

JUL 28 2020

WATER RESOURCES
WESTERN REGION

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Attorneys for Protestant SUEZ Water Idaho Inc.

BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF APPLICATION FOR
PERMIT NO. 63-34614 IN THE NAME OF
MICRON TECHNOLOGY, INC.

**SUEZ’S RESPONSE TO IRRIGATORS’
MOTION TO STRIKE, AND MOTION TO
ALLOW SUEZ’S REPLY AND
DECLARATION**

INTRODUCTION

On July 2, 2020 SUEZ Water Idaho Inc. (“SUEZ”) filed *SUEZ’s Motion for Partial Summary Judgment Concerning Condition 908 (“MSJ”)*, together with a supporting brief and declaration. On July 16, 2020, the Ditch Companies and the Boise Project Board of Control (collectively “Irrigators”) each filed a response brief. On July 23, 2020, SUEZ filed *SUEZ’s Consolidated Reply in Support of its Motion for Partial Summary Judgment Concerning Condition 908 (“Reply”)* and *Second Declaration of Michael P. Lawrence in Support of SUEZ’s Motion for Partial Summary Judgment Concerning Condition 908 (“Declaration”)*. On July 24, 2020, the Ditch Companies and the Boise Project Board of Control (collectively “Irrigators”) filed *Ditch Companies and Boise Project Board of Control’s Motion to Strike SUEZ’s*

SUEZ’S RESPONSE TO IRRIGATORS’ MOTION TO STRIKE, AND MOTION TO ALLOW SUEZ’S REPLY AND DECLARATION (7/28/2020)

Consolidated Reply in Support of its Motion for Partial Summary Judgment Concerning Condition 908 and Second Declaration of Michael P. Lawrence (“Irrigators’ Motion”).

Now, by and through its counsel of record, Givens Pursley LLP, and pursuant Rules 260, 270.02, 564, and 565 of the Idaho Department of Water Resources’ (“IDWR” or “Department”) Rules of Procedure (IDAPA 37.01.01.260, .270.02, .564, 565), SUEZ hereby submits its response to *Irrigators’ Motion* together with SUEZ’s own motion to allow the filing of SUEZ’s *Reply and Declaration*.

It is unfortunate, and telling, that the Irrigators choose to employ this procedural maneuver in order to keep useful information and argument from the decision-maker. The Irrigators know it is standard practice for the party moving for summary judgment to file a reply brief in proceedings before IDWR. Both the Ditch Companies and Boise Project have employed the practice before, and the Ditch Companies vigorously defended it in a recent filing (attached as Appendix A at page 10).

If the Hearing Officer agrees that, as a matter of course, moving parties can and do file reply briefs in summary judgment proceedings before the Department (with or without an order authorizing replies), the Hearing Officer should simply deny the *Irrigators’ Motion*. If instead the Hearing Officer determines that a reply should be allowed only when expressly authorized by the Hearing Officer, SUEZ requests that the Hearing Officer authorize SUEZ’s *Reply and Declaration* by granting SUEZ’s motion contained herein.

RESPONSE TO *IRRIGATORS’ MOTION*

I. SUEZ’S *REPLY* WAS NECESSARY TO ADDRESS MISSTATEMENTS AND NEW ISSUES ASSERTED BY THE IRRIGATORS.

SUEZ filed its *Reply and Declaration* to assist the Hearing Officer in his determination of

its *MSJ*. This was necessary and appropriate in order to correct misstatements made by the Irrigators.¹ Moreover, the responses filed by Micron and the Irrigators presented to the Hearing Officer, for the first time, proposed new modifications to Condition 908 (as well as two other brand new conditions). Although not styled as cross-motions for summary judgment, the Irrigators' responses served that function. They affirmatively asked the Hearing Officer to approve and adopt the their newly offered modified Condition 908.² In other words, Micron and the Irrigators raised new matters and sought new relief outside the scope of SUEZ's *MSJ*.

SUEZ could have responded, as have the Irrigators here, by raising procedural objections—which would have served only to delay the proceedings. Instead, SUEZ simply addressed in its reply the new issues and the new request for relief. In doing so, SUEZ acted in conformity with the guiding principle in contested cases:³ All parties should be allowed to make their points in an efficient manner, without distraction, allowing the Department to focus on what matters—the merits. Alas, the Irrigators have offered their own distraction, to which SUEZ now must respond.

II. FILING REPLIES IN SUMMARY JUDGMENT PROCEEDINGS IS STANDARD PRACTICE.

The *Irrigators' Motion* contends that the Hearing Officer “should strike and/or not consider” SUEZ's *Reply* and *Declaration* because the Department's Rules of Procedure do not

¹ For example, the Irrigators inaccurately stated that SUEZ failed to provide public testimony in the matter of Application for Permit No. 63-34348 (“*Elmore County Matter*”). In fact, SUEZ had provided testimony that specifically addressed its concerns over the use of Condition 908.

² *Ditch Companies' Response* at 12 (“Accordingly, the modified Condition 908 proposed by the Ditch Companies, and agreed to by Micron, should be affirmatively confirmed by the Department.”); *Boise Project's Response* at 3 (“The Boise Project requests that the hearing officer adopt the proposed settlement terms . . .”).

³ See IDAPA 37.01.01.052 quoted in footnote 7 at page 4.

allow for the filing of replies. *Irrigators Motion* at 2.⁴

The Idaho Rules of Civil Procedure (“IRCP”) provide that the party moving for summary judgment may file a reply following the filing of any “answering brief and any opposing documents.” IRCP 56(b)(2). Although the Department’s Rules of Procedure do not adopt the entirety of the IRCP,⁵ it is nonetheless common practice for parties in contested cases to file motions for summary judgment, and to brief them, consistent with the procedures in IRCP 56.⁶ And for good reason. These motions can streamline the case. And replies are helpful, and often important, on potentially dispositive motions.⁷

Indeed, in the Elmore County matter, the Ditch Companies filed a reply (“*Elmore County Reply*”) in support of their motion for summary judgment, citing Department Rule of Procedure 260 (IDAPA 37.01.01.260) and IRCP 56 as the basis for the filing.⁸ After the Applicant objected

⁴ The *Irrigators’ Motion* also complains that SUEZ “made no mention of the need or intent to file a reply at the status conference held on July 20, 2020 in this matter.” *Irrigators Motion* at 2. Because filing a reply in a summary judgment proceeding is standard practice recognized by the Ditch Companies and Boise Project (as discussed in the main text), it did not occur to SUEZ to mention it.

⁵ “Unless required by statute, or otherwise provided by these rules, the Idaho Rules of Civil Procedure and the Idaho Rules of Evidence do not apply to contested case proceedings conducted before the agency.” IDAPA 37.01.01.052. Elsewhere, the Department adopts the IRCP rules in specific contexts. IDAPA 37.01.01.520.02 (discovery); IDAPA 37.01.01.740.02.d and 37.01.01.791.02 (appeals).

⁶ This practice has been recognized by the Department: “Although the Idaho Rules of Civil Procedure generally do not apply to contested cases before the Department . . . , the Department relies on the standards set forth in Rule 56 of the Idaho Rules of Civil Procedure and the associated case law as a guide for addressing motions for summary judgment.” *Preliminary Order Denying Motion for Summary Judgment and Denying Application* at 2, In the Matter of Application for Permit No. 25-14428 in the name of Black Hawk HOA and Iron Rim Ranch HOA (Jan. 13, 2017).

⁷ There is no doubt that it is within the Hearing Officer’s discretion to allow a reply brief. “The rules in this chapter will be construed liberally to secure just, speedy and economical determination of all issues presented to the agency. Unless prohibited by statute, the agency may permit deviation from these rules when it finds that compliance with them is impractical, unnecessary or not in the public interest.” IDAPA 37.01.01.052.

⁸ On at least one occasion Boise Project also has filed a reply brief in support of its own motion for summary judgment in a contested case. See *Reply Memorandum in Support of Motion for Summary Judgment to Limit Planning Horizon*, In the Matter of Integrated Municipal Application Package (“IMAP”) of United Water Idaho Inc., Being a Collection of Individual Applications for Transfers of Water Rights and Applications for

to the *Elmore County Reply* and moved to strike it, the Ditch Companies argued that the filing of reply briefs in the context of motions for summary judgment in contested cases “is well known to, and applied by, the Department.” *Ditch Companies’ Response in Opposition to Applicant’s Objection and Motion to Strike Protestants’ Reply Briefs* (“*Elmore County Response*”) at 5 (Oct. 18, 2018). (A copy of the *Elmore County Response* is set forth in Appendix A attached hereto at page 10.)

The Ditch Companies further noted in their *Elmore County Response*:

[T]he Department’s use of Rule 56-based summary judgment procedure has not been overturned by either the district court or the Idaho Supreme Court, both having had opportunities to review and do so if either considered the practice in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; or made upon unlawful procedure pursuant to Idaho Code Section 67-5279(3).

Elmore County Response at 5.⁹

Ultimately, the Hearing Officer in the *Elmore County Matter* did “not consider” the Ditch Companies’ *Elmore County Reply* because “the hearing officer did not establish a deadline for filing replies” *Order Denying Motions for Summary Judgment; Order Denying Motion to Strike* at 2 n.2. However, the Hearing Officer also determined that he would not address Elmore County’s motion to strike, and he in fact did not strike the Ditch Companies’ *Elmore County Reply* from the record.

Amendment of Permits (Apr. 16, 2018). In that matter, Boise Project filed its reply brief despite there being no order allowing the filing of reply briefs.

⁹ The Ditch Companies made many more statements in support of its filing of a reply brief in the *Elmore County Matter*. SUEZ adopts and incorporates them by reference. See Appendix A attached hereto at page 10 of this response.

To summarize, there is no debate that summary judgment procedures under IRCP 56 (including the filing of reply briefs) are common practice before the Department. The Ditch Companies employed this practice in the *Elmore County Matter*, and vigorously argued in its defense. As the Ditch Companies noted, summary judgment practice before the Department has been upheld on appeal. It is inconsistent, to say the least, for the Ditch Companies and Boise Project to object to SUEZ's use of a practice they have employed and defended.

III. THE CAT CREEK ORDER DOES NOT ADDRESS FILING REPLIES IN SUMMARY JUDGMENT PROCEEDINGS.

The *Irrigators' Motion* cites the Director's *Order on Motion for Protective Order* issued July 14, 2020, in the matter of Application for Permit Nos. 63-34403, 63-34652, 63-34897, and 63-34900 in the name of Cat Creek Energy LLC ("*Cat Creek Order*") in support of the argument that reply briefs must be stricken or not considered. *Irrigators' Motion* at 2.

The simple answer is that *Cat Creek Order* had nothing to do with summary judgment proceedings and, therefore, does not reflect a determination by the Director that summary judgment reply briefs cannot be allowed. In any event, the *Irrigators' Motion* mischaracterizes the Director's statements in the *Cat Creek Order*. While noting that "IDWR's Rules of Procedure do not allow for the filing of a reply to a response to a motion," *Cat Creek Order* at 2 n.2, the Director goes on to state that "Cat Creek's Reply Brief will be addressed in [a] forthcoming order." *Id.*¹⁰ This is directly contrary to the assertion in the *Irrigators' Motion* that the "Director struck and/or did not consider the reply brief submitted by Cat Creek Energy." *Irrigators' Motion* at 2.

¹⁰ An additional order has not yet been issued.

IV. THERE IS NO BASIS TO STRIKE SUEZ’S *REPLY* OR *DECLARATION*.

Even if the Hearing Officer is persuaded to not consider SUEZ’s *Reply*, there is no reason to strike it from the record. The Department’s Rules of Procedure do not contemplate striking a reply.¹¹ And IRCP 12(f) authorizes a tribunal, in its discretion, to only strike “from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” IRCP 12(f). *See also* Ditch Companies’ *Elmore County Response* at 2 (citing same rule). The *Irrigators’ Motion* does not allege that anything contained in SUEZ’s *Reply* is redundant, immaterial, impertinent, or scandalous. Therefore, it is well within the Hearing Officer’s discretion to deny the *Irrigators’ Motion* on that ground. *James v. Mercea*, 152 Idaho 914, 917, 277 P.3d 361, 364 (2012). *See also* Ditch Companies’ *Elmore County Response* at 2 (citing and quoting same).

And, even if the Hearing Officer determines that he will not consider SUEZ’s *Reply*, there is no reason to not consider (let alone to strike) the *Declaration* or the documents attached to SUEZ’s *Reply* as Appendices A and B. The Appendices contain evidence directly contradicting misstatements in the *Boise Project Board of Control’s Response to SUEZ’s Motion for Partial Summary Judgment Concerning Condition 908* (“*Boise Project’s Response*”). Namely, the Appendices are copies of the public witness testimony and follow-up letter filed by SUEZ in the *Elmore County Matter*, which Boise Project contends SUEZ never submitted. *See Boise Project’s Response* at 2. The *Declaration* simply states that the Appendices are true and

¹¹ The only form of the word “strike” in the Department’s rules is found once—in Rule 260.03: “ Any motion to dismiss, strike or limit an application or claim or appeal, complaint, petition, or protest must be filed before the answer is due or be included in the answer, if the movant is obligated to file an answer.” IDAPA 37.01.01.260.03 (emphasis added). Neither SUEZ’s *Reply* nor the *Declaration* are an application or claim or appeal, complaint, petition, or protest.

correct copies and that they were attached to SUEZ's *Reply* (instead of to a separate affidavit or declaration) as a matter of convenience for the reader.

The Department's Rules of Procedure welcome evidence that will help determine the issues in a contested case:

Evidence should be taken by the agency to assist the parties' development of a record, not excluded to frustrate that development. The presiding officer at hearing is not bound by the Idaho Rules of Evidence. No informality in any proceeding or in the manner of taking testimony invalidates any order. The presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho. All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs. The agency's experience, technical competence and specialized knowledge may be used in evaluation of evidence.

IDAPA 37.01.01.600. The Department's Rules of Procedure also provide that "[d]ocumentary evidence may be received in the form of copies" IDAPA 37.01.01.601.

Because the Appendices attached to the *Reply* (and the confirmation contained in the *Declaration* that they are true and correct copies) will assist in the development of the record, they should remain in the record and be considered by the Hearing Officer in his determination of this matter.

MOTION TO FILE SUEZ'S *REPLY* AND *DECLARATION*

If the Hearing Officer determines that a party may not file a reply without an express order authorizing it, SUEZ moves for such an order.

Pursuant to Rule 260 of the Department's Rules of Procedure, IDAPA 37.01.01.260, SUEZ hereby moves the Hearing Officer for an order authorizing *nunc pro tunc* the filing of SUEZ's *Reply* and *Declaration*.

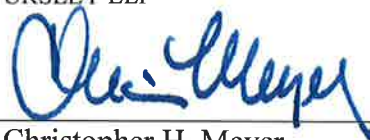
SUEZ'S RESPONSE TO IRRIGATORS' MOTION TO STRIKE, AND MOTION TO ALLOW SUEZ'S *REPLY* AND *DECLARATION* (7/28/2020)

The grounds for such motion are set forth above (under the section entitled *Response to Irrigators' Motion*). SUEZ also adopts by reference the arguments set out by the Ditch Companies in their brief set out in Appendix A at page 10.

Respectfully submitted this 28th day of July, 2020.

GIVENS PURSLEY LLP

By



Christopher H. Meyer

By



Michael P. Lawrence

Attorneys for Protestant SUEZ Water Idaho Inc.

Appendix A DITCH COMPANIES' *ELMORE COUNTY RESPONSE*

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR
PERMIT NO. 63-34348 IN THE NAME OF
ELMORE COUNTY, BOARD OF COUNTY
COMMISSIONERS

DITCH COMPANIES' RESPONSE IN
OPPOSITION TO APPLICANT'S OBJECTION
AND MOTION TO STRIKE PROTESTANTS'
REPLY BRIEFS

The Ditch Companies,¹ by and through undersigned counsel of record and pursuant to Department Procedure Rules 260 and 565 (IDAPA 37.01.01.260 and .565), and Idaho Rule of Civil Procedure 12(f), hereby submit this response in opposition to the Elmore County, Board of County Commissioners' ("County") *Objection and Motion to Strike Protestants' Reply Briefs* (Oct. 17, 2018) ("Objection"). The County's Objection should be denied because the Protestants' reply briefs were procedurally proper, and because the County's evidentiary objections are baseless and incorrect.

¹ The Protestant "Ditch Companies" include Ballentyne Ditch Company, Boise Valley Irrigation Ditch Company, Canyon County Water Company, Eureka Water Company, Farmers' Co-operative Ditch Company, Middleton Mill Ditch Company, Middleton Irrigation Association, Inc., Nampa & Meridian Irrigation District, New Dry Creek Ditch Company, Pioneer Ditch Company, Pioneer Irrigation District, Settlers Irrigation District, South Boise Water Company, and Thurman Mill Ditch Company.

Ignoring the County's grandiloquence, its Objection presents two substantive contentions: (1) the Protestants cannot have it both ways (*i.e.*, avail themselves of I.R.C.P.-based motions practice—namely summary judgment—on the one hand, while allegedly eschewing I.R.C.P. and I.R.E.-based evidentiary requirements on the other in favor of the comparatively more relaxed evidentiary standards of Procedure Rule 600 (IDAPA 37.01.01.600)); and (2) reply briefs are impermissible because the Department's Procedure Rules (namely Procedure Rule 565) do not provide for such an opportunity. Objection, p. 2. The County then requests the opportunity to file a "sur-response" brief to the extent the Hearing Officer is inclined to consider the Protestants' reply briefs. *Id.* The Ditch Companies address each of these contentions and requests in turn.

A. Applicable Legal Standard

Absent from both the County's prior *Consolidated Response to Protestants' Motions for Summary Judgment* (Oct. 9, 2018), and its pending Objection, is recitation and application of the Rule 12(f) standards. In the absence of an administrative rule or statute providing otherwise, Civil Rule 12(f) provides the "other controlling law" upon which the County's request to strike is based. IDAPA 37.01.01.260.01 and .02.b.

Civil Rule 12(f) authorizes a tribunal, in its discretion, to strike from a pleading "an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." I.R.C.P. 12(f). The County advances no contention that anything contained within the *Ditch Companies' Reply in Support of Motion for Summary Judgment* (Oct. 16, 2018) ("Reply") is redundant, immaterial, impertinent, or scandalous. Therefore, the County's request should be denied, and it is well within the Hearing Officer's discretion to do so. *See, e.g., James v. Mercea*, 152 Idaho 914, 917, 277 P.3d 361, 364 (2012) ("[Movant] has not pointed to any matter

**DITCH COMPANIES' RESPONSE IN OPPOSITION TO APPLICANT'S
OBJECTION AND MOTION TO STRIKE PROTESTANTS' REPLY BRIEFS – Page 2**

in the answer that was redundant, immaterial, impertinent, or scandalous, and therefore the district court did not abuse its discretion in denying the motion.”).

B. The Ditch Companies' Reply Brief and Affidavit Exhibits are Proper Under Either Analysis (Under Both the Department's Procedure Rules *And* the Civil Rules and Corresponding Rules of Evidence)

Rather than risk invitation of the County's "having it both ways" arguments, the Ditch Companies explained in thorough detail why their summary judgment filings were appropriate under not only the Departments Procedure Rules (IDAPA 37.01.01) but also under the pertinent (though not necessarily applicable) Idaho Rules of Civil Procedure and the Idaho Rules of Evidence. *See* Reply, pp. 2-7. To that end, the Ditch Companies explained and applied:

- Idaho Code Sections 42-1734(19), 42-1805(8), and 67-5206(5) (authorizing the Department to promulgate and implement procedural and operative rules governing the agency's business and effectuating the powers and duties of the agency);
- Procedure Rules 260 and 565 (IDAPA 37.01.01.260 and .565, respectively) (governing prehearing motions practice before the Department—which practice in the absence of any other applicable statute, rule, or order bases prehearing motions practice on any “other controlling law” relating to the relief requested);
- Numerous past orders of the Department all applying Procedure Rules 260 and 565 in conjunction with Civil Rule 56;
- Procedure Rule 520.02 (IDAPA 37.01.01.520.02; engrafting I.R.C.P. 26 into the Department's Procedure Rules for discovery purposes), Civil Rules 26 and 56(c)(4), and Idaho Code Section 54-1215(3) (all related to foundation, oath, and certification/verification requirements meeting, if not exceeding, the evidentiary requirements of Procedure Rules 600 and 603 (IDAPA 37.01.01.600 and .603, respectively));
- Water Appropriation Rule 40.05.g (IDAPA 37.03.08.040.05.g) (promulgating the legal requirement that applicant solicit and that, among other agencies, the Idaho Department of Fish and Game respond with, comments concerning review of the County's pending Application); and
- Idaho Rules of Evidence 803(8), 803(14), 803(18), and 803(24)(A) (all providing express, applicable exceptions to the County's hearsay objections if, for the sake

**DITCH COMPANIES' RESPONSE IN OPPOSITION TO APPLICANT'S
OBJECTION AND MOTION TO STRIKE PROTESTANTS' REPLY BRIEFS – Page 3**

of argument, the Idaho Rules of Evidence applied to contested case proceedings before the Department).

The Ditch Companies performed this analysis demonstrating that its practices and filings pass muster *in both* administrative and judicial settings.

The sum and substance of the County's Objection amount to conclusory allegations that the Protestants (apparently arrogantly) "chastise Elmore County's demand for evidentiary accountability under [Rule 56]" and its "associated evidentiary standards." But, the County offers no substantive rebuttal disputing the Ditch Companies' detailed analysis—the content of which demonstrates the error of the County's naked assertions.

Regarding the County's contention that the Department's Procedure Rules "do[] not afford movants a reply brief," that too is wrong. Objection, p. 2. Again, and as explained in detail in the Ditch Companies' Reply (*see* pp. 2-4) and above, motions practice before the Department is broad, encompassing "all other" requests for the agency to "take any other action in a contested case." IDAPA 37.01.01.260. In the event the motions practice at issue is different than that otherwise specifically covered by Procedure Rules 210 through 270, Procedure Rule 260 simply requires one to meet the form and contents requirements of the rule, namely citation to the "controlling law upon which [the motion] is based," together with a statement of the relief requested. IDAPA 37.01.01.260.

In this instance, the Ditch Companies' motion to dismiss the County's Application short of trial (which is a motion specifically contemplated by Procedure 260.03) is governed by Idaho Rules of Civil Procedure 12(b)(6) (failure to state a claim upon which relief can be granted—*i.e.*, filing of a deficient application for permit on which the County cannot meet its evidentiary burdens of initial production or ultimate persuasion), which by operation of Civil Rule 12(d) is converted to a motion for summary judgment under Civil Rule 56 because of the presentation of

**DITCH COMPANIES' RESPONSE IN OPPOSITION TO APPLICANT'S
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evidence outside of the four corners of the Application itself. The Ditch Companies' request for relief is clear (dismissal of the application short of trial), and the "controlling law" upon which such a motion is based is Civil Rule 56 and the corresponding administrative and common law applying the same. And, Rule 56(b)(2) plainly provides the Protestants (or movants in this instance) the opportunity to file a "reply brief" responding to the "answering brief and any opposing documents" filed by the County. *Id.*

This practice and procedure (including the filing of reply briefs) is well known to, and applied by, the Department. *See, e.g., Preliminary Order Granting Motion for Summary Judgment With Respect to Application For Permit No. 37-22852* (May 26, 2015) (upheld by the Director in his *Final Order Denying Exceptions* (Aug. 7, 2015). And as correctly noted by Protestant City of Boise, the Department's use of Rule 56-based summary judgment procedure has not been overturned by either the district court or the Idaho Supreme Court, both having had opportunities to review and do so if either considered the practice in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; or made upon unlawful procedure pursuant to Idaho Code Section 67-5279(3). *See, e.g., Memorandum Decision, CV-2017-7491* (In the Matter of Water Right No. 95-0734) (Apr. 11, 2018) (district court judicial review of administrative decision predicated on cross motions for summary judgment); *see also, Rangen, Inc. v. Idaho Dep't of Water Res. (In re Distrib. of Water to Water Right Nos. 36-02551 & 36-07694 (Rangen, Inc.) IDWR Docket CM-DC-2011-004, 159 Idaho 798, 367 P.3d 193* (2016) (Idaho Supreme Court review of IDWR delivery call contested case predicated in part on summary judgment proceedings before the agency).

**DITCH COMPANIES' RESPONSE IN OPPOSITION TO APPLICANT'S
OBJECTION AND MOTION TO STRIKE PROTESTANTS' REPLY BRIEFS – Page 5**

C. The County is Not Entitled to File a “Sur-Response”

The County fully understood that the Protestants “summary judgment” motions were proceeding under Civil Rule 56 (as authorized by Department Procedure Rules 260 and 565). *See, e.g., Memorandum in Support of Ditch Companies’ Motion for Summary Judgment* (Sept. 25, 2018), pp. 2-3. The “controlling law” governing summary judgment briefing protocols plainly provides for the movant’s opening motion, supporting documents and brief; the non-movant’s answering brief and any opposing documents; and “any reply brief of the *moving party*.” I.R.C.P. 56(b)(2) (emphasis added). The summary judgment standards do not provide for a “sur-response.” Motions practice (and corresponding oral argument) is purposefully designed to provide the movant with the “last word” opportunity.

If the County is concerned that its *Consolidated Response to Protestants’ Motions for Summary Judgment* was somehow incomplete or lacking, that is a problem of its own creation. The County had full and fair opportunity to respond to the pending motions for summary judgment as it deemed fit and it availed itself of that opportunity. The Protestants “replied” as permitted and the pending motions for summary judgment are now fully briefed and submitted for decision, with the exception of any oral argument the Hearing Officer might set. Allowing a “sur-response” would further upset the prehearing (and potentially hearing) schedule in this matter and deny the Protestants the last word opportunity to which they are entitled as the moving parties.

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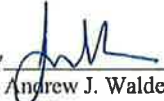
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**DITCH COMPANIES’ RESPONSE IN OPPOSITION TO APPLICANT’S
OBJECTION AND MOTION TO STRIKE PROTESTANTS’ REPLY BRIEFS – Page 6**

For the foregoing, the Ditch Companies respectfully request that the Hearing Officer deny the County's Objection in its entirety.

DATED this 18th day of October, 2018.

SAWTOOTH LAW OFFICES, PLLC

By 
Andrew J. Waldera
Attorneys for the Ditch Companies

**DITCH COMPANIES' RESPONSE IN OPPOSITION TO APPLICANT'S
OBJECTION AND MOTION TO STRIKE PROTESTANTS' REPLY BRIEFS – Page 7**

**SUEZ'S RESPONSE TO IRRIGATORS' MOTION TO STRIKE, AND MOTION TO ALLOW SUEZ'S REPLY AND
DECLARATION (7/28/2020)**

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of October, 2018, I caused a true and correct copy of the foregoing DITCH COMPANIES' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT to be served by the method indicated below, and addressed to the following:

Mathew Weaver, Hearing Officer	<input type="checkbox"/> U.S. Mail, Postage Prepaid
IDAHO DEPARTMENT OF WATER RESOURCES	<input type="checkbox"/> Hand Delivered
322 E. Front Street, 6th Floor	<input type="checkbox"/> Overnight Mail
P.O. Box 83720	<input checked="" type="checkbox"/> Facsimile
Boise, ID 83720	<input checked="" type="checkbox"/> Email
F (208) 287-6700	

Scott L. Campbell	<input type="checkbox"/> U.S. Mail, Postage Prepaid
CAMPBELL LAW, CHTD.	<input type="checkbox"/> Hand Delivered
P.O. Box 170538	<input type="checkbox"/> Overnight Mail
Boise, ID 83717	<input type="checkbox"/> Facsimile
P (208) 949-0599	<input checked="" type="checkbox"/> Email
E <i>scott@slclexh20.com</i>	

Matthew J. McGee	<input type="checkbox"/> U.S. Mail, Postage Prepaid
SPINK BUTLER, LLP	<input type="checkbox"/> Hand Delivered
251 E. Front Street, Suite 200	<input type="checkbox"/> Overnight Mail
P.O. Box 639	<input type="checkbox"/> Facsimile
Boise, ID 83701	<input checked="" type="checkbox"/> Email
P (208) 388-1000	
F (208) 388-1001	
E <i>mmcgee@spinkbutler.com</i>	

John K. Simpson	<input type="checkbox"/> U.S. Mail, Postage Prepaid
Albert P. Barker	<input type="checkbox"/> Hand Delivered
Shelley M. Davis	<input type="checkbox"/> Overnight Mail
BARKER ROSHOLT & SIMPSON LLP	<input type="checkbox"/> Facsimile
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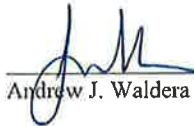
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of July 2020, the foregoing, together with any appendices or exhibits, was filed, served, and copied as shown below.

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