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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.;	)	Case No. CV-2010-382
)	
Petitioner,	)	(consolidated Gooding County Cases
	)	CV-2010-382, CV-2010-383, CV-2010-
vs.	)	388, Twin Falls County Cases CV-2010-
	)	3403, CV-2010-5520, CV-2010-5946,
CITY OF POCATELLO;	)	CV-2012-2096, CV-2013-2305, CV-
	)	2013-4417, and Lincoln County Case
Petitioner,	)	CV-2013-155)
)	
vs.)	
	)	SURFACE WATER COALITION'S
TWIN FALLS CANAL COMPANY, NORTH	)	BRIEF IN SUPPORT OF JOINT
SIDE CANAL COMPANY, A&B	)	PETITION FOR REHEARING
IRRIGATION DISTRICT, AMERICAN)	
FALLS RESERVOIR DISTRICT#2,)	
BURLEY IRRIGATION DISTRICT,)	
MILNER IRRIGATION DISTRICT, and)	
MINIDOKA IRRIGATION DISTRICT,)	
)	
Petitioners,)	
)	

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**

On September 26, 2014, the Court issued its *Memorandum Decision and Order on Petitions for Judicial Review* (“*Memorandum Decision*”). 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 (collectively hereafter referred to as the “Surface Water Coalition”, “Coalition”, or “SWC”)¹ submitted their *Joint Petition for Rehearing* on October 10, 2014. The Coalition hereby submits its opening brief in support of the joint petition for rehearing.

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 Court's *Memorandum Decision* addresses the petitions for judicial review filed by the Coalition, the Idaho Ground Water Appropriators, Inc. ("IGWA"), and the City of Pocatello ("Pocatello"). The parties raised distinct issues challenging the Director's *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("Methodology Order") and its implementation. See September 26, 2014 Order at 3-5. The petitions for judicial review did not address any final orders from the Director concerning a mitigation plan filed under the Department's conjunctive management rules. See IDAPA 37.03.11.43 (CM Rule 43). Accordingly, the Coalition respectfully requests the Court to rehear the following issue:

- 1. Whether the Court's analysis and language in Part V.A.iv constitutes an "advisory opinion" on a mitigation plan not presently before the Court on judicial review and should be removed from the *Memorandum Decision and Order on Petitions for Judicial Review*?**

As described below, the Court should remove the analysis set forth in Part V.A.iv of the *Memorandum Decision* pursuant to the Idaho Administrative Procedure Act (Idaho APA) and other principles of law set forth below.

ARGUMENT

Judicial review of a final decision from IDWR is governed by the Idaho APA. See I.C. § 42-1701A(4); *Thompson Creek Mining Co. v. IDWR*, 148 Idaho 200, 205 (2009). Pursuant to the Idaho APA, the Court is limited to review the Director's Methodology Order and the underlying administrative record created before the agency. See I.C. §§ 67-5277, 5270 *et seq.*; *Greenfield Village Apartments, L.P. v. Ada County*, 130 Idaho 207, 209 (1997); *Dovel v. Dobson*, 122 Idaho 59, 61 (1992). The focal point on appeal is the existing administrative record, not "some new record made initially in the reviewing court." See *Regan v. Kootenai County*, 148 Idaho 721,

725 (2004) (citing *Camp v. Pitts*, 411 U.S. 138, 142, 36 L.Ed.2d. 106, 93 S.Ct. 1241 (1973)).

Moreover, the Idaho Supreme Court has instructed that “[t]he resolution of factual issues cannot be made for the first time by the district court nor can they be made by this Court on appeal . . .

Under the APA, those findings properly belong to the agency.” *Mercy Med. Ctr. v. Ada County*, 146 Idaho 226, 232 (2008).

The Court’s analysis in Parts V.A.i – iii specifically addresses issues on appeal raised by the parties against the backdrop of the underlying administrative record. *See Memorandum Decision* at 3, n. 1 (i.e. 382 R. ____; 551 R. ____). Notably, the Court found that step 8 of the Methodology Order is “inconsistent with Rule 40 of the CM Rules and the precedent established in the 2013 SWC Case.” *Id.* at 12. The Court agreed with the Coalition that step 8 “unlawfully permits out-of-priority water use to occur without remedy of curtailment or a property enacted mitigation plan.” *Id.* The Court rejected the Director’s justification for his decision, including the “total water supply” theory offered in briefing and at oral argument. *Id.* at 14. The Court recognized and held that under “Idaho law the holder of a surface water storage right is entitled to maintain a reasonable amount of carryover storage to assure water supplies for future dry years.” *Id.* at 15. Notwithstanding this decision, the Court then described a “possible” viable mitigation plan in Part V.A.iv. *Id.* at 16.

The Court’s analysis in Part V.A.iv does not address any stated issue on appeal and instead identifies what “could” be accomplished with a hypothetical mitigation plan. Although the Court attempts to address a potential resolution to a problem when junior groundwater users encounter an increased mitigation obligation during the irrigation season, the analysis is outside the scope of the Court’s judicial review capacity. Again, where the Court sits in an “appellate capacity” it can only review issues on appeal against the backdrop of the underlying

administrative record. See I.C. §§ 67-5277, 5270 *et seq.*; *Burns Holdings, LLC v. Madison County Bd. of Commr's*, 147 Idaho 660, 662 (2009); *Greenfield Village Apartments, L.P. v. Ada County*, 130 Idaho 207, 209 (1997); *Dovel v. Dobson*, 122 Idaho 59, 61 (1992). Since there was no “mitigation plan” at issue in the Director’s Methodology Order, the Court could not rule on what could, or could not be approved by the Director in that regard. Any mitigation plans filed by junior ground water users must follow the established procedures in CM Rule 43, which afford interested parties the right to protest and have a hearing on any proposed plan. See CM Rule 43.02. The notice and hearing procedure is necessary to satisfy an interested party’s constitutional right to due process. See *e.g. Friends of Minidoka v. Jerome County*, 153 Idaho 298, 311 (2012). Furthermore, Rule 43 identifies specific information requirements for mitigation plans and factors for the Director to consider when evaluating whether the plan will prevent injury to senior rights. See Rule 43.01; 03.

The Court’s analysis in Part V.A.iv should be removed to avoid any implications that a yet to be filed mitigation plan is or would be “pre-approved” pursuant to the *Memorandum Decision*. Indeed, the facts surrounding any mitigation plans must be fully developed based upon the criteria in CM Rule 43 and first addressed through a final order of the Director. See CM Rule 43; *see also, Mercy Med. Ctr. v. Ada County*, 146 Idaho 226, 232 (2008).

Moreover, since this judicial review proceeding does not concern an appeal from any final agency order on a mitigation plan, including an accompanying record on the same, this Court did not have jurisdiction on that issue and there was no justiciable controversy to decide. See I.C. § 67-5270; *see e.g. Wylie v. State, Idaho Transp. Bd.*, 151 Idaho 26, 31-32 (2011). The Ninth Circuit Court of Appeals’ description of the “ripeness” doctrine is particularly relevant in this situation:

Ripeness serves "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977).

Western Watersheds Project v. Kraayenbrink, 632 F.3d 672, 686 (9th Cir. 2011).

Finally, as recently found by the Idaho Supreme Court, the judiciary "must be especially circumspect when deciding water law issues of first impression with potentially far-reaching consequences." *A&B Irr. Dist. v. State (In re SRBA)*, 2014 Ida. Lexis 203, (Idaho Aug. 4, 2014). In *A&B* the Court specifically declined to issue an "advisory opinion" in the absence of a complete factual record. *Id.* The same reasoning applies in this case. Consequently, the Court should remove its analysis concerning a hypothetical mitigation plan that was not the subject of judicial review.

CONCLUSION

As described above, the Idaho APA and well established precedent govern a district court's judicial review of an agency decision on appeal. In this case the Court addressed the parties' petitions for judicial review of the Director's Methodology Order and its implementation. *See Memorandum Decision* at Parts V.A.i – iii; B. – F. Since there was no final agency order concerning a mitigation plan before the Court, the analysis in Part V.A.iv should be removed consistent with Idaho law. Amendment of the decision will properly protect all parties' rights as to any mitigation plans and related proceedings that have yet to proceed before the Department. The Coalition respectfully requests the Court to grant the joint petition for rehearing and amend the *Memorandum Decision* accordingly.

DATED this 24th day of October, 2014.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of October, 2014, I served true and correct copies of the foregoing upon the following by the method indicated:

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