

Docket No. 38403-2011 [38421-2011 / 38422-2011]

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

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; and,
Defendants-Respondents,

v.

THE IDAHO GROUND WATER APPROPRIATORS, INC.; THE CITY OF POCA TELLO;
Respondents-Cross Appellants,

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.

**RESPONDENT-CROSS APPELLANT CITY OF POCA TELLO'S RESPONSE TO
MOTION TO STRIKE PARTS OF CROSS-APPELLANTS' REPLY BRIEFS**

Appeal from the District Court of the Fifth Judicial District
for Minidoka County District Court No. 2009-647
Honorable Eric J. Wildman, District Judge, Presiding

ATTORNEYS FOR PETITIONER-APPELLANT

John K. Simpson
Travis L. Thompson
Paul L. Arrington
BARKER ROSHOLT & SIMPSON LLP
113 Main Ave. West, Suite 303
P. O. Box 485
Twin Falls, ID 83303
(208) 733-0700 – Telephone
(208) 287-6700 – Facsimile

**ATTORNEYS FOR DEFENDANTS-
RESPONDENTS**

Garrick Baxter
Chris M. Bromley
IDAHO DEPT. OF WATER RESOURCES
P. O. Box 83720
Boise, ID 83720-0098
(208) 287-4800 – Telephone
(208) 287-6700 – Facsimile
*- Attorneys for Interim Director and Idaho
Department of Water Resources*

**ATTORNEYS FOR RESPONDENTS-CROSS
APPELLANTS**

Randall C. Budge
Candice M. McHugh
RACINE OLSON NYE BUDGE &
BAILEY, CHTD.
101 S Capitol Blvd, Ste 300
Boise, ID 83702
(208) 395-0011 – Telephone
(208) 433-0167 – Facsimile
*- Attorneys for Idaho Groundwater
Appropriators, Inc. et al.*

Sarah A. Klahn, I.S.B. # 7928
Mitra M. Pemberton
WHITE & JANKOWSKI, LLP
511 Sixteenth Street, Suite 500
Denver, Colorado 80202
(303) 595-9441 – Telephone
(303) 825-5632 – Facsimile

A. Dean Tranmer, I.S.B. # 2793
CITY OF POCATELLO
P.O. Box 4169
Pocatello, Idaho 83205-4169
(208) 234-6149 – Telephone
(208) 234-6297 – Facsimile
- Attorneys for City of Pocatello

**ATTORNEY FOR DISTRICT COURT
INTERVENORS**

Jerry R. Rigby
RIGBY ANDRUS & RIGBY CHTD.
P.O. Box 250
Rexbury, ID 83440-0250
(208) 356-3633 – Telephone
(208) 356-0768 – Facsimile
*- Attorneys for Fremont-Madison Irrigation
District et al.*

COME NOW the Respondent-Cross Appellant City of Pocatello (“City” or “Pocatello”), by and through its counsel and hereby files this response to Petitioner-Appellant, A&B Irrigation District’s (“A&B”) *Motion to Strike Parts of Cross-Appellants’ Reply Briefs* (“Motion to Strike”). The Motion to Strike should be denied for the following reasons:

This Court’s *Amended Order Re: Briefing In These Consolidated Appeals and Consolidating and Amending Titles* dated June 23, 2011 determines the respective roles of the parties in this appeal and the briefing schedule. As described in that Order, Pocatello is a cross-appellant in this consolidated appeal. A&B is a respondent to Pocatello’s appeal, and similarly Pocatello is a respondent to A&B’s appeal. The Idaho Department of Water Resources (“IDWR”) is also a respondent on appeal.

A&B filed its opening brief on June 30, 2011. Pocatello filed its opening brief on July 29, 2011, which raised its sole issue on appeal and also responded to the issues on appeal raised by A&B's opening brief. IDWR responded to all parties’ opening briefs on August 25, 2011. A&B filed its reply brief on September 16, 2011 which responded to Pocatello’s issues on appeal and replied to Pocatello’s response to A&B’s issues on appeal. Pocatello then filed its reply brief October 11, 2011 as allowed pursuant to this Court’s June 23, 2011 Order.

Pocatello’s reply brief addresses not only arguments in IDWR’s brief but also additional arguments raised in A&B’s reply brief. A&B asks the Court to strike this additional argument, and cites to *Myers v. Workmen’s Auto Ins. Co.*, 140 Idaho 495, 508, 95 P.3d 977, 990 (2004) in support of its request. Motion to Strike at 3-4 (also citing *Suits v. Nix*, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005); *In re Bd. of Psychologist Examiners’ Final Order Case No. PSY-P4B-01-*

010-002 ex rel. Wright, 148 Idaho 542, 546, 224 P.3d 1131, 1135 (2010)). The authority provided by A&B stands for the rule that an appellant’s opening brief controls the issues it may raise on appeal, and that new issues—i.e., a new ground for reversal—may not be considered by the Court unless the appellant raised the issue in its opening brief.

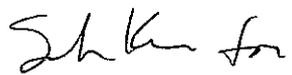
Consistent with this case law, Pocatello did not raise new issues in its reply beyond the scope of its opening brief. Instead, Pocatello included additional arguments in response to those made in A&B’s reply brief. Idaho Appellate Rule (“IAR”) 35(c) states that a reply is to “contain additional argument in rebuttal to the contentions” of respondents. Because of the nature of this consolidated appeal, A&B is not only an appellant but also a “respondent” to Pocatello’s cross-appeal. A&B raised certain issues in its opening brief, and provided new arguments regarding those issues in its reply brief filed on September 16, 2011. Pocatello directly and specifically addressed the new arguments in A&B’s reply brief and IDWR’s brief, consistent with IAR 35(c). *See, e.g.*, Pocatello’s reply at 3, 6, 8, 9 (“On reply, A&B argues that the Director’s findings regarding A&B’s ‘drilling techniques,’ combined with the language of CMR 42.01.g, invalidate the Director’s determination . . .”).

Further, even if the Court did not contemplate that Pocatello would provide additional argument in its reply brief, providing additional legal argument in briefing does not prejudice A&B and thus a motion to strike is not merited; A&B will have the opportunity to respond to these arguments during oral argument. Because A&B is not prejudiced, and because Pocatello’s reply brief was narrowly limited to responding to new arguments introduced in A&B’s reply

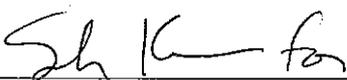
brief as permitted by IAR 35(c), Pocatello respectfully requests that the Court deny A&B's Motion to Strike.

DATED this 21st day of October, 2011.

CITY OF POCATELLO ATTORNEY'S OFFICE

By 
A. Dean Tranmer

WHITE & JANKOWSKI, LLP

By 
Mitra M. Pemberton

By 
Sarah A. Klahn

ATTORNEYS FOR CITY OF POCATELLO

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October, 2011, I caused to be served a true and correct copy of the foregoing **RESPONDENT-CROSS APPELLANT CITY OF POCATELLO'S RESPONSE TO MOTION TO STRIKE PARTS OF CROSS-APPELLANTS' REPLY BRIEFS** in Supreme Court Docket No. 38403-2011 [38421-2011 / 38422-2011] (Minidoka County District Court No. CV-2009-647) via the following marked method to:



Sarah A. Klahn, White & Jankowski, LLP

Idaho Supreme Court Clerk of the Courts 451 West State Street Boise ID 83702	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Federal Express Court's Phone 208-334-2210 <input type="checkbox"/> Email sctbriefs@idcourts.net
Garrick L. Baxter Chris M. Bromley Deputy Attorneys General – IDWR PO Box 83720 Boise ID 83720-0098	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile 208-287-6700 <input checked="" type="checkbox"/> Email garrick.baxter@idwr.idaho.gov chris.bromley@idwr.idaho.gov
John K. Simpson Travis L. Thompson Barker Rosholt & Simpson PO Box 485 Twin Falls ID 83303-0485	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile 208-735-2444 <input checked="" type="checkbox"/> Email jks@idahowaters.com tlt@idahowaters.com
A. Dean Tranmer City of Pocatello PO Box 4169 Pocatello ID 83201	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile 208-234-6297 <input checked="" type="checkbox"/> Email dtranmer@pocatello.us
Randall C. Budge Candice M. McHugh Racine Olson Nye Budge & Bailey 101 S Capitol Blvd Ste 300 Boise ID 83702	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile 208-433-0167 <input checked="" type="checkbox"/> Email cmm@racinelaw.net
Jerry R. Rigby, Esq. Rigby Andrus & Moeller PO Box 250 Rexburg ID 83440	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile 208-356-0768 <input checked="" type="checkbox"/> Email jrigby@rex-law.com