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IN THE SUPREME COURT OF THE STATE OF IDAHO

SOUTH VALLEY GROUND WATER DISTRICT and GALENA GROUND WATER DISTRICT,

Petitioners-Respondents-Cross Appellants,

v.

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

Respondents-Appellants-Cross Respondents,

and

SUN VALLEY COMPANY, CITY OF BELLEVUE, BIG WOOD CANAL COMPANY, BIG WOOD & LITTLE WOOD WATER USERS ASSOCIATION, CITY OF POCATELLO, CITY OF KETCHUM, and CITY OF HAILEY

Intervenor-Respondents.

Supreme Court Docket No. 49632-2022

Blaine County District Court No. CV07-21-00243

IDWR'S OPPOSITION TO THE DISTRICTS' MOTION TO AUGMENT THE RECORD

Appellants-Cross Respondents, the Idaho Department of Water Resources and Gary Spackman, oppose the November 21, 2022 Motion to Augment the Record ("Motion") filed by Respondents-Cross Appellants South Valley Ground Water District and Galena Ground Water District ("Districts"). The Motion seeks to add 285 more pages of immaterial documents to an immense record, already approaching 10,000 pages. None of the Districts' proffered documents are in the settled administrative record reviewed by the district court. And, despite ample opportunity to create or properly supplement the administrative record at both the agency and district court levels, the Districts inexplicably held their Motion until the day appellate briefing closed. The Court should deny the Motion.

The proffered documents fall into three categories:

1. Addenda attached, improperly, to the Districts' opening combined brief (Aug. 1–275);
2. An unexecuted, unattributed *draft* agreement (Aug. 276–80); and
3. The Second Declaration of Michael A. Short, dated June 29, 2021 (Aug. 281–85).

Only Mr. Short's second declaration meets the basic requirements of Idaho Appellate Rule 30(a). But the Court should, in its discretion, refuse to admit it at this late stage in the proceedings. No party sought to include Mr. Short's second declaration in the clerk's record. *See* Notice of Appeal ¶ 6; Notice of Cross-Appeal ¶ 5.a (requesting "None"). Moreover, the district court did not mention or rely on anything stated in or attached to that declaration. On the contrary, the district court recognized that the only administrative order under review was the Director's June 28, 2021 *Final Order*. R. 679–80. And the district court specifically noted that the Director's order on the Districts' mitigation plan was "not before the Court in this proceeding." R. 680 n.1. As explained in

the Department's combined response-reply brief on pages 57 and 58, the declaration only pertains to an issue outside the courts' jurisdiction. This is reason enough to deny the motion with respect to Mr. Short's second declaration.

There are two independent reasons for denying the Motion with respect to the addenda and draft agreement.

First, neither the addenda nor the draft agreement complies with Idaho Appellate Rule 30(a). The Districts admit compliance with Rule 30(a) is mandatory even if a proffered document could be judicially noticed under Idaho Rule of Evidence 201. Motion at 3 (quoting *Ellis v. Ellis*, 167 Idaho 1, 5 n.2, 467 P.3d 365, 369 n.2 (2020)). The moving party "shall" state "specific grounds for the request," attach the proffered documents to the motion, and either (a) show that each proffered document "ha[s] a legible filing stamp of the clerk indicating the date of its filing" *in the case on appeal*[1] or (b) "establish by citation to the record or transcript that the document was presented to the district court." I.A.R. 30(a). These requirements ensure that the appellate record is not augmented with documents the district court never considered. The proffered addenda and draft agreement do not satisfy either Rule 30(a) requirement, and the Districts do not attempt to argue otherwise in their Motion. Therefore, the Motion can be denied on this basis alone.

Second and independently, the Motion violates Idaho Code § 67-5276 in multiple ways. As explained on pages 56 and 57 of the Department's reply and cross-response brief,

[1] Two considerations support limiting the "filing stamp" option to documents filed *in the case on appeal*. First, without such a limitation, Rule 30(a) would be an open invitation to augment any appellate record at any time before the issuance of an opinion with any legibly file-stamped stamped document from any case whatsoever. The problems with such a procedure, including but not limited to evidentiary gamesmanship, are obvious. Second, the other option—a citation establishing the document was "presented to the district court"—is clearly limited to documents presented in the case on appeal. The rule of *in pari materia*, therefore, supports also reading that limitation into the filing stamp option. *See Saint Alphonsus Reg'l Med. Ctr. v. Elmore Cnty.*, 158 Idaho 648, 653, 350 P.3d 1025, 1030 (2015) ("Statutes that [relate to the same subject] are construed together to effect legislative intent.").

§ 67-5276 requires this judicial review proceeding "to be conducted on the record, absent specific authorization." *Euclid Ave. Trust v. City of Boise*, 146 Idaho 306, 309, 193 P.3d 853, 856 (2008) (citing I.C. § 67-5276). "Thus, generally, judicial review is confined to the agency record unless the party requesting the additional evidence complies with one of the two statutory exceptions in I.C. § 67–5276." *Graves v. State, Dep't of Transp.*, No. 38103, 2011 WL 11067229, at *2 (Idaho Ct. App. Dec. 7, 2011) (citing *Petersen v. Franklin Cnty.*, 130 Idaho 176, 185, 938 P.2d 1214, 1223 (1997)). The Districts have not complied with either exception. Moreover, the time to do so was "before the date set for hearing" in the district court. I.C. 67-5276(1). That did not happen, so the Districts are now barred from augmenting the administrative and district court records on appeal.

In addition, the Districts fail to show the addenda or the draft agreement are "material." *Id*. This case concerns in-season administrative action under Idaho Code § 42-237a.g, supplying water to senior water right holders during the extreme 2021 drought. Answers to the questions presented on appeal simply cannot be found in miscellaneous documents from more than a decade ago (Aug. 1–275) or an unexecuted *draft* agreement prepared by an unknown author (Aug. 276–80). That much is evident from the Districts' strained attempts to explain the relevance of these documents—all of which were, it bears emphasis, inessential to the Districts' arguments before both the Director *and* the district court.

For all these reasons, the Department respectfully requests that the Court deny the Districts' Motion before oral argument. In the alternative, and only if the Court grants the Motion in whole or in part, the Department requests leave to file a sur-reply addressing the Districts' arguments based on any documents admitted to the record after briefing closed.

DATED this 1st day of December 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of December 2022, I caused to be served a true and correct copy of the foregoing *IDWR's Opposition to the Districts' Motion to Augment the Record*, via iCourt E-File and Serve, upon the following:

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