

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

GARRICK L. BAXTER, ISB #6301
EMMI L. BLADES, ISB #8682
Deputy Attorneys General
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
Telephone: (208) 287-4800
Facsimile: (208) 287-6700
garrick.baxter@idwr.idaho.gov
emmi.blades@idwr.idaho.gov

Attorneys for Respondents

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

SUN VALLEY COMPANY, a Wyoming
corporation,

Petitioner,

vs.

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

Respondents,

and

CITY OF KETCHUM, CITY OF FAIRFIELD,
WATER DISTRICT 37-B GROUNDWATER
GROUP, BIG WOOD & LITTLE WOOD
WATER USERS ASSOCIATION, SOUTH
VALLEY GROUND WATER DISTRICT,
ANIMAL SHELTER OF WOOD RIVER
VALLEY, DENNIS J. CARD and MAUREEN E.

Case No. CV-WA-2015-14500

**REPLY TO JOINT RESPONSE TO
MOTION TO AUGMENT
THE RECORD**

MCCANTY, EDWARD A LAWSON, FLYING HEART RANCH II SUBDIVISION OWNERS ASSOCIATION, INC., HELIOS DEVELOPMENT, LLC, SOUTHERN COMFORT HOMEOWNER'S ASSOCIATION, THE VILLAGE GREEN AT THE VALLEY CLUB HOMEOWNERS ASSOCIATION, INC., AIRPORT WEST BUSINESS PARK OWNERS ASSN INC., ANNE L. WINGATE TRUST, AQUARIUS SAW LLC, ASPEN HOLLOW HOMEOWNERS, DON R. and JUDY H. ATKINSON, BARRIE FAMILY PARTNERS, BELLEVUE FARMS LANDOWNERS ASSN, BLAINE COUNTY RECREATION DISTRICT, BLAINE COUNTY SCHOOL DISTRICT #61, HENRY and JANNE BURDICK, LYNN H. CAMPION, CLEAR CREEK LLC, CLIFFSIDE HOMEOWNERS ASSN INC, THE COMMUNITY SCHOOL INC, JAMES P. and JOAN CONGER, DANIEL T. MANOOGIAN REVOCABLE TRUST, DONNA F. TUTTLE TRUST, DAN S. FAIRMAN MD and MELYNDA KIM STANDLEE FAIRMAN, JAMES K. and SANDRA D. FIGGE, FLOWERS BENCH LLC, ELIZABETH K. GRAY, R. THOMAS GOODRICH and REBECCA LEA PATTON, GREENHORN OWNERS ASSN INC, GRIFFIN RANCH HOMEOWNERS ASSN and GRIFFIN RANCH PUD SUBDIVISION HOMEOWNERS ASSN INC, GULCH TRUST, IDAHO RANCH LLC, THE JONES TRUST, LOUISA JANE H. JUDGE, RALPH R. LAPHAM, LAURA L. LUCERE, CHARLES L. MATTHIESEN, MID VALLEY WATER CO LLC, MARGO PECK, PIONEER RESIDENTIAL & RECREATIONAL PROPERTIES LLC, RALPH W. & KANDI L. GIRTON 1999 REVOCABLE TRUST, RED CLIFFS HOMEOWNERS ASSOCIATION, F. ALFREDO REGO, RESTATED MC MAHAN 1986 REVOCABLE TRUST, RHYTHM RANCH HOMEOWNERS ASSN, RIVER ROCK RANCH LP, ROBERT ROHE, MARION R. and ROBERT M. ROSENTHAL, SAGE WILLOW LLC, SALIGAO LLC, KIRIL SOKOLOFF, STONEGATE HOMEOWNERS

ASSN INC, SANDOR and TERI SZOMBATHY,
THE BARKER LIVING TRUST, CAROL
BURDZY THIELEN, TOBY B. LAMBERT
LIVING TRUST, VERNON IRREVOCABLE
TRUST, CHARLES & COLLEEN WEAVER,
THOMAS W. WEISEL, MATS AND SONYA
WILANDER, MICHAEL E. WILLARD, LINDA
D. WOODCOCK, STARLITE HOMEOWNERS
ASSOCIATION, GOLDEN EAGLE RANCH
HOMEOWNERS ASSN INC, TIMBERVIEW
TERRACE HOEMOWNERS ASSN, and
HEATHERLANDS HOMEOWNERS
ASSOCIATION INC.,

Intervenors.

IN THE MATTER OF DISTRIBUTION OF
WATER TO WATER RIGHTS HELD BY
MEMBERS OF THE BIG WOOD & LITTLE
WOOD WATER USERS ASSOCIATION
DIVERTING FROM THE BIG WOOD AND
LITTLE WOOD RIVERS

COME NOW, Respondents, by and through their counsel of record, and file this *Reply to Joint Response to Motion to Augment the Record* to address arguments raised by Sun Valley Company (“SVC”) and the City of Ketchum and the City of Fairfield (collectively “Ketchum and Fairfield”) in their November 10, 2015, *Joint Response to Motion to Augment the Record* (“Joint Response”).

As explained in the October 28, 2015, *Motion to Augment the Record* (“Motion to Augment”) filed in Case No. CV-WA-2015-14500, SVC filed a *Motion to Dismiss Contested Case Proceedings* (“SVC Motion to Dismiss”) in the underlying delivery call matters on June 25, 2015. The City of Hailey and the City of Bellevue (“Hailey and Bellevue”) filed a *Joint Motion to Designate ACGWS by Rulemaking and to Dismiss Delivery Calls* (“Joint Motion to Dismiss”) in the underlying delivery call matters on June 26, 2015.

On July 22, 2015, the Director of the Department (“Director”) issued an *Order Denying Sun Valley Company’s Motion to Dismiss* (“Sun Valley Order”) and an *Order Denying Joint Motion to Designate ACGWS by Rulemaking and to Dismiss Delivery Calls* (“ACGWS Order”).

On August 6, 2015, SVC filed a *Motion for Review of Interlocutory Order* requesting the Director review and revise the Sun Valley Order to grant the SVC Motion to Dismiss (“SVC Motion to Revise”). On August 18, 2015, Hailey and Bellevue filed a *Joint Motion for Review of Interlocutory Order* requesting the Director review and revise the ACGWS Order to grant the Joint Motion to Dismiss (“Hailey and Bellevue Motion to Revise”). The SVC Motion to Revise and the Hailey and Bellevue Motion to Revise are collectively referred to herein as the “Rule 711 Motions.”

On August 18, 2015, Hailey and Bellevue filed a joint petition for judicial review of the ACGWS Order (reassigned Case No. CV-WA-2015-14419). On August 19, 2015, SVC filed a petition for judicial review of the Sun Valley Order (reassigned Case No. CV-WA-2015-14500). Thereafter, the Respondents, SVC, Hailey and Bellevue, and certain other parties to the two appeals entered discussions. Following these discussions, a *Corrected Stipulation* (“Stipulation”) was filed in both appeals on September 18, 2015.

The signatories to the Stipulation agreed to the following:

In the event the Director takes any action in response to the [Rule 711 Motions] within twenty-one (21) days of the filing of the settled records, the parties agree that Hailey and Bellevue and SVC will take appropriate step [sic] to amend their [petitions for judicial review], if necessary, and the parties will take appropriate steps to augment the records before the District Court with any record or evidence of such action in accordance with Rule 84(1), Idaho Rules of Civil Procedure.

Id. at 6. Consistent with the Stipulation, SVC filed an *Amended Petition for Judicial Review* (“Amended Petition”) on October 26, 2016. Also consistent with the Stipulation, the Director’s

October 16, 2015, orders responding to the Rule 711 Motions (“Rule 711 Orders”) were included as Attachments A-8 and A-9 to the Motion to Augment and the October 28, 2015, *Stipulated Motion to Augment the Record* (“Stipulated Motion to Augment”) filed in Case No. CV-WA-2015-14419. However, SVC and Ketchum and Fairfield now object to augmenting the record on appeal with the Rule 711 Orders. *Joint Response* at 3-4.

Noticeably absent from the Joint Response is any reference to the Stipulation wherein SVC and Ketchum and Fairfield agreed to “take appropriate steps to augment the records before the District Court” with the Rule 711 Orders. *Stipulation* at 6. As a general rule, stipulations of parties or counsel made in pending proceedings are conclusive as to all matters properly contained or included therein. *State v. Trimming*, 89 Idaho 440, 444, 406 P.2d 118, 121 (1965). A stipulation is a contract and its enforceability is determined by contract principles. *Maroun v. Wyreless Sys., Inc.*, 141 Idaho 604, 611, 114 P.3d 974, 981 (2005). As with the interpretation of contracts, the Court must interpret stipulations so as to carry out the intention of the parties at the time the contract was made. *Straub v. Smith*, 145 Idaho 65, 69, 175 P.3d 754, 758 (2007); 83 C.J.S. *Stipulations* § 46 (2013). If possible, the intent of the parties should be ascertained from the language of the agreement as the best indication of their intent. *Straub*, 145 Idaho at 69, 175 P.3d at 758.

Here, the language of the Stipulation unambiguously demonstrates the signatories intended to “take appropriate steps to augment the records before the District Court” with the Rule 711 Orders. *Stipulation* at 6. The fact that Hailey and Bellevue stipulated to inclusion of the Rule 711 Orders in the Stipulated Motion to Augment “pursuant to Idaho Rule of Civil Procedure 84(l) and the September 18, 2015 *Stipulation*” further demonstrates the parties’ intent was to make the Rule 711 Orders part of the records on appeal. The Joint Response objecting to

inclusion of the Rule 711 Orders is an inappropriate attempt by SVC and Ketchum and Fairfield to avoid enforcement of the Stipulation and should not be allowed.

Even if the Court considers arguments in the Joint Response, none of the arguments warrant a conclusion that the Rule 711 Orders should be precluded from the record. First, SVC and Ketchum and Fairfield assert “[t]he Rule 711 Orders merely reflected that the Director declined to review or revise an interlocutory order” *Joint Response* at 4. SVC and Ketchum and Fairfield also assert the Amended Petition “does not raise the Rule 711 Orders as an issue for consideration by this Court.” *Id.* at 5. SVC and Ketchum and Fairfield fail to acknowledge that the SVC Motion to Revise raised a new argument for the Director’s consideration that was not raised in the SVC Motion to Dismiss. Specifically, SVC argued the Sun Valley Order should be “reviewed and revised” because the Director must complete a fixed two-step sequential process (first determining an area of common ground water supply and then incorporating that area into an organized water district) before administering the use of water in accordance with priorities of the various water rights as provided in CM Rule 40. *SVC Motion to Revise* at 2, 8, 10. Hailey and Bellevue raised this same argument in the Hailey and Bellevue Motion to Revise. *See Hailey and Bellevue Motion to Revise* at 3. The Director addressed this new argument in the Rule 711 Orders. Thus, the Rule 711 Orders do not merely reflect the Director declined to review or revise the Sun Valley Order or the ACGWS Order. In addition, SVC never withdrew the SVC Motion to Revise and SVC states in the Amended Petition that it “seeks judicial review of the actions taken by the Director and the Department for the reasons set forth in the Motion to Dismiss Contested Case Proceedings and the [SVC Motion to Revise].” *Amended Petition* at 6. Accordingly, the Amended Petition does raise issues addressed in the Rule 711 Orders.

Second, SVC and Ketchum and Fairfield argue that, because the Director issued an *Order Granting Joint Motion for Stay of Delivery Calls; Granting Motion to Compel* (“Stay Order”) on October 15, 2015, staying “[a]ll administrative proceedings . . . as to all parties to the Delivery Calls,” the Rule 711 Orders should be precluded from the record. *Joint Response* at 4-5. SVC and Ketchum and Fairfield also argue they “are without any recourse to address the Rule 711 Orders.” *Id.* at 5. The Director’s Stay Order did not preclude issuance of the Rule 711 Orders on October 16, 2015, in response to the pending Rule 711 Motions. The Stipulation demonstrates the parties anticipated the Director would issue the Rule 711 Orders in addition to the Stay Order. *See Stipulation* at 6-7. Also, SVC and Ketchum and Fairfield are not without recourse to address the Rule 711 Orders. That is precisely why the Rule 711 Orders should be included in the record on appeal.

SVC and Ketchum and Fairfield note they objected to the agency record’s inclusion of certain staff memoranda that are referenced in the Rule 711 Orders. *Joint Response* at 5. SVC and Ketchum and Fairfield argue the “staff memoranda are vaguely referenced in the Rule 711 Orders” as a “*post-hoc* attempt to justify the propriety of such memoranda in the record on appeal.” *Id.* at 5. The Director’s references to the staff memoranda in the Rule 711 Orders are not vague. The references are also not an attempt to justify the propriety of the memoranda in the record, but rather demonstrate why the fixed two-step process advocated for in the Rule 711 Motions is untenable. The references to the staff memoranda in the Rule 711 Orders are not grounds to preclude the Rule 711 Orders from the record.

Finally, SVC and Ketchum and Fairfield cite to the statement in Idaho Rule of Civil Procedure (“IRCP”) 84(l) that “[a]ny party desiring to augment the transcript or record with additional materials presented to the agency may move the district court” to augment the record.

Joint Response at 5. SVC and Ketchum and Fairfield argue the Rule 711 Orders were not “materials presented to the agency,” therefore they should not be included in the record on appeal. *Id.* However, IRCP 84(f)(3)(H) mandates the agency record contain “All petitions for rehearing or reconsideration and orders thereon.” The Rule 711 Motions are in the record. The Rule 711 Orders on those motions should also be in the record.

For the foregoing reasons, Respondents respectfully request the Court enter an order granting the Motion to Augment.

DATED this 12th day of November 2015.

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Chief, Natural Resources Division



GARRICK L. BAXTER
EMMI L. BLADES
Deputy Attorneys General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of November 2015, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the following parties by the indicated methods:

Original to:
SRBA DISTRICT COURT
253 3RD AVE NORTH
PO BOX 2707
TWIN FALLS ID 83303-2707
Facsimile: (208) 736-2121

U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail

SCOTT L CAMPBELL
MOFFATT THOMAS
PO BOX 829
BOISE ID 83701-0829
slc@moffatt.com

U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail

ALBERT P BARKER
BARKER ROSHOLT & SIMPSON
PO BOX 2139
BOISE ID 83701-2139
apb@idahowaters.com

U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail

DYLAN B LAWRENCE
VARIN WARDWELL LLC
PO BOX 1676
BOISE ID 83701-1676
dylanlawrence@varinwardwell.com

U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail

JAMES P SPECK
SPECK & AANESTAD
PO BOX 987
KETCHUM ID 83340-0987
jim@speckandaanestad.com

U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail

JAMES R LASKI
HEATHER O LEARY
LAWSON LASKI CLARK POGUE PLLC
PO BOX 3310
KETCHUM ID 83340
jrl@lawsonlaski.com
heo@lawsonlaski.com

U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail

JOSEPH F JAMES
BROWN & JAMES
130 4TH AVENUE W
GOODING ID 83330
joe@brownjameslaw.com

U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail

SUSAN E BUXTON
MOORE SMITH BUXTON & TURCKE
950 W BANNOCK ST STE 520
BOISE ID 83702
seb@msbtlaw.com

U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail



Emmi L. Bládes
Deputy Attorney General