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Idaho Ground Water Appropriators, Inc.*

IN THE SUPREME COURT OF THE STATE OF IDAHO

A & B IRRIGATION DISTRICT,

Petitioner-Appellant,

vs.

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., and THE CITY OF
POCATELLO,

Respondents-Cross-Appellants, and

FREMONT-MADISON IRRIGATION
DISTRICT, ROBERT & SUE HUSKINSON,
SUN-LGO INDUSTRIES, VAL
SCHWENDIMAN FARMS, INC., DAVID
SCHWENDIMAN FARMS, INC., DARRELL
C. NEVILLE, SCOTT C. NEVILLE, AND
STAND D. NEVILLE,

District Court Intervenors.

**DOCKET NO. 38403-2011
(Consolidated with nos. 38421-2011 and
38422-2011)**

**RESPONSE TO A&B IRRIGATION
DISTRICT'S MOTION TO STRIKE
PARTS OF CROSS-APPELLANT'S
REPLY BRIEF**

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 Cross-Appellant Idaho Ground Water Appropriators, Inc. (“IGWA”), by and through 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 claims that “contrary to Rule 35(c), IGWA improperly ‘responded’ to A&B’s reply brief and A&B’s issues on appeal.” Motion to Strike 3. A&B argues that IGWA’s reply brief must only address arguments made in IDWR’s response brief and cannot provide argument to A&B’s brief. *Id.* The Motion to Strike should be denied for the following reasons.

Because this is a consolidated appeal, A&B is not only the appellant, but also a respondent to IGWA’s appeal. Idaho Appellate Rule 35(c) provides that reply briefs “may contain additional argument in rebuttal to the contentions of the respondent.” The arguments in IGWA’s reply brief that A&B objects to pertain directly to issues raised on appeal by A&B.

A&B cites *Myers v. Workmen’s Auto Ins. Co.* for the proposition that an appellant’s opening brief controls the issues it may raise on appeal, and that new issues—e.g. new grounds for reversal—may not be considered by the Court. 140 Idaho 495, 508 (2004); see also *Hernandez v. State*, 127 Idaho 685, 687, 905 P.2d 86, 88 (1995) (“A reviewing court looks to the initial brief on appeal for the issues presented on appeal”) and *State v. Killinger*, 126 Idaho 737, 740, 890 P.2d 323, 326 (1995) (“this Court will not consider arguments raised for the first time in the appellant’s reply brief”). IGWA’s reply brief does not violate this line of cases because it does

not raise any new issues for appeal. It simply replies to arguments made by A&B in relation to issues that have been raised by A&B in its appeal.

Lastly, there is no prejudice to A&B by the arguments raised by IGWA in its reply brief. These arguments are in line with arguments made in IGWA's opening brief, they can be made at oral argument, and A&B has an opportunity to respond at oral argument. IGWA Opening Br. and Response Br. at 42; *cf.* IGWA Reply Br. at 7, 8, 9; IGWA Opening Br. and Response Br. at 34, *cf.* IGWA Reply Br. at 12; IGWA Opening Br. and Response Br. at 45, *cf.* IGWA Reply Br. at 10.

For these reasons, IGWA requests that A&B's *Motion to Strike* be denied.

DATED this 24th day of October, 2011.

RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED

By: 
CANDICE M. MCHUGH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of October, 2011, the above and foregoing document was served in the following manner:

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