

Thomas J. Budge (ISB# 7465)  
Elisheva M. Patterson (ISB#11746)  
RACINE OLSON, PLLP  
201 E. Center St. / P.O. Box 1391  
Pocatello, Idaho 83204  
Ph: (208) 232-6101  
tj@racineolson.com  
elisheva@racineolson.com

*Attorneys for Idaho Ground Water Appropriators, Inc. (IGWA)*

**DISTRICT COURT OF THE STATE OF IDAHO  
FOURTH JUDICIAL DISTRICT  
ADA COUNTY**

IDAHO GROUND WATER  
APPROPRIATORS, INC.,

Petitioner,

vs.

IDAHO DEPARTMENT OF WATER  
RESOURCES, and GARY SPACKMAN 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 POCA TELLO, 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, CITY OF WENDELL,

Case No. CV01-23-13173

**MOTION TO AUGMENT AGENCY  
RECORD OR PRESENT  
ADDITIONAL EVIDENCE**

BONNEVILLE-JEFFERSON GROUND  
WATER DISTRICT, and BINGHAM  
GROUND WATER DISTRICT,

Intervenors.

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

Idaho Ground Water Appropriators, Inc. (“IGWA”), acting for and on behalf of North Snake Ground Water District, Magic Valley Ground Water District, Carey Valley Ground Water District, American Falls-Aberdeen Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, and Henry’s Fork Ground Water District, through counsel, submits this motion to augment the agency record or present additional evidence pursuant to Idaho Code § 67-5275(3), Idaho Code § 67-5276, Rule 84(l) of the Idaho Rules of Civil Procedure, Idaho Appellate Rule 30, and paragraph 8 of the court’s *Procedural Order* dated August 16, 2023.

### **Procedural History**

On August 16, 2023, IGWA filed its *Petition for Judicial Review* of several related orders issued by the Idaho Department of Water Resources (“IDWR” or “Department”) and its prior Director, Gary Spackman, in IDWR Docket No. CM-DC-2010-001. On August 30, 2023, the Department filed notice that it had lodged the agency record and transcript with the Department. On September 19, 2023, IGWA filed *IGWA’s Objection to the Agency Record and Transcript* with the Department, requesting five additional documents be included in the agency record and certain corrections be made to the hearing transcript. On September 27, 2023, the Department filed its *Response to Objection; Order Settling the Agency Transcript and Record*, declining to make any changes to the agency record. On the same day, the Department lodged the agency record and transcript with this court.

## LEGAL STANDARD

The Idaho Administrative Procedures Act (“APA”) provides in Idaho Code § 67-5277 that “judicial review of disputed issues of fact must be confined to the agency record for judicial review as defined in this chapter, supplemented by additional evidence taken pursuant to section 67-5276, Idaho Code.” Idaho Code § 67-5275(3) allows the court to “require corrections to the record.” In addition, the court has authority under Idaho Code § 67-5276(1) to consider additional evidence outside the agency record under two circumstances:

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 proceedings 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.

A court’s decision to consider additional evidence pursuant to Idaho Code § 67-5276 is a matter of discretion. *Crown Point Dev., Inc. v. City of Sun Valley*, 144 Idaho 72, 75 (2007).

In keeping with the APA, Idaho Rule of Civil Procedure 84(e) states that judicial review “shall be based upon the record created before that agency,” but that “the district court may take additional evidence itself upon judicial review,” and may “order the taking of additional evidence upon its own motion or motion of any party to the judicial review.” Rule 84(l) provides that “any party desiring to augment the transcript or record with additional materials presented to the agency may move the district court, within twenty-one (21) days of the filing of the settled transcript and record in the same manner and pursuant to the same procedure for augmentation of the record in appeals to the Supreme Court.” Idaho Appellate Rule 30 similarly provides that at “any time before the issuance of an opinion, any party may move the [ ] Court to augment or delete from the settled reporter’s transcript or clerk’s or agency’s record.”

## ARGUMENT

IGWA respectfully moves the Court to correct the agency record to include the documents identified below pursuant to Idaho Code § Idaho Code § 67-5275(3), or to consider such

information as additional evidence pursuant to Idaho Code § 67-5276(3). Copies of these documents are attached hereto as Appendix A.

1. *Ground Water Districts' Brief in Support of Motion for Stay, Motion for Injunctive Relief, Motion to Compel, Motion for Expedited Decision, and Application to Show Cause*, filed May 19, 2023, in Ada County Case No. CV01-23-08187 (“*IGWA's Ada County Brief*”).
2. *Declaration of Thomas J. Budge in Support of Ground Water Districts' Brief in Support of Motion for Stay, Motion for Injunctive Relief, Motion to Compel, Motion for Expedited Decision, and Application to Show Cause*, filed May 19, 2023, in Ada County Case No. CV01-23-08187 (“*Supporting Declaration*”).

These documents are material and relate to the validity of the first issue listed in *IGWA's Petition for Judicial Review*, namely: “Whether 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.” (*IGWA's Pet. for Jud. Rev.*, p. 3.) The foregoing documents demonstrate 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.

*IGWA's Ada County Brief* demonstrates that IGWA notified the Director on multiple occasions that any changes to the Fourth Methodology Order must comply with due process and the APA. (*IGWA's May 2023 Br.*, p. 13-15.) When the Director announced that he intended to revise the Methodology Order at a status conference held August 5, 2022, counsel for IGWA expressed concern about the process the Director would follow, stating:

It would be helpful if we had a more clear picture of the process the Department anticipates going through in terms of revising the Methodology Order ... this was all created in the context of a contested and litigated case so we've got principals of res judicata and due process that need to be taken into account.

(*Supporting Decl.*, Ex. C, p. 67-68.) Counsel for IGWA repeated this concern in two separate emails to the Director’s legal counsel in September 2022. It had come to the attention of IGWA’s legal counsel that Department staff had been directed to form a technical working group to evaluate the Fourth Methodology Order. The first email states:

I would also like to understand how this working group will function within the contested case structure of the Administrative Procedures Act. ... Before any technical issues are discussed, I recommend that a scoping meeting be held to discuss which elements of the Methodology Order will be reconsidered, the process that will be followed, and how it fits within the contested case structure of the APA. Please advise if the Department will do this.

(*Id.* at Ex. D.) The second email states:

Please know that I do not wish to make things difficult. I appreciate that the Department is inviting input on technical issues as it reconsiders the Methodology Order. It is important that the process comply with the APA, which as you know requires that decisions in contested cases be confined to the agency record. It would help me, and presumably others, to understand how the actions of the TWG fit within the APA, including how and when the Department envisions evidence being added to the agency record, action being taken on this new evidence, etc. I kindly ask that these issues be clarified up front so we avoid disputes down the road over compliance with the APA.

*Id.*

Despite IGWA's request that the Director comply with due process and the APA, the Director did not hold a scoping meeting, status conference, or any other meeting with the parties to discuss or explain how he intended to comply with due process and the APA, nor did he hold a hearing to develop the evidentiary record upon which the methodology would be amended, nor did he base the Fifth Methodology Order exclusively on the agency record. Instead, he reviewed the Fourth Methodology Order and developed the Fifth Methodology Order on his own, behind closed doors, outside of the contested case parameters of the APA, and then sprung it on water users on April 21, 2023, after the 2023 farming season had already begun.

The Director held an after-the-fact hearing June 6-9, 2023, to hear challenges to the Fifth Methodology Order and its application in the April 2023 As-Applied Order issued the same day. IGWA did not attempt to place the above statements into the record at the June hearing for three reasons.

First, 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 officer.

Second, the Director issued two pre-hearing orders on May 5, 2023, that functioned to prevent the parties from calling Department staff as witnesses to address procedural errors by the Department. The *Order Denying the Appointment of Independent Hearing Officer and Motion*

*for Continuance and Limiting Scope of Depositions* memorializes the Director’s order given verbally at the pre-hearing conference that only two Department staff would be produced as witnesses—Mathew Anders and Jennifer Sukow—and their testimony would be limited to “facts and information the Department considered in updating the Methodology Order and As-Applied Order.” (R. 301.) The order prevented the parties from asking Mr. Anders or Ms. Sukow “about the Director’s deliberative process related to legal and policy considerations.” *Id.* The Director also issued a *Notice of Materials Department Witnesses May Rely Upon at Hearing and Intent to Take Official Notice* limiting the materials and information that Mr. Anders and Ms. Sukow would be permitted to address at the hearing to specific technical documents. (R. 305-306.) At the hearing, the Director reiterated that he would not consider evidence beyond the factual matters identified in the pre-hearing orders, stating: “the testimony that I receive in this particular hearing will be limited to the factual components that were a part of the development and writing of the Fifth Methodology Order.” (Tr. Vol. I, 22:7-11 (emphasis added).) These orders prevented parties from questioning Department staff about procedural actions by the Department.

Third, during the June hearing the Director refused to consider evidence of procedural errors. When counsel for Bingham Ground Water District attempted to make an offer of proof regarding two exhibits (Exhibits 340 and 354) related to procedural errors, the Director refused to allow it as set forth in the following exchange:

Hearing Officer [Director]: Okay. Mr. Anderson, I’m not even accepting this. I will tell you that I am always meeting with staff trying to establish priorities as to what I need to work on and what I don’t need to work on, and that’s what I’m doing here.

Mr. Anderson: Well, I’m not intending to try to make you a witness, Director. I just – this is information that was disclosed to us as a part of a request.

Hearing Officer [Director]: That’s fine. And we supplied this information in good faith, but I don’t see anything in this that would either establish any nefarious intent or any reason to bring this document that was – I’ve never seen this document that I’m aware of. SWC discussion points, main discussion points, I’ve never seen any of this, and I think it’s because it was part of settlement, and I was excluded from those discussions. So my string of emails here and what’s included simply was an attempt on my part to say what do we need to prioritize and work on in the many responsibilities that the Department and the Director has, and that was the intent of these emails. And we disclosed them in good faith, and I guess, from my perspective, for you to even insinuate that there was something nefarious, I find to be offensive, and I won’t let it in. Thank you.

(Tr. Vol. IV, 1032:4-1033:5.)

Since (i) it would not be appropriate to call the Director as a witness, (ii) the Director limited the scope of evidence to preclude Department staff from addressing procedural errors, and (iii) the Director made an evidentiary ruling that prevented the parties from making offers of proof of procedural errors, the parties had no way of admitting the statements cited above into the agency record.

In order to preserve the procedural errors for appeal, IGWA included its arguments concerning due process and the APA in *IGWA's Post-Hearing Brief*. (R. 975-76.) IGWA not only raised procedural issues but also took a position, consistent with *County Highway District v. Brooke View, Inc.*, 162 Idaho 138, 140-41 (2017). Thus, the issues are preserved for appeal. *Id.*

*IGWA's Post-Hearing Brief* summarizes its arguments and incorporates by reference *IGWA's Ada County Brief* where the arguments are made in full. *IGWA's Ada County Brief* and the *Supporting Declaration* were filed a month prior in Ada County Case No. CV01-23-08187, to which the Director was a party. Rather than restate IGWA's lengthy argument, IGWA incorporated *IGWA's Ada County Brief* by reference. *Id.*

Since *IGWA's Ada County Brief* and the *Supporting Declaration* were incorporated by reference in *IGWA's Post-Hearing Brief*, IGWA contends they are part of the agency record. The Director rejected IGWA's request that they be included in the agency record. (R. 2944-47.) Therefore, IGWA respectfully requests that this court correct the agency record to include them pursuant to Idaho Code § 67-5275(3).

Alternatively, IGWA requests that the court consider them as additional evidence pursuant to Idaho Code § 67-5276(1). The statements identified above are material and relate to the validity of IGWA's petition for judicial review because they show that the Director was repeatedly notified that any revision of the Methodology Order must comply with due process and the APA. IGWA's inability to call the Director as a witness, the Director's pre-hearing orders limiting the scope of evidence, and the Director's refusal to consider evidence suggesting procedural impropriety by the Department, all constitute "irregularities in procedure before the agency" under Idaho Code § 67-5276. Therefore, this court should augment the record on appeal with the documents identified above.

Should the Court augment the record accordingly, Idaho Code § 67-5276(2) permits the Director to modify his actions and file any modifications or new findings with the Court. Since

the statements cited above were communicated directly to the Director or his attorney and were incorporated by reference in *IGWA's Post-Hearing Brief*, little time should be needed for the Director to make this determination.

### CONCLUSION

The most significant issue on appeal is the Director's non-compliance with the APA and violation of due process. It addresses conduct by the Department that has undermined trust in the institution. The information IGWA seeks to have considered is relevant and material because it demonstrates that the Director knowingly and intentionally refused to hold a hearing and comply with the APA. The Director then issued pre-hearing orders and made evidentiary rulings to keep evidence of his procedural errors out of the agency record and free from the scrutiny of judicial review. This is precisely why courts have authority to correct the agency record pursuant to Idaho Code § 67-5275, and to consider evidence that is not part of the agency record when there "irregularities in procedure" or "good reasons for failure to present it in the proceedings before the agency" pursuant to Idaho Code § 67-5276.

For the reasons set forth above, IGWA respectfully requests the Court correct the agency record to include the attached documents pursuant to Idaho Code § 67-5275, or to consider such documents as additional evidence pursuant to Idaho Code § 67-5276 and allow the Department to revise its decision in light of such evidence if the Director is so inclined.

Respectfully submitted this 16th day of October, 2023.

RACINE OLSON, PLLP

By: 

Elsheva M. Patterson  
*Attorneys for IGWA*



**CERTIFICATE OF SERVICE**

I hereby certify that on this 16th day of October, 2023, I served the foregoing document on the persons below via iCourt.

  
Elisheva M. Patterson

Clerk of the Court ADA COUNTY DISTRICT COURT
Director Mathew Weaver Garrick Baxter Sarah Tschohl IDAHO DEPT. OF WATER RESOURCES
John K. Simpson Travis L. Thompson MARTEN LAW
W. Kent Fletcher FLETCHER LAW OFFICE
Sarah A Klahn Maximilian C Bricker SOMACH SIMMONS & DUNN
Candice McHugh Chris Bromley MCHUGH BROMLEY, PLLC
Skyler C. Johns Nathan M. Olsen Steven L. Taggart OLSEN TAGGART PLLC
Dylan Anderson DYLAN ANDERSON LAW PLLC