioners did not.

On August 16, 2023, Petitioners filed their *Notice of Appeal and Petition for Judicial Review of Final Agency Action* (“Petition for Judicial Review” or “Petition”), appealing the Post-Hearing Order. On August 31, 2023, IDWR filed notice that it lodged the agency record and transcript with the agency. 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 28, 2023, IDWR filed its *Order Settling the Agency Transcript and Record*, noting that no parties had filed any objection to the transcript or record. On October 19, 2023, Petitioners filed their *Motion to Augment the Record* (“Motion to Augment” or “Motion”) in which it seeks to add the following documents to the agency record: (1) *Motion for Clarification and Reconsideration of Denial of Request for Hearing and to Engage in Discovery*, Docket No. CM-DC-2010-001 (Sep. 5, 2023) (“Motion for Reconsideration”), (2) *Surface Water Coalition’s Response to Cities’ Motion for Clarification and Reconsideration*, Docket No. CM-DC-2010-001 (Sep. 19, 2023). (“SWC’s Response”), and (3) *Order Denying Cities’ Motion for Clarification and Reconsideration*, Docket No. CM-DC-2010-001 (Sep. 25, 2023) (“Order Denying Motion for Reconsideration”).

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.” I.C. § 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.” A court may also “require corrections to the record.” Idaho Code § 67-5275(3).

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 (“IRCP”) 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.” Rule 84(l) 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 Rules, Rule 30(a) provides 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).

ARGUMENT

Petitioners seek to augment the agency record on judicial review by adding three documents in the agency docket below that were filed after the Department's deadline to lodge the agency record.¹ These documents relate to a separate order captioned in the ongoing delivery call docket, and the documents are properly outside the record for the Post-Hearing Order which is the subject of this appeal. The general rule is that the record for judicial review is limited to the agency record lodged with the court, unless a statutory exception applies. I.C. §§ 67-5249(3), 67-5277. As discussed below, Petitioners do not argue that any exception applies, perhaps because none do; instead, Petitioners merely argue that the additional documents "will be helpful to the court." To the contrary, supplementing the record with these additional documents would, at most, reiterate what is already shown by the properly lodged record for appeal and would unnecessarily enlarge the record with briefing and an order that are wholly independent of the subject of this Petition for Judicial Review. Therefore, SWC requests that the Court deny Petitioners' Motion.

I. There is no statutory basis for augmenting the record with the requested documents.

Ordinarily, judicial review is limited to the agency record, but the court may or augment the record 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.* §§ 67-5275(3), 67-5276(1)(a)-(b). The court may also "require corrections to the record" if there is an error.

¹ Although certain post-order documents (R. 1101-1175) were included in the settled agency record, the Coalition disputes their relevance as to the record that was created and used to issue the Post-Hearing Order. Moreover, the Coalition did not waive any right to object to the Petitioners' present motion to augment despite those documents inclusion.

First, Petitioners made no argument that the supplementary documents are material to their Petition for Judicial Review. They are not. Petitioners proffered documents include their Motion for Reconsideration, SWC's Response, and the Director's Order Denying Motion for Reconsideration, all of which relate to a different order regarding a request made by the Petitioners for a second administrative hearing, not the Post-Hearing Order that they appealed. The process that was due under either the APA or the constitution is a question of law that may be fully argued without these supplemental documents relating to a different order issued well after the Post-Hearing Order regarding the Petitioners' separate request. *See Spencer v. Kootenai County*, 145 Idaho 448, 454 (2008) (stating that "[d]ue process issues are generally questions of law"). The process that was actually afforded to Petitioners when they filed their Petition for Judicial Review is accurately captured within the existing settled agency record. Therefore, there are no facts material to Petitioners' claims.

Second, Petitioners claim that the agency action was invalid as of the date of their Petition for Judicial review because they were allegedly not afforded the opportunity to conduct the discovery necessary in the underlying proceeding. IDWR's decision to deny the Motion for Reconsideration and the briefing for that Motion merely maintained the status quo following the issuance of the final agency order in this case. There are no material facts that will affect the outcome of Petitioners' case. The Director's decision to deny their second request for hearing was a wholly separate request, filed well after the Post-Hearing Order and culmination of the earlier requested hearing and final agency order.

Third, the "good reasons" provision is inapplicable because Petitioners are not seeking to supplement the record on appeal with evidence, only with post-petition filings in the continuing delivery call proceeding. Additionally, Plaintiffs have not alleged any irregularities in the

underlying administrative proceeding that resulted in the Post-Hearing and Sixth Methodology Orders.

Finally, although the court may require a correction to the record, no correction is needed. Petitioners have not alleged an error in the record; they have merely argued that the inclusion of post-petition filings “will be helpful to the Court.” Motion at 3. The proffered documents are in fact related to a separate agency order, not the final order that is the subject of this appeal and were filed after the agency record was lodged for this appeal. Thus, the documents are properly excluded from the record.

Therefore, SWC requests that the Court deny Petitioner’s Motion because they have not met the requirements of section 67-5276 to augment the record nor is a correction to the record appropriate under section 67-5275(3).

II. Petitioners’ Motion does not comply with the Idaho Appellate Rule 30(a).

Independently, the court should deny Petitioners’ Motion because it does not comply with Idaho Appellate Rule 30(a). 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 appeal 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, Petitioners did not attach a copy of the documents sought to be included in the agency record nor did they state the specific grounds for the request. Petitioners vaguely state that the proffered documents “will be helpful to the court,” but they offer no specific provision of law that would allow the court to augment the record under these facts. Therefore, the SWC requests that the Court deny the Motion for its failure to comply with the Idaho Appellate Rules.

CONCLUSION

Petitioners statement of issues include “[w]hether the Director violated Petitioners’ rights to due process by limiting the scope of discovery and time in which to complete discovery” prior to the Post-Hearing Order. Petitioners’ Motion for Reconsideration and the subsequent filings which concern subsequent actions by IDWR have no bearing on the process that was due before IDWR issued the Post-Hearing Order. Petitioners have provided no basis to augment the record, nor have they complied with the Idaho Appellate Rules to augment the record with these documents which are unrelated to the Post-Hearing Order and underlying proceeding leading up that order. Therefore, SWC respectfully requests that the Court deny the Motion to Augment the Record.

Dated this 2nd day of November, 2023.

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for

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of November, 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 mathew.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 Bricker Dylan Thompson Somach Simmons & Dunn 2033 11th Street, Ste. 5 Boulder, CO 80302 *** service by electronic mail only sklahn@somachlaw.com mbricker@somachlaw.com dthompson@somachlaw.com</p>
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