

Docket No. 41069-2013

IN THE SUPREME COURT FOR THE STATE OF IDAHO

IN THE MATTER OF THE PETITION FOR DELIVERY CALL OF A&B IRRIGATION
DISTRICT FOR THE DELIVERY OF GROUND WATER AND FOR THE CREATION
OF A GROUND WATER MANAGEMENT AREA.

A&B IRRIGATION DISTRICT,
Petitioner-Appellant,

v.

IDAHO DEPARTMENT OF WATER RESOURCES, and GARY SPACKMAN, in his official
capacity as Director of the IDAHO DEPARTMENT OF WATER RESOURCES,
Respondents,

and

IDAHO GROUND WATER APPROPRIATORS, INC.; and THE CITY OF POCA TELLO,
Intervenors-Respondents.

**CITY OF POCA TELLO'S RESPONSE PURSUANT TO I.A.R. 33 AND 32
TO DECEMBER 4, 2013 STIPULATION TO DISMISS APPEAL**

On Appeal from the District Court of the Fifth Judicial District of the State of Idaho,
in and for the County of Minidoka, Docket No. 2011-512

Honorable Eric J. Wildman, District Judge, Presiding

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COMES NOW the City of Pocatello (“Pocatello”) and responds to the Stipulation to Dismiss Appeal (“Stipulation”) filed December 4, 2013, pursuant to Idaho Appellate Rules 33 and 32.

STANDARD OF REVIEW

Pocatello is not a party to the Stipulation filed by Appellant A&B Irrigation District (“A&B”). Pursuant to Idaho Appellate Rule (“I.A.R.”) 33, “[a]ny such stipulation for dismissal signed by some but not all of the parties to an appeal shall be considered and processed as a motion for dismissal under Rule 32.” Rule 32(b) elaborates that “[a]ny appealing party may move the court to dismiss the party’s appeal with prejudice at any time, before or after oral argument. The court may tax costs and attorney fees as though the non-appealing party had prevailed.”

ARGUMENT

Pocatello informed A&B that it could stipulate to paragraphs 1, 2 and 4 of the Stipulation because these paragraphs resolve issues properly before the Court. Pocatello objects to the Stipulation as executed because it goes beyond issues properly before the Court, and requires the Court to order relief that is not presently among the issues raised by A&B’s appeal. For example, paragraph 5 of the Stipulation requests an order regarding a prospective process for A&B to continue with its delivery call. The Stipulation also seeks to identify the proper evidentiary record that might be used in further proceedings (§ 6). In addition to raising issues beyond the scope of the appeal, the Stipulation effectively seeks an advisory opinion about matters that have not been briefed, including the proper Idaho Department of Water Resources’ (“IDWR”) procedures to be followed regarding prospective admissibility of evidence in a proceeding that has not commenced.

Nothing prevents A&B, IDWR and Idaho Ground Water Appropriators, Inc. from entering into a separate agreement about the remainder of the issues; however, the conditions of the Stipulation do not need to be incorporated into any order approving the Stipulation. Therefore, Pocatello requests that if the Court is inclined to grant A&B's motion for dismissal, the dismissal be "with prejudice" pursuant to I.A.R. 32(b) without approval of the terms of the Stipulation, or in the alternative that any order approving the Stipulation should be limited to paragraphs 1, 2, and 4.

Furthermore, Pocatello seeks attorney fees as provided for under I.A.R. 32(b). As demonstrated by Appendix 2 to Pocatello's *Response Brief* dated November 14, 2013, A&B's pursuit of its delivery call in *A&B I, II* and *III* has resulted in repetitive and unnecessary litigation in which Pocatello has incurred substantial costs and attorney fees. A&B conceded in the Stipulation that the district court's memorandum decision was correct, but only after Pocatello incurred significant expense in filing its response brief. If A&B chooses to voluntarily dismiss its appeal at this stage of the briefing, attorney fees are proper.

WHEREFORE, Pocatello respectfully requests that the Court exclude from any order dismissing this appeal all substantive paragraphs from the Stipulation, and limiting the order to a dismissal "with prejudice." Pocatello also respectfully requests costs and attorney fees pursuant to I.A.R. 32(b).

Respectfully submitted, this 5th day of December, 2013.

CITY OF POCA TELLO ATTORNEY'S OFFICE

By 
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WHITE & JANKOWSKI, LLP

By 
Sarah A. Klahn

ATTORNEYS FOR CITY OF POCA TELLO

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December, 2013, a copy of **City of Pocatello's Response Pursuant to I.A.R. 33 and 32 to December 4, 2013 Stipulation to Dismiss Appeal in Idaho Supreme Court Docket No. 41069-2013** was served to the following parties by the method indicated:



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