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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

JOHN B. KUGLER Petitioner, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN, in his official capacity as Interim Director of the Idaho Department of Water Resources Respondents. IN THE MATTER OF PERMIT TO APPROPRIATE WATER NO. 35-8359 IN THE NAME OF JOHN B. & DIANE K. KUGLER	**Case No. CV-WA-2011-15672** **RESPONSE AND BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO SUBMIT ADDITIONAL EVIDENCE**

SCANNED
APR 12 2012

INTRODUCTION

Respondents IDAHO DEPARTMENT OF WATER RESOURCES ("IDWR") and GARY SPACKMAN ("Director Spackman") (collectively referred to as "IDWR" unless otherwise specified) oppose Petitioner John Kugler's ("Kugler") Motion for Leave to Submit Additional Evidence ("Motion"). Not only does Kugler's Motion and supporting documents fail to establish the requisite criteria of Idaho Code § 67-5276 for augmenting an administrative record before this Court, but supplementing the record in the manner Kugler proposes is prejudicial to IDWR. Accordingly, his Motion should be denied.

STATEMENT OF FACTS

On October 4, 1984, Kugler and his wife filed an application to appropriate water with IDWR, seeking groundwater for irrigation. The proposed point of diversion lies within the trust water area. Instead of diverting water, however, beginning May 16, 1986 and through September 30, 2009, Kugler enrolled the land in the Conservation Reserve Program ("CRP") and has not constructed a well on the land, run power to it, or otherwise developed any diversion works or irrigation system. On July 27, 1990, IDWR issued permit number 35-8359 to the Kuglers. On November 9, 1994, IDWR issued an Order for Temporary Stay of Development and Notice of Formal Proceedings ("Temporary Stay Order") which applied to permits in the trust water area for which no proof of beneficial use had been filed citing, among other things, water shortages, water delivery calls and difficulties maintaining minimum stream flow levels. The Temporary Stay Order applied to Kugler's permit. Kugler did not appeal the Temporary Stay Order. On December 6, 2007, IDWR issued an Order Continuing Indefinite Stay in Development Period specifically prohibiting additional development of Kugler's permit. On December 21, 2007, Kugler filed a petition for reconsideration and requested a hearing. On

January 21, 2009, IDWR held a hearing on the Order Continuing Indefinite Stay in Development Period. On March 23, 2009, the hearing officer signed the Preliminary Order Suspending Action and Prohibiting Development ("Preliminary Order"). On April 6, 2009, IDWR received Kugler's Petition for Reconsideration. On April 24, 2009, the hearing officer denied the Petition for Reconsideration. On May 7, 2009, Kugler filed an Exception and Memorandum ("Exceptions"). On August 23, 2010, Director Spackman issued an Order Granting Augmentation Hearing in response to the Exceptions. On June 14, 2011, Director Spackman held the Augmentation Hearing for Kugler's permit. On July 18, 2011, Director Spackman issued a Final Order suspending further work on and development of Kugler's permit. On August 15, 2011, Kugler filed this appeal.

On September 16, 2011, IDWR mailed Kugler a letter informing him, among other things, that he would have fourteen days pursuant to Rule 84(j) of the Idaho Rules of Civil Procedure to file objections to the transcript and record. On September 30, 2011, IDWR mailed a CD containing the contents of the record and transcripts pursuant to Rule 84(j) to Kugler, alerting him again that he had fourteen days to file objections thereto. Kugler did not file objections to the record. Thus, on October 31, 2011, Director Spackman signed the Agency's Certificate of Record in this matter and IDWR filed its Order Settling Agency Transcripts and Record with this Court. Kugler did not move to augment the record pursuant to Rule 84(l) within twenty-one days of the filing of the settled transcript. Instead, on January 9, 2012, Kugler filed his opening brief. On February 1, 2012, IDWR filed its brief, and on February 27, 2012, Kugler filed his reply brief.

On March 21, 2012, two days before the scheduled oral argument, Kugler for the first time raised the issue of additional material that should be in the record. On March 28, 2012,

Kugler filed the present Motion. IDWR understands that Kugler is seeking to introduce his own testimony and "possibly" that of his son at the hearing before the oral argument. It appears Kugler wants to relate his version of three conversations. Two of the conversations purportedly involved Director Spackman: one in September 2009 about the status of Kugler's appeal and why he "had not received any information from the department with respect to it's [sic] progress," and the other after the conclusion of the Augmentation Hearing on June 14, 2011 about whether Kugler needed to apply for a well drilling permit "to complete my appeal that I intended to file." The third conversation purportedly involved IDWR staff in July 1986, but Kugler is not sure who the staff member was and suggests the content of the conversation concerned his intended enrollment of his lands in CRP.

ARGUMENT

Pursuant to § 67-5276, Kugler must prove the purported evidence is (a) material, related to the validity of IDWR's action and (b) either there were good reasons for failure to present the evidence in earlier proceedings before IDWR or there were irregularities in agency procedure. See I.C. § 67-5276(1). Kugler fails, however, to specify the materiality of the proposed evidence, explain why he failed to properly and timely make such conversations part of the record before IDWR, and connect the dots between his alleged evidence and any irregularities in IDWR procedure.

A. The proposed evidence is not material or relevant to review of IDWR's Final Order.

The purported evidence is immaterial or irrelevant to the judicial review of IDWR's actions. Materiality is a threshold consideration for determining whether the record should be augmented. See Wohrle v. Kootenai County, 147 Idaho 267, 272, 207 P.3d 998, 1003 (2009) (holding district court erred in augmenting because the purported evidence was not material and

the proponent of the purported evidence failed to prove irregularities in the agency's procedure). The purported evidence must relate to the "*validity* of the agency action." I.C. § 67-5276(1) (emphasis added). The Comments to the Idaho Administrative Procedure Act for this provision state "[t]he term 'validity' encompasses the scope of judicial review provisions in section 67-5279. In other words, evidence may be received only if it is likely to contribute to the court's determination of the validity of the agency action under one or more of the standards set forth in section 67-5279." I.C. § 67-5276, cmt. 3 (1993).

As was the case in Wohrle, Kugler's affidavit and memorandum in support of the Motion do not state clearly how the purported evidence is relevant or material to the validity of IDWR's Final Order. His purported evidence is, at best, just additional; it is not relevant to the validity of IDWR's Final Order. None of the conversations suggest IDWR's actions were invalid under the standards of Idaho Code § 67-5279.

Kugler's 1986 conversation about his intent to enroll the land in CRP is well-trod ground that is already a matter of the record. See Respondents' Brief, p.2 for some of the citations. There is no dispute he enrolled the land in CRP. Additional evidence about his enrollment in CRP is therefore not material to IDWR's actions on his permit.

Moreover, if, as suggested in his Motion, the purported evidence is related to one of the substantive claims rendered in support of the decision, then Kugler had numerous opportunities to present the purported evidence after the hearing officer issued the Preliminary Order in March 2009. Kugler raised no evidentiary issue in his April 2009 Petition for Reconsideration. He presented no additional evidence in his May 2009 Exceptions. In August 2010, Director Spackman granted Kugler a second, supplemental hearing, the June 2011 Augmentation Hearing. Anything Kugler now seeks to offer that occurred prior to the Augmentation Hearing should not

be allowed because the Augmentation Hearing would have been the proper place to present the purported evidence before IDWR if indeed the purported evidence was relevant to the issues. The fact that he failed to do so previously, after multiple opportunities, underscores the lack of relevance to the validity of IDWR's Final Order.

Kugler's off-the-record, post-Augmentation Hearing conversation appears to relate to a potential well-drilling permit, not his water permit which is the subject of the Final Order. IDWR cannot overstate the importance of that distinction. Kugler is confused about the difference between his water right permit and a well-drilling permit. His confusion is not reason to grant his Motion. The first sentence of his memorandum in support of the Motion highlights the pervasive problem. IDWR's Final Order concerns Kugler's water right permit, not a well-drilling permit, so purported evidence about a well-drilling permit is irrelevant. See Respondents' Brief, Parts V. 1.D. and V.3., discussing Kugler's failure to distinguish between water right permit number 35-8359 and a well-drilling permit.

B. Kugler has no good reason for his failure to present the purported evidence in earlier proceedings before IDWR.

Even assuming for the sake of argument that the additional evidence is material or relevant, Kugler wholly lacks good reason for his failure to present the purported evidence in proceedings before IDWR. He does not address why he failed to present the pre-Augmentation Hearing discussions on the record at the Augmentation Hearing. As to the post-Augmentation Hearing conversation, Kugler failed to follow Idaho Code § 67-5246 regarding effectiveness of Final Orders. The statute provides him with fourteen days in which to file a motion for reconsideration. Instead, of seeking reconsideration and addressing the alleged additional evidence, he filed an appeal with the district court. Section 67-5276 is not a vehicle to give Kugler one more bite of an apple. Judicial review of a disputed issue of fact must be confined to

the agency record for judicial review as defined by § 67-5275(1) and supplemented by § 67-5276. See Crown Point Dev't, Inc. v. City of Sun Valley, 144 Idaho 72, 76, 156 P.3d 573, 577 (2007) (holding augmentation was improper when the proponent of the purported evidence failed to show good reasons for failure to present it to the agency and failed to allege irregularities in the agency procedure). Only when shown to the satisfaction of this Court that there were good reasons for Kugler's failure to present the purported evidence before IDWR may he be allowed to introduce additional evidence, but via remand to the agency in accordance with Idaho Code § 67-5276(1)(a). Kugler's suggestion that the additional evidence is not prejudicial to IDWR is a nonstarter and refuted below in Part D.

C. Kugler fails to show irregularities in IDWR's procedure.

There were no irregularities in procedure concerning his water rights permit. Kugler's Motion lacks detail supporting his bare allegations of irregularities. Lack of proof of irregularities should doom his Motion. See Wohrle, 147 Idaho at 272, 207 P.3d at 1003. There, the Court noted that no evidence was presented that would support a finding of irregularities in procedure. See id. "Instead, counsel's affidavit in support of the motion simply stated that '[t]he attached documents support the Petitioners' claims that the decision by Kootenai County to deny their variance application was arbitrary, capricious, an abuse of discretion and not supported by substantial evidence in the record.'" Id. IDWR incorporates its argument in Respondents' Brief, Parts V.1.D., V.2.A. & B., and V.4., in response to Kugler's vague references to irregularities and due process in his Motion. Kugler has enjoyed ample due process: a hearing, an Augmentation Hearing, multiple motions before IDWR and Director Spackman seeking reconsideration. In none of those forums did he allege an irregularity in procedure. He is simply dissatisfied with the reasoned and well-supported decision. As demonstrated in Wohrle,

Kugler's dissatisfaction with IDWR's Final Order is insufficient grounds to allow augmentation of the record.

D. Allowing Kugler to belatedly present detailed testimony after multiple opportunities and his nebulous briefing would be prejudicial to IDWR.

Kugler is misusing a procedural mechanism designed to provide a full and complete factual record for judicial review. Instead of explaining in detail the proposed evidence and their materiality, Kugler generalizes the substance of three conversations and ignores completely the relevancy requirement. And he does so in a manner prejudicial to IDWR. He alleges the conversation(s) "establish an abuse of discretion by the department that also constitutes an irregularity not apparent on the record," but neglects to describe the irregularity. Kugler suggests in his supporting affidavit that he "did not present this question earlier as appellant was trying to digest and more fully understand the law from all of the cases utilized by opposing counsel in justifying and supporting the respondent's [sic] position in this matter." He is not describing an irregularity in procedure. His phraseology ("this question") indicates the purported evidence may be additional argument, not factual matter, which is altogether improper to introduce by this Motion. Rather, Kugler's statement rings more like the realization that only if he alleges an irregularity would the Court consider further testimony, so he grasped at those straws.

The Motion does not tell IDWR (or the Court) who exactly will testify or what Kugler and possibly his son will say. The Motion does not connect the purported evidence to the standards of judicial review. Kugler's proposed presentation does not allow IDWR an opportunity to present rebuttal testimony. IDWR does not even know the identity of one of the supposed parties to a 1986 conversation. Debbie Gibson no longer works for IDWR and neither do several of her predecessors in that role. Adopting Kugler's suggested approach would prejudice IDWR because there is no opportunity for IDWR to respond or develop a record on the

issue. Section 67-5276 should not countenance the presentation of additional evidence in the fashion Kugler proposes.

CONCLUSION

Kugler has not demonstrated the need to include additional facts that are material to the validity of IDWR's actions on his permit. He fails completely to address any good reason he neglected to present the purported evidence before IDWR. And he states without support that there is an irregularity in procedure. Because Kugler has not satisfied the statutory criteria for allowing augmentation, his Motion should be denied.

DATED this 11th day of April, 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of April, 2012, I caused a true and correct copy of the foregoing RESPONSE AND BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO SUBMIT ADDITIONAL EVIDENCE to be filed with the Court and served on the following parties by the indicated methods:

Original to: SRBA Court 253 3rd Ave. North P.O. Box 2707 Twin Falls, ID 83303-2707 Facsimile: (208) 736-2121	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☒ Facsimile
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