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IN THE SUPREME COURT OF 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.	Supreme Court Docket No. 38403-2011 Minidoka County District Court No. 2009-647 Supreme Court Docket No. 38421-2011 Minidoka County District Court No. 2009-647 Supreme Court Docket No. 38422-2011 Minidoka County District Court No. 2009-647
A&B IRRIGATION DISTRICT, Petitioner-Appellant, v. **THE IDAHO DEPARTMENT OF WATER RESOURCES**, and **GARY SPACKMAN,** in his official capacity as Interim Director of the Idaho Department of Water Resources, Defendants-Respondents. and **THE IDAHO GROUND WATER APPROPRIATORS, INC.; THE CITY OF POCATELLO;** Respondents-Cross Appellants, and	**A&B IRRIGATION DISTRICT'S MOTION TO STRIKE PARTS OF CROSS-APPELLANTS' REPLY BRIEFS**

FREMONT-MADISON IRRIGATION DISTRICT; ROBERT & SUE HUSKINSON; SUN-GLO INDUSTRIES; VAL SCHWENDIMAN FARMS, INC.; DAVID SCHWENDIMAN FARMS, INC.; DARRELL C. NEVILLE; SCOTT C. NEVILLE; STAN D. NEVILLE,	)
District Court Intervenors.	)

COMES NOW, Petitioner-Appellant, A&B Irrigation District ("A&B"), by and through counsel of record, and moves this Court for an order striking parts of the reply briefs filed by Cross-Appellants the Idaho Ground Water Appropriators, Inc. ("IGWA") and the City of Pocatello ("Pocatello"). The bases for A&B's motion are set forth below.

BACKGROUND

A&B filed a notice of appeal in this matter on December 29, 2010. Pocatello filed a notice of appeal on December 30, 2010. IGWA filed a notice of appeal on January 4, 2011. The Court consolidated the appeals for all purposes on March 16, 2011. *See Order to Consolidate Appeals for All Purposes*. On June 23, 2011 the Court entered an *Amended Order re: Briefing in These Consolidated Appeals and Consolidating and Amending Titles* ("*Briefing Order*"). The Court clarified the parties' roles and ordered A&B to be classified as "Appellant" and IGWA and Pocatello as "Cross-Appellants." *Briefing Order* at 4.

A&B filed its opening brief on July 1, 2011. IGWA and Pocatello filed their opening briefs on July 29, 2011. In addition to arguing their sole issue on appeal, IGWA and Pocatello also responded to A&B's opening brief. *See Cross-Appellant Idaho Ground Water Appropriators, Inc.'s Opening Brief and Response Brief* at 33-48 ("*IGWA Opening Br.*"); *Respondent-Cross Appellant City of Pocatello's Brief* at 11-25 ("*Poc. Opening Br.*"). IDWR responded to all parties' opening briefs on August 26, 2011. *See IDWR Defendants-*

Respondents' Brief. A&B then filed a reply brief that included a response to IGWA's and Pocatello's issues on appeal on September 16, 2011. *See A&B Irrigation District's Reply Brief.* Finally, IGWA and Pocatello filed reply briefs on October 11, 2011.

STATEMENT IN SUPPORT OF MOTION

Idaho Appellate Rule 35 defines the content and arrangement of briefs on appeal. The process is straight forward and allows for an opening brief, response, and reply. The rule allows the appellant or cross-appellant to file a "brief in reply to the brief of respondent . . . which may contain additional argument in rebuttal to the contentions of the respondent." I.A.R. 35(c). Consistent with the rule, IGWA and Pocatello replied to the responses filed by IDWR and A&B. *See IGWA's Reply Br.* at 14; *Poc. Reply Br.* at 16-18. However, contrary to Rule 35(c), IGWA and Pocatello also improperly "responded" to A&B's reply brief and A&B's issues on appeal. *See IGWA's Reply Br.* at 5-14, 15; *Poc. Reply Br.* at 1-15. The Court's rules do not allow a party to further respond to an appellant's reply brief.

IGWA and Pocatello only raised one issue in their notices of appeal and opening briefs, the District Court's finding that the Director erred in failing to apply the proper evidentiary standard in evaluating injury to A&B's senior water right. *IGWA Opening Br.* at 14; *Poc. Opening Br.* at 11. Consequently, IGWA and Pocatello were prohibited from raising additional issues in their reply briefs. *Myers v. Workmen's Auto Ins. Co.*, 140 Idaho 495, 508 (2004). Since a brief on reply is limited to the issues addressed in the party's opening brief, or "in rebuttal to the contentions of the respondent," IGWA and Pocatello have no legal basis to further respond to A&B's issues on appeal in their reply briefs. *See Suitts v. Nix*, 141 Idaho 706, 708 (2005) ("A reviewing court looks only to the initial brief on appeal for the issues presented because those are the arguments and authority to which the respondent has an opportunity to

respond in the respondent's brief."); *see also*, *In re Board of Psychologist Examiners' Final Order Case No. PSY-PB4-01-010-002 ex rel. Wright*, 148 Idaho 542, 546 (2010).

Moreover, both IGWA and Pocatello already responded to A&B's issues on appeal. *See Cross-Appellant Idaho Ground Water Appropriators, Inc.'s Opening Brief and Response Brief* at 33-48; *Respondent-Cross Appellant City of Pocatello's Brief* at 11-25. Therefore, any further response to A&B's appeal is prejudicial, untimely, and prohibited by the Appellate Rules. I.A.R. 35; *see also*, *Briefing Order* at 4. A&B respectfully requests the Court to strike those parts of *IGWA's Reply Brief* (pp. 5-14, 15) and *Pocatello's Reply Brief* (pp. 1-15) that improperly respond to A&B's reply and do not address IGWA's and Pocatello's issues on appeal set forth in their opening briefs.

CONCLUSION

The Appellate Rules clearly define the content and arrangement of briefs filed with the Idaho Supreme Court. An appellant or cross-appellant is permitted to file a reply brief in support of that party's issues identified in the opening brief and to rebut the contentions of a respondent. I.A.R. 35(c). IGWA and Pocatello have violated Rule 35 by further responding to A&B's reply brief and attempting to raise issues beyond the scope of their opening briefs. Therefore, the parts of IGWA's and Pocatello's reply briefs that do not address their sole issue on appeal should be stricken pursuant to Idaho law.

DATED this 12th day of October, 2011.

BARKER ROSHOLT & SIMPSON LLP

Travis L. Thompson

Attorneys for A&B Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of October, 2011, I served true and correct copies of the foregoing upon the following by the method indicated:

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