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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,

vs.

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

Respondents-Appellants-Cross Respondents,

and

SUN VALLEY COMPANY, CITY OF BELLEVUE, BIG WOOD CANAL

Supreme Court Docket No. 49632-2022

RESPONDENTS' AND CROSS-APPELLANTS' REPLY IN SUPPORT OF ITS MOTION TO AUGMENT THE RECORD

COMPANY, BIG WOOD & LITTLE WOOD WATER USERS ASSOCIATION, CITY OF POCATELLO, CITY OF KETCHUM, and CITY OF HAILEY,

Intervenors-Respondents.

COME NOW the Petitioners/Respondents/Cross Appellants, SOUTH VALLEY GROUND WATER DISTRICT, on behalf of its members, by and through counsel of record, BARKER ROSHOLT & SIMPSON LLP and GALENA GROUND WATER DISTRICT, on behalf of its members, by and through counsel of record, LAWSON LASKI CLARK, PLLC (collectively the "Districts"), and submit this reply in support of its *Motion to Augment the Record*.

On November 21, 2022, the Districts filed their *Motion to Augment the Record* ("Motion") asking the Court to include eight (8) additional documents to the record. Many of these documents are publicly available and were included for ease of the Court. On December 1, 2022, Appellants-Cross Respondents, the Idaho Department of Water Resources and Gary Spackman ("IDWR" or the "Department") filed its *Opposition to the Districts' Motion to Augment the Record* ("Response"). The Department wrongly contends that the documents are immaterial to the issues before the Court or do not comply with Idaho Appellate Rule 30(a). Response at 2. For the reasons herein, the Districts' Motion is timely and there is good cause for the Court to augment the record.

I. The Second Declaration of Michael A. Short should be included in the record before the Court.

The Districts seek to augment the record to include the *Second Declaration of Michael A. Short* ("Short Declaration") as it provides clarity on the scope of the issues presented to the district court. Specifically, it, along with the allegations in the Districts' First Amended Petition,

R. 146-50, show that the Districts raised the issue of the Director's denial of the Districts' proposed mitigation plan within the 28-day statutory period. The Short Declaration is material to the Districts' third additional issue on cross-appeal related to the Director's summary denial without a hearing of the Districts' mitigation plan. *Respondents' and Cross Appellants' Combined Brief* at 11.

Moreover, the Department is not prejudiced by including this declaration in the record. The Short Declaration is publicly available and was filed with the district court in this case.[1] The Department even cited to that document in its briefings before the district court, R. 193 at fn. 7. And, the declaration is included to address arguments presented by IDWR for the first time in its reply brief before this Court. *See IDWR Appellants' Reply and Cross-Response Brief* at 57. The Department should be precluded from bringing these arguments in a reply brief. *See e.g.*, *State v. Raudenbaugh*, 124 Idaho 758, 763, 864 P.2d 595, 601 (1993) (raising an issue for the first time in a reply brief "does not allow for full consideration of the issue, and we will not address it"); *Henman v. State*, 132 Idaho 49, 51, 966 P.2d 49, 51 (Ct. App. 1998) ("Issues raised for the first time in a reply brief will not be addressed on appeal").[2] To the extent necessary to address IDWR's new arguments, the Short Declaration is appropriate.

Finally, IDWR asks the Court to refuse admittance of the Short Declaration "at this late stage in the proceedings." Response at 2. As noted above, including this document is necessary to respond to the Department's new argument in its reply. Furthermore, the declaration, though

[1] At https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CV07-21-00243/Second-Declaration-of-Michael-A-Short..pdf.

[2] The Department should also be precluded from bringing this argument as they did not contest the reviewability of the mitigation plan at the district court. Instead, IDWR merely argued that mitigation plans are not a junior's right. R. 591-93

omitted from the record, was presented to the district court and included in the clerk's summary of documents. *See* R. 5. The Short Declaration should be included in the record.

II. The addenda should be included in the record before the Court.

The Department generally argues that the remaining augmented record documents are "immaterial" and that the Districts "inexplicably held their Motion until the day the appellate briefing closed." Response at 2. IDWR ignores the substance of the Districts' motion. The Districts describe in detail the nature, importance, and application of each of the documents in the augmented record. Each is germane to the issues presented in the Districts' cross-appeal, or in reply to the arguments presented by IDWR. The Department tries to narrowly define the issues of this case as only related to in-season administrative action during the 2021 drought, Response at 4, but the numerous issues on appeal and cross-appeal illustrate the breadth of questions presented to the Court, such as due process requirements under the CM Rules and Idaho Code § 42-237a.g, and the scope of the prior appropriation doctrine. The legal briefs, orders, and legislative history offered by the Districts provides the Court persuasive legal background for issues material to these appeals. These records in the motion to augment are largely documents drafted by IDWR or its attorneys or court rulings or findings of the legislature. None of this should be any surprise to the Department.

IDWR contends that the addenda do not comply with Idaho Appellate Rule 30(a), which requires that "a motion shall be accompanied by a statement setting forth the specific grounds for the request and attaching a copy of any document sought to be augmented to the original motion which document must have a legible filing stamp of the clerk indicating the date of its filing." The Districts' motion does comply with Idaho Appellate Rule 30(a).

First, the motion sets forth the specific grounds for the Districts' request. Next, the motion has attached full copies of the documents it seeks to add to the record. IDWR contends the documents do not have a "legible filing stamp of the clerk indicating the dates of its filing in the case on appeal." Response at 3. However, IDWR does not contend that these documents are not genuine. And, the motion and all the documents attached therein have been accepted by the clerk and bear the legible filing date stamp of November 21, 2022. The requirements to augment the record before the Supreme Court have all been met.

The Department argues that the motion violates Idaho Code § 67-5276. However, the addenda, Aug. pp. 1-275, do not present evidence to this Court regarding disputed issues of fact. Instead, the addenda provide the Department's prior legal arguments, reasoning and conclusions on issues directly at issue in this appeal.[3] The purpose of offering these documents is to show that the legal arguments made by IDWR on appeal are diametrically opposite of the Department's prior legal arguments. IDWR does not contend that it did not make these inconsistent arguments, it just asks this Court to ignore them. Nothing in Idaho Code § 67-5276 requires that such additional legal support be presented at the proceedings before the agency, nor that good cause be shown why it was not. Failure to present publicly available legal citations at the hearing, most of which were authored by the Department, when the Districts were not aware that IDWR would be taking inconsistent legal positions on appeal, is not an excuse to remove these prior inconsistent legal positions now. The Districts' addenda provide important context for the issues here on appeal and these documents should be included in the record.

[3] Addendum C presents the statement of purpose and legislative history for the 1994 amendments of Idaho Code §§ 42-602 and 42-237a. The Department contends this legislative should be ignored but in another breath provides similar legislative or rulemaking history in its four addenda to its *Combined Reply and Cross Response Brief*. The Department also links to statements of purpose and committee minutes without requesting judicial notice by means of a motion to augment. *Reply and Cross Response Brief* at 18.

Finally, the addenda are not subject to reasonable dispute, nor does the Department argue that the addenda are inaccurate. As such, the addenda are proper matters for judicial notice. I.R.E. 201. "Matters to be judicially noticed by the Supreme Court must be augmented in the settled record by motion under I.A.R. 30(a), with a motion and all relevant documents attached." *Ellis v. Ellis*, 167 Idaho at 5 fn. 2, 467 P.3d at 369 fn. 2. The Districts have complied with those requirements and the addenda should be judicially noticed and included in the record for the Court.

III. A sur-reply is inappropriate.

The Department asks to file a sur-reply if any of the augmented record documents are considered by the Court. The Department has been aware of these documents, and the Districts' related arguments, throughout these proceedings. The Court "has discretion to allow the opposing party to file a sur-reply where it appears appropriate so that it may consider the arguments contained in the reply." *Signal Hill Serv., Inc. v. Macquarie Bank Ltd.*, 2013 WL 12244286, at *4 (C.D. Cal. Feb. 19, 2013); "The standard for granting a leave to file a sur-reply is whether the party making the motion would be unable to contest matters presented to the court for the first time in the opposing party's reply." *Lewis v. Rumsfeld*, 154 F. Supp. 2d 56, 61 (D.D.C. 2001).

Here, a sur-reply is unwarranted. As to the Short Declaration, the Districts' use of that document in its reply brief was necessary to rebut an argument presented by the Districts for the first time in its own reply. The Short Declaration does not "raise a new matter." Similarly, the addenda do not raise new matters in its reply where the Department was unable to contest those issues. The addenda were presented first in the Districts' combined opening brief and the Department filed a reply brief in which it could address those arguments. Moreover, the addenda

do not represent additional or novel arguments. Instead, these addenda help explain to this Court that IDWR has made a tectonic shift in its legal positions before this Court.

Finally, the draft agreement is a document in the possession of the Department that was never included in the agency record but which is referenced therein. AR. 6418 (the draft agreement was presented at the first BWRGWMA advisory committee meeting on November 4, 2020; AR. 5962 (the draft agreement was reviewed again at the March 3, 2021 meeting, Mr. Luke reviewed "the draft proposed agreement submitted by the surface water users"). Indeed, at the prehearing conference before the Department, the Director stated that the advisory committee notes, agendas, and settlement negotiations would be included in the record and that he would "take notice of those." See PATr. 33-37. The Department has not explained why the draft agreement that was delivered to the Director and the Advisory Committee was never included in the record. Why does the Department not want this Court to see that further demand? The draft agreement illustrated the seniors' repeated demands for administration under the prior appropriation doctrine. That evidence is present, in spades, elsewhere in the record.[4] This draft agreement is simply more proof of the same, one more nail in the coffin of IDWR's claim that no one asked for priority administration. There is no need for additional briefing.

The Districts' motion to augment the record does not present new evidence, nor did the Districts' reply brief present new arguments that the Department has not had the opportunity to respond to. IDWR's request for a sur-reply should be denied.

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[4] In the January 2021 meeting, the seniors' consultant stated that the water supply was a "zero sum game" and if water was used by pumping then it was not available for surface water users. AR. 6273. In February 2021, Tim Luke of IDWR asked for written explanations from the committee members about their goals. AR. 6279. After receiving the written responses (which IDWR did not place in the record), Mr. Luke reported to the advisory committee that the seniors demanded curtailment of groundwater as required by the priority of their water rights. AR. 6413, 6418. Mr. Luke summarized the demands of the seniors as: "The seniority of surface water rights is currently not being honored. i.e., groundwater rights that are junior to surface rights should be curtailed accordingly." AR. 6413 (emphasis added). Discussion at the meetings included "curtailment by priority, conjunctive management." AR. 6418.

IV. Conclusion.

The Short Declaration was presented to the district court, and is listed on the district court clerk's case summary. R. 5. It is material and is the subject of a motion complying with Idaho Appellate Rule 30(a). The Court should augment the record to include this document.

The addenda represent legal, not factual, evidence that contextualizes the history of conjunctive administration and the Department's prior representations and interpretations of Idaho statutes, the CM Rules, and the prior appropriation doctrine. They are not documents addressing disputed facts and are therefore not subject to the standards of Idaho Code § 67-5276. Instead, they are documents susceptible of judicial notice. The Districts have complied with the requirements to have those facts judicially noticed. The addenda have been provided for ease of the Court, just as the Department has repeatedly referred to publicly available documents throughout its briefing. These documents provide important legal background. The addenda are no different than if the Districts were to cite to an IDWR guidance document or a law review article. They provide support for the legal issues present.

The Court should grant the Districts' motion to augment the record and/or take judicial notice of the Short Declaration and the addenda.

RESPECTFULLY SUBMITTED this 8th day of December, 2022.

BARKER ROSHOLT & SIMPSON LLP

/s/ Michael A. Short
Michael A. Short
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of December 2022, the foregoing was filed electronically using the Court's e-file system, and upon such filing the following parties were served electronically.

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