

STATE OF IDAHO
 County of BONNER)^{ss}
 FILED _____
 AT _____ O'Clock ____M
 CLERK, DISTRICT COURT

 Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER**

WATERFRONT PROPERTY)
MANAGEMENT, LLC., an Idaho LLC, and)
R&S PROPERTIES, an Idaho Limited)
Partnership,)
)
 Petitioners,)
)
 vs.)
)
STATE OF IDAHO, BD. OF LAND)
COMMISSIONERS, DEPT. OF LANDS, and)
the STATE OF IDAHO TRANSP. DEPT.,)
)
 Respondents.)

Case No. **S CV 2007 23**

**MEMORANDUM DECISION AND
 ORDER DENYING PETITIONERS':
 1) "MOTION TO RECONSIDER,
 SUPPLEMENT TO OBJECTION TO
 RECORD and SUPPLEMENT TO
 MOTION TO AUGMENT RECORD"
 and 2) "MOTION TO RECONSIDER,
 MOTION TO ALTER OR AMEND,
 AND/OR PETITION FOR
 REHEARING"**

I. INTRODUCTION AND BACKGROUND.

On May 22, 2008, petitioners filed an "Objection to Record and Alternative Motion to Augment Record". Petitioners wanted all of the record from the 2004 application to be considered by this Court, not just the 2006 application which is before the Court on judicial review. Objection to Record and Alternative Motion to Augment Record, p. 3.

On June 5, 2008, the respondent State of Idaho Board of Land Commissioners, Department of Lands (IDL) filed its "Response to Objection to Record and Objection to Motion to Augment Record", and the respondent State of Idaho Transportation Department (ITD) filed the "ITD's Response to Petitioners' Objection to Record and Alternative Motion to Augment the Record." Both respondents wanted this Court to only consider certain specific documents from

the 2004 application in this Court's review of the 2006 application. Those are documents that were actually referenced in the 2006 application.

At the same time this Court had under advisement Petitioners' "Objection to Record and Alternative Motion to Augment Record", the Court also had under advisement Petitioners' "Supplemental Motion for Stay Pending Judicial Review", filed on April 2, 2008. Oral argument on that motion was held on April 23, 2008, and the matter was taken under advisement by this Court as of May 2, 2008, when the parties filed their final briefs on that issue. Before the Court could make a decision on Petitioners' Supplemental Motion for Stay Pending Judicial Review, the petitioners filed the "Objection to Record and Alternative Motion to Augment Record" on May 22, 2008. Because the Court's decision on the Petitioners' Supplemental Motion for Stay Pending Judicial Review could have been affected by "what is to be reviewed" by the Court, the Court addressed petitioners' Objection to Record and Alternative Motion to Augment Record before deciding the petitioners' Supplemental Motion for Stay Pending Judicial Review. This Court noted petitioners' "Brief Regarding Standing/Jurisdiction/Etc.", filed April 30, 2008, at page 14, places the 2004 ITD application at issue on the Supplemental Motion for Stay Pending Judicial Review.

Accordingly, on June 20, 2008, this Court filed its "Memorandum Decision and Order on Petitioner's [Petitioners'] 'Objection to Record and Alternatively Motion to Augment Record'." In response to that Order, petitioners on June 30, 2008, filed their "Motion to Reconsider, Supplement to Objection to Record and Supplement to Motion to Augment Record." This was a motion and brief incorporated into one document. On July 14, 2008, ITD filed its "Brief of Respondent Idaho Transportation Department in Opposition to Petitioners' Motion to Reconsider, Supplement to Objection to Record and Supplement to Motion to Augment Record." IDL filed no response to petitioners' Motion to Reconsider, Supplement to Objection to Record

and Supplement to Motion to Augment Record.

Then, on July 3, 2008, this Court filed its “Memorandum Decision and Order Denying Petitioner’s [Petitioners’] Supplemental Motion for Stay Pending Judicial Review.” In response to that Order, petitioners on July 17, 2008, filed their “Motion to Reconsider, Motion to Alter or Amend, and/or Petition for Rehearing.” Again, this was a motion and a brief in one document. On July 30, 2008, ITD filed its “Brief of Respondent Idaho Transportation Department in Opposition to Peititioners’ Motion to Reconsider, Motion to Alter or Amend, and/or Petition for Rehearing”. On July 31, 2008, IDL filed its “Response to Petitioners’ Motion to Reconsider, Motion to Alter and Amend Judgment, and/or Petition for Rehearing of the Court’s July 3, 2008, Decision on Stay.”

Petitioners noticed up for oral argument on October 16, 2008, a hearing on both: 1) its Motion to Reconsider, Supplement to Objection to Record and Supplement to Motion to Augment Record and 2) its Motion to Reconsider, Supplement to Objection to Record and Supplement to Motion to Augment Record. The Court had read the briefing filed on both of petitioners’ motions, but had to take both matters under advisement, as at the time of oral argument this Court had not yet had the opportunity to read Judge Verby’s December 6, 2007, “Decision on Appeal” in Bonner County Case No. CV 2006 2039, *Seneacquoteen Homeowners Association v. Idaho Department of Lands and Willow Bay Holdings, LLC*, nor had the Court had the opportunity to read the Affidavit of Steven J. Schuster, filed July 31, 2008, which was filed in response to the decision of Judge Verby in *Seneacquoteen Homeowners Association*.

II. ANALYSIS.

A. Petitioners’ Motion to Reconsider, Supplement to Objection to Record and Supplement to Motion to Augment Record.

On June 20, 2008, this Court denied Objection to Record and Alternative Motion to

Augment Record. This Court reasoned petitioners failed to meet the requirements of I.C. §67-5276 which limits judicial review to the agency record except where the additional evidence is material and relates to the validity of the agency action *and* either (1) there were good reasons for the failure to present this additional evidence in the proceeding before the agency, or, (2) there were alleged irregularities in the procedure before the agency. I.C. § 67-526(1)(a) and (b). These exceptions have been recognized as the sole bases for a Court to allow augmentation of the record. *Lane Ranch Partnership v. City of Sun Valley*, 144 Idaho 584, 590, 166 P.3d 34, 380 (2007). This Court reasoned that petitioners did not produce evidence that the agency abused its power when it limited the record to limited, specific documents from the 2004 record to assist in its 2006 decision, and that the only 2004 documents that were included were documents which were relevant in the 2006 decision which petitioners did not dispute. Order on Petitioners' "Objection to Record and Alternative Motion to Augment Record," p. 7. This Court recognized that a decision on the augmentation of the record was within its discretion, but such a decision must meet the applicable statutory requirements; "[o]nly when there is sufficient evidence presented to this Court in support of such a motion can this Court use its discretion to allow the record to be augmented." *Id.*

Petitioners now move this Court to reconsider its decision pursuant to I.R.C.P. 84 and argue that the entire 2004 record should be included because the IDL "reviewed the 2004 application and decision documents, recited the conditions imposed from the 2004 decision documents, and imposed additional conditions... in the 2006 decision documents." Motion to Reconsider, Supplement to Objection to Record and Supplement to Motion to Augment Record, p. 2. Alternatively, petitioners argue that specific portions of the 2004 record point to procedural irregularities in IDL's administration of the 2006 Application. *Id.*, pp. 2-3. Specifically, IDL allowed petitioners to submit a written reconsideration request in 2004 where petitioners had

appeared via written public comment letter, but IDL did not allow petitioners to do that in 2006. *Id.*, p. 3. Petitioners other argument regarding procedural irregularities is that this Court issued its opinion on written submissions only, despite petitioners having called to request oral argument. *Id.*

ITD argues this Court's June 20, 2008, Memorandum Decision and Order on Petitioner's [Petitioners'] 'Objection to Record and Alternatively Motion to Augment Record should stand because petitioners failed to present any legitimate basis for this Court to reconsider its ruling and again failed to satisfy statutory requirements for allowing augmentation. Brief of Respondent ITD in Opposition to Petitioners' Motion to Reconsider, Supplement to Objection to Record and Supplement to Motion to Augment Record, p. 1. ITD argues petitioners' identification of procedural irregularities are unfounded. *Id.*, pp. 2-4. ITD argues the fact that IDL permitted reconsideration based on written comments in 2004, but not in 2006, is irrelevant because this Court determined in its Decision on the Motion to Stay (at pp. 10-11) that petitioners had not appeared according to the mandatory language in IDAPA 20.03.04.030, and, as such, had not exhausted administrative remedies as a threshold matter. Brief of Respondent ITD in Opposition to Petitioners' Motion to Reconsider, Supplement to Objection to Record and Supplement to Motion to Augment Record, p. 3. ITD further argues petitioners' contention that procedural irregularities resulted from this Court's issuing a ruling rather than setting the matter for oral argument is also inapt, as I.C. § 67-5276 allows augmentation of the record where there were alleged irregularities in procedure **before the agency**. *Id.*, pp. 3-4. Clearly, any action by this Court cannot be construed as an irregularity in **agency** procedure. Finally, in response to petitioners' argument in the alternative that several specific documents be augmented (as opposed to the 2004 record as a whole), ITD notes this Court pointed out in its Decision denying the Alternative Motion to Augment:

Idaho Code § 67-5276 limits the augmentation of the record to those ‘additional materials presented to the agency.’ Thus, because the entire 2004 application record was not presented to the agency in the 2006 application, it should not be included in the record for judicial review.

Order on Petitioners’ “Objection to Record and Alternative Motion to Augment Record,” p. 5.

There is no indication that IDL considered the specific documents listed by petitioners when it considered the 2006 application. Brief of Respondent ITD in Opposition to Petitioners’ Motion to Reconsider, Supplement to Objection to Record and Supplement to Motion to Augment Record, p. 5.

The decision to admit additional evidence pursuant to I.C. § 67-5276 is reviewed under the abuse of discretion standard. *Crown Point Development, Inc. v. City of Sun Valley*, 144 Idaho 72, ___, 156 P.3d 573, 577 (2008). This Court recognized the issue of whether to permit augmentation of the record as one of discretion and determined that statutory prerequisites had not been met such that the Court could exercise its discretion and allow the record to be augmented. Order on Petitioners’ “Objection to Record and Alternative Motion to Augment Record,” p. 7. Petitioners cite no portion of the transcript and record in support of their contention that IDL reviewed the 2004 application and decision documents. Instead, petitioners state “lack of specific references in the 2006 decision documents is putting form over substance.” Motion to Reconsider, Supplement to Objection to Record and Supplement to Motion to Augment Record, p. 2. This argument neither provides this Court with evidence to support their motion, nor meets the requirements of I.C. §67-5276.

In an attempt to present procedural irregularities falling within I.C. § 67-5276, while remaining at best vague about whether these additional materials had been presented to the agency below, petitioners’ argument that IDL permitted reconsideration based on written comments in 2004, but not in 2006, also falls flat. After listing the six items, petitioners write:

“These documents go to the procedural irregularities of the IDL’s administration of the 2006 application compared to the 2004 application, primarily to the issue of appearance at the ‘public comment’ hearings held.” Motion to Reconsider, Supplement to Objection to Record and Supplement to Motion to Augment Record, pp. 2-3. Petitioners fail entirely to demonstrate for the Court that the six items listed are material and relate to the validity of the agency action. Only then can this Court make the determination as to whether I.C. § 67-5276 (1)(a) or (b) are met. Thus, where this Court has determined that petitioners had not appeared in 2006, within the meaning of IDAPA, letters from Petitioners relating to the 2004 permit application are simply not material or related to the validity of IDL’s action in 2006. Accordingly, this Court need not reach the question of procedural irregularities.

However, petitioners have made claims of procedural irregularities *with this Court*. Specific to procedural irregularities, ITD’s argument that this Court’s issuing a ruling rather than setting the matter for oral argument was proper is also well taken. As ITD points out, I.C. § 67-5276 allows augmentation of the record where there were alleged irregularities in procedure before the agency, not the Court. Most importantly, I.R.C.P. 84(o), as ITD points out, states that motions “shall be determined *without oral argument* unless ordered by the Court.” (emphasis added). Thus, petitioners’ request to schedule oral argument does not obligate this Court to schedule an oral argument. This Court’s issuance of its Memorandum Decision and Order on Petitioner’s [Petitioners’] “Objection to Record and Alternatively Motion to Augment Record” without oral argument does not amount to a procedural irregularity.

for B. Petitioners’ Motion to Reconsider, Motion to Alter or Amend, and/or Petition Rehearing (regarding this Court’s July 3, 2008, Memorandum Decision and Order Denying Petitioners’ Supplemental Motion for Stay Pending Judicial Review).

Petitioners move this Court to reconsider, alter or amend, and/or rehear its conclusions in

its July 3, 2008, Memorandum Decision and Order Denying Petitioner's Motion for Stay. Petitioners make this motion pursuant to I.R.C.P. 84, 11, 59, and/or I.A.R. 42. Motion to Reconsider, Motion to Alter or Amend, and/or Petition for Rehearing, p. 1. Petitioners make three arguments: (1) that as a threshold matter, IDL did not have jurisdiction to consider any application by ITD as ITD was not the owner and did not have the approval of the owner of the property at issue, as required by IDAPA; therefore; Petitioners' not physically appearing at the hearing was excused; (2) that IDL's acceptance of Petitioners' written comments and subsequent reconsideration request in 2004 meant that IDL's failure to do so in 2006 constituted a procedural irregularity; and (3) that this Court's conclusion that Petitioners "chose" not to exhaust administrative remedies is contrary to the facts and statutory construction. Motion to Reconsider, Motion to Alter or Amend, and/or Petition for Rehearing, pp. 2-7.

1) IDL's Jurisdiction Regarding the Permit at Issue.

Petitioners argue IDL lacked the jurisdiction to grant the underlying application because ITD did not own the property at issue. In response, IDL states it is granted jurisdictional and quasi-jurisdictional authority over encroachments on navigable lakes in Idaho, pursuant to I.C. § 58-1303, and that petitioners are actually alleging an error of procedure (as opposed to a lack of jurisdiction) concerning the owner's signature/approval not being part of ITD's permit application. Response to Petitioners' Motion to Reconsider, Motion to Alter or Amend, and/or Petition for Rehearing, p. 4. IDL is an executive agency of the State of Idaho and is charged with deciding who will and who will not be granted a lake encroachment permit. That is the jurisdictional issue. If for some reason there is a parcel along the entire route of this parcel for which ITD does not have an ownership interest, ITD has the right of eminent domain. There is no dispute as to ITD's ownership interest as it pertains to petitioners' land, thus, petitioners are claiming ITD has less than an ownership interest in some other parcel, specifically land of the

railroad. Even if that were true, petitioners have not stated how that might affect any substantial right of the petitioners. Although it concerns the Idaho Public Utilities Commission and not IDL, *Utah-Idaho Sugar v. Intermountain Gas Co.*, 100 Idaho 368, 374, 597 P.2d 1058, 1064 (1979) is instructive. In that case, Utah-Idaho Sugar Company claimed Intermountain Gas Company's failure to properly submit its rate application to the Idaho Public Utilities Commission, resulted in the Commission lacking jurisdiction. *Id.* The Idaho Supreme Court held any defect in the rate application was a procedural defect, not a jurisdictional defect. *Id.* This Court finds that any lack of ownership interest by the ITD does not result in a lack of jurisdiction of the IDL to determine ITD's permit application. "Mere procedural errors do not render an order of the Commission vulnerable to collateral attack unless those errors result in a denial of due process to a party." *Id.* Petitioners have not demonstrated how any lack of ownership interest in ITD would affect petitioners.

Petitioner points this Court to Judge Verby's December 6, 2007, "Decision on Appeal" in Bonner County Case No. CV 2006 2039, *Seneacquoteen Homeowners Association v. Idaho Department of Lands and Willow Bay Holdings, LLC*, in which Judge Verby determined IDL had not obtained jurisdiction to process the application at hand because the one of the owners of the littoral land had not applied for or approved the application. Motion to Reconsider, Motion to Alter or Amend, and/or Petition for Rehearing, p. 3. IDL responds that *Willow Bay* is distinguishable because reconsideration of Judge Verby's decision was sought by the prevailing party in that decision, because neither the prevailing party nor the opposing party viewed the matter as a jurisdictional issue. *Id.*, Affidavit of Steven J. Schuster, Exhibit A. Further, the parties settled their dispute after Judge Verby's decision was rendered, and dismissed that case with prejudice. *Id.* This Court is not bound by the non-precedential decisions of Judge Verby. This Court has already determined that the threshold issue in this judicial review was whether

petitioners had exhausted administrative remedies such that it could seek review, not whether ITD lacked approval from a property owner such that the permit approval was procedurally improper. Further, as IDL points out, ITD now has the requisite property rights and, at the time of application, had the statutory right to file a condemnation action against the owner and acquire the property through the power of eminent domain. Response to Petitioners' Motion to reconsider, Motion to Alter or Amend, and/or Petition for Rehearing, p. 6. In fact, "IDL made acquisition of all littoral rights for the project a condition that must be satisfied before work began." *Id.* IDL also correctly points out that I.C. § 67-5279(4) states that agency action shall be affirmed, even where the agency action violated constitutional or statutory provision, was made in excess of the agency authority, was made on unlawful procedure, or was arbitrary, capricious, or an abuse of discretion, unless a parties' substantial rights have been prejudiced. *Id.* p. 7. Similar language is found in *Utah-Idaho Sugar v. Intermountain Gas Co.*, 100 Idaho 368, 374, 597 P.2d 1058, 1064 (1979), discussed above. Petitioners have simply not identified any prejudice *to petitioners* resulting from ITD's actions regarding Burlington Northern Santa Fe's property. *Id.*

Finally, at the October 16, 2008, hearing, counsel for ITD state they had the rest of the attachments to the agreement that was submitted as Exhibit D to Mr. Minzghor's affidavit. Counsel for petitioners asked that those attachments be submitted as an exhibit for this Court's consideration. Counsel for both ITD and IDL stated they had no objection to that being made an exhibit. The Court received those records, has reviewed those records, and marked the attachments collectively for purposes of identification as Court's Exhibit 1, and said exhibit is admitted. On October 28, 2008, counsel for petitioners filed a pleading entitled "Petitioners' Response to Notice of Submittal of Additional Information". The Court has reviewed that pleading. Petitioners claim that some of the attachments found in Court's Exhibit 1: do not

locate lines or distances; show agreements entered into as recently as February 28, 2008, well after this permit application and subsequent lawsuit were started; and show agreements which have lapsed. Even if all that were true, it does not change this Court's decision. As set forth above, IDL did not lack jurisdiction, even if all the claims of petitioners regarding ITD's ownership interests were true.

2) IDL's Treatment of Petitioners in 2004.

Petitioners' next argument is that this Court failed to properly consider IDL's treatment of petitioners' appearance and reconsideration request in 2004. In response, ITD argues that this Court's having determined that petitioners' not exhausting their administrative remedies precluded a review of the issues presented, including whether IDL treated the 2006 permit application differently from the 2004 application. Respondent ITD's Brief in Opposition to Petitioners' Motion to Reconsider and Supplement, p. 4, *citing Stafford v. Idaho Dept. of Health & Welfare*, 135 Idaho 530, 533, 181 P.3d 456, 459 (2008). IDL responds that whether or not it permitted reconsideration in 2004 based solely on written comments is irrelevant to the 2006 case, and that, as this Court has determined, for a party to exhaust their administrative remedies, they must both appear at the hearing and submit oral or written testimony. Response to Petitioners' Motion to Reconsider, Motion to Alter or Amend, and/or Petition for Rehearing, p. 7. Petitioner has not pointed this Court to any authority indicating that an agency's handling of a permit application made two years earlier, and which was subsequently withdrawn, would dictate that agency's treatment of an objecting owner of adjacent real property. The instant matter is before this Court on a motion for reconsideration of its order holding that petitioners did not exhaust administrative remedies as a result of their not appearing at the initial hearing as required by statute. IDL's having accepted petitioners' request for reconsideration in 2004 is simply irrelevant.

3) Conclusions of this Court in the July 3, 2008, Decision.

Petitioners' final argument is that this Court's conclusion that petitioners "chose" not to exhaust administrative remedies is contrary to the facts and rules of statutory construction.

Motion to Reconsider, Motion to Alter or Amend, and/or Petition for Rehearing, p. 6.

Alternatively, petitioners argue that the statute and IDAPA rules regarding the word "appear" are ambiguous. *Id.* In response, both ITD and IDL argue that merely disagreeing with this Court's interpretation of the language at issue does not constitute a valid basis for reconsideration.

Respondent ITD's Brief in opposition to Petitioners' Motion to Reconsider and Supplement, p. 3; Response to Petitioners' Motion to Reconsider, Motion to Alter or Amend, and/or Petition for Rehearing, p. 8.

This Court, in its Memorandum Decision and Order Denying Petitioners' Supplemental Motion for Stay Pending Judicial Review, at page 10, reasoned that IDAPA leaves the definition of "appearance" up to the discretion of the court. The Court then stated that:

The "and in between the two criteria suggest that despite submitting written comments at the initial hearing, the applicant or aggrieved persons need to be present at the hearing in order to be eligible for the reconsideration hearing....According to the language in the statute, in which it appears the legislative intent was to make both criteria [appearing at the public hearing **and** giving oral or written testimony] mandatory in the initial hearing, Petitioners simply did not meet the requirement that they physically appear... However, providing written comments does not qualify as appearing according to the mandatory language provided in the statute. Therefore, because Petitioner did not meet the standards for administrative proceedings, he "chose" not to exhaust all of his administrative remedies when he did not personally appear at the initial hearing.

Memorandum Decision and Order Denying Petitioners' Supplemental Motion for Stay Pending Judicial Review, pp. 10-11. Despite this Court's reasoning, petitioner again argues that each person who submits written comments is a "hearing participant," and that while physical

presence at a hearing is permissive, accepting written comments is mandatory. Motion to Reconsider, Motion to Alter or Amend, and/or Petition for Rehearing, p. 6. Again, petitioner has set forth no authority in support of their position that this Court's interpretation is wrong. Merely disagreeing with a Court's interpretation is not a proper basis for reconsideration or rehearing.

Petitioners' alternative argument that provisions in the statute and in IDAPA are ambiguous is similarly without basis. *Id.* Administrative regulations are subject to the same principles of statutory construction as statutes. *Mason v. Donnelly Club*, 135 Idaho 581, 586, 21 P. 3d 903, 908 (2001). Both statutes and regulations should be given their plain, obvious, and rational meanings. *Id.* Where the language is clear and unambiguous, the Court does not need to engage in any statutory construction. *State v. Quick Transport, Inc.*, 134 Idaho 240, 244, 999 P.2d 895, 899 (2000). Courts will only look to the rules of construction for guidance and consider the reasonableness of proposed interpretations where language is ambiguous. *Albee v. Judy*, 136 Idaho 226, 231, 31 P.3d 248, 253 (2001). Even where statutes or regulations are ambiguous, the court begins employment of the rules of statutory construction with the literal words of the statute or regulation and gives language its plain, obvious, and rational meaning. *Wolfe v. Farm Bureau Ins. Serv. Co.*, 128 Idaho 398, 404, 913 P.2d 1168, 1174 (1996). Here, the Court did just that. Memorandum Decision and Order denying Petitioners' Supplemental Motion for Stay Pending Judicial Review, pp. 9-11. The Court stated:

When looking at IDAPA 20.03.04.030 regarding reconsideration, it states, "the applicant, if dissatisfied with the Director's decision, or other aggrieved persons who appeared at the public hearing *and* gave oral or written testimony, shall..." IDAPA 20.03.04.090.09 (emphasis added). The "and" in between the two criteria suggest that despite submitting written comments at the initial hearing, the applicant or aggrieved person need to be present at the hearing in order to be eligible for the reconsideration hearing.

Id. at 10. The Court clearly began with the literal words of the regulation and gave the language its plain, obvious, and rational meaning. IDAPA 20.03.04.090.09 is clear, and it defines who may apply for reconsideration: A person who appeared at the public hearing and gave oral or written testimony. Petitioners’ argument that because Mr. Sletager made written comment, which written comments are to be received by IDL according to IDAPA 20.03.04.090.06, somehow makes him a “hearing participant” under that section, would result in a very strained interpretation. IDAPA 20.03.04.030.06 reads:

Hearing Participants: Any person may appear at the public hearing and present oral testimony. Written comments shall also be received by the Department.

The second sentence has nothing to do with “appearing” at a hearing. The first sentence has everything to do with “appearing” at a hearing. It would be a tortured interpretation to read the two sentences together and come to the interpretation that anyone who provides written comment has “appeared” at a hearing or is a “hearing participant”. This Court can simply find no way to allow petitioners’ tortured reading of IDAPA 20.03.04.030.06 to trump the clear language in IDAPA 20.03.04.030.09.

III. ORDER.

IT IS HEREBY ORDERED petitioners’ Motion to Reconsider, Supplement to Objection to Record and Supplement to Motion to Augment Record is DENIED, and petitioners’ Motion to Reconsider, Motion to Alter or Amend, and/or Petition for Rehearing is DENIED.

Entered this 30th day of October, 2008.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of October, 2008, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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