

RECEIVED

OCT 31 2012

DEPARTMENT OF
WATER RESOURCES

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
195 River Vista Place, Suite 204
Twin Falls, Idaho 83301-3029
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

Attorneys for A&B Irrigation District

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

A&B IRRIGATION DISTRICT,)	CASE NO. CV-2011-512
)	
Petitioner,)	
)	
vs.)	
)	A&B IRRIGATION DISTRICT'S
THE IDAHO DEPARTMENT OF WATER)	MOTION TO STRIKE AFFIDAVITS
RESOURCES and GARY SPACKMAN in his)	OF CHRIS M. BROMLEY /
official capacity as Director of the Idaho)	SUPPORTING POINTS &
Department of Water Resources,)	AUTHORITIES
)	
Respondents,)	
)	
and)	
)	
THE IDAHO GROUND WATER)	
APPROPRIATORS, INC., and THE CITY OF)	
POCATELLO,)	
)	
Respondents-Intervenors.)	
_____)	
)	
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)	
_____)	

COMES NOW, the Petitioner A&B Irrigation District (“A&B”), by and through its undersigned counsel, and hereby files this *Motion to Strike Affidavits of Chris M. Bromley / Supporting Points & Authorities*. A&B files this motion pursuant to Idaho Rules of Civil Procedure 84(o), 12(f), and pursuant to the September 14, 2012 opinion of the Idaho Supreme Court, Docket No. 39196-2011.

A&B previously filed a motion to strike the *Affidavit of Chris M. Bromley* pursuant to Idaho Rule of Civil Procedure 12(f), which states:

Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty (20) days after the service of the pleading upon the party or upon the court’s own initiative at any time the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

It was A&B’s position that the *Affidavit of Chris M. Bromley* was immaterial to this proceeding and therefore should be stricken. As the District Court noted, the entirety of the affidavit consists of two attachments— copies of the Director’s June 30, 2011 *Order Regarding Petition for Reconsideration*, and the *Amended Final Order*. See *Amended Order on Motion to Dismiss and Motion to Strike* at 8 (8/29/2011). Mr. Bromley later filed a second affidavit that included the Director’s June 1st and 9th 2011 orders, and additional correspondence, as attachments. See *Second Affidavit of Chris M. Bromley*. The District Court explained the following with regards to its reasoning in denying A&B’s first motion to strike:

A&B’s *Motion to Strike* is premised and relies upon the same arguments and rationale that it set forth in its *Response* to the Department’s *Motion to Dismiss*.... Since A&B’s arguments in this respect have been rejected by the Court for the reason stated above, the basis for its *Motion to Strike* must likewise be rejected.

Id.

On appeal, the Supreme Court reversed and found that A&B's petition for reconsideration was deemed denied by operation of law because IDWR did not issue a written decision disposing of it within 21 days. The Court found IDWR did not have jurisdiction over the matter and that the June 30, 2011 *Amended Final Order* was a nullity. See 2012 Opinion No. 121 (September 14, 2012). Since the District Court did not have a basis to deny A&B's *Motion to Strike* upon the same premise and conclusion as the motion to dismiss, the *Affidavit of Chris Bromley* and the *Second Affidavit of Chris M. Bromley* should have been stricken from the record.

The Director's actions after the 21 day timeframe within which to dispose of A&B's petition for reconsideration were *ultra vires* and void as a matter of law—"IDWR no longer had jurisdiction in the matter, and the order issued on June 30, 2011, is a nullity." See 2012 Opinion No. 121, at p. 7. The July 2011 correspondence attached to the *Second Affidavit of Chris M. Bromley* is similarly immaterial to this matter. Since the orders and correspondence attached to the two affidavits of Mr. Bromley are irrelevant, they have no place in the record in these proceedings. The Supreme Court's decision is dispositive on this issue.

For the above stated reasons, A&B requests this Court to strike the *Affidavit of Chris M. Bromley in Support of IDWR's Motion to Dismiss* and the *Second Affidavit of Chris M. Bromley*, including their attachments, from the record. A&B requests oral argument on this motion.

DATED this 30th day of October 2012.

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson

Attorneys for A&B Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of October, 2012, I served true and correct copies of **A&B IRRIGATION DISTRICT'S MOTION TO STRIKE THE AFFIDAVITS OF CHRIS M. BROMLEY / SUPPORTING POINTS & AUTHORITIES** upon the following by the method indicated:

Deputy Clerk
 SRBA District Court
 253 3rd Ave N.
 P.O. Box 2707
 Twin Falls, Idaho 83303-2707

U.S. Mail, Postage Prepaid
 Hand Delivery
 Overnight Mail
 Facsimile
 Email

Garrick Baxter
 Chris Bromley
 Deputy Attorneys General
 Idaho Department of Water Resources
 P.O. Box 83720
 Boise, Idaho 83720-0098
garrick.baxter@idwr.idaho.gov
chris.bromley@idwr.idaho.gov

U.S. Mail, Postage Prepaid
 Hand Delivery
 Overnight Mail
 Facsimile
 Email

Jerry R. Rigby Rigby Andrus and Rigby 25 N 2 nd East Rexburg, ID 83440 jrigby@rex-law.com	Randall C. Budge Candice M. McHugh Racine Olson P.O. Box 1391 201 E Center Street Pocatello, ID 83204-1391 rcb@racinelaw.net cmm@racinelaw.net	Sarah A. Klahn Mitra Pemberton White & Jankowski LLP 511 Sixteenth Street, Suite 500 Denver, CO 80202 sarahk@white-jankowski.com mitrap@white-jankowski.com
A. Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83201 dtranmer@pocatello.us		



 Travis L. Thompson