

11-7-2011

A & B Irr. Dist. V. IDWR Clerk's Record v. 1 Dckt.  
39196

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VOLUME 1 of 1

**LAW CLERK** SUPREME COURT NO. 39196-2011

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

Snake River Basin Adjudication #2011-512

**A&B IRRIGATION DISTRICT**

Petitioner-Appellant,

**SEE AUGMENTATION RECORD**

v.

**THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN, in his capacity as Interim Director of the Idaho Department of Water Resources,**

Respondents,

and

**THE CITY OF POCATELLO and IDAHO GROUND WATER APPROPRIATORS, INC.,**

Intervenors.

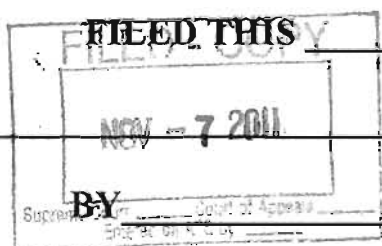
Appealed from the District Court of the Fifth Judicial District  
of the State of Idaho, in and for Minidoka County

Honorable Eric J. Wildman, Presiding Judge

John K. Simpson, Travis L. Thompson, Paul L. Arrington, Sarah W. Higer, BARKER ROSHOLT & SIMPSON, LLP, Attorneys for Petitioner-Appellant.

Garrick Baxter, Chris Bromley, Deputy Attorneys General, IDAHO DEPARTMENT OF WATER RESOURCES, Attorneys for Respondents.

City of Pocatello and Idaho Ground Water Appropriators, Inc., Intervenors.



DAY OF \_\_\_\_\_, 2011.

CLERK

**39196**

DEPUTY

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL  
DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA**

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 capacity as Interim )  
Director of the Idaho Department of )  
Water Resources, )

Respondents, )

and )

THE CITY OF POCA TELLO and )  
IDAHO GROUND WATER )  
APPROPRIATORS, INC., )

Intervenors. )

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**Supreme Court  
Docket No. 39196-2011**

**Snake River Basin  
Adjudication  
Docket No. 2011-512**

**CLERK'S RECORD ON APPEAL**

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Minidoka.<sup>1</sup>

**Honorable Eric J. Wildman**  
**Presiding Judge**

## **APPEARANCES**

**John K. Simpson, Travis L. Thompson, Paul L. Arrington, Sarah W. Higer,** Barker Rosholt & Simpson LLP, PO Box 485, Twin Falls, Idaho, 83303-0485, appearing for Appellant.

**Garrick L. Baxter and Chris M. Bromley, Deputy Attorneys General, Idaho Department of Water Resources,** PO Box 83720, Boise, Idaho, 83720-0098, appearing for Respondents.

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<sup>1</sup> This matter was reassigned to this Court on June 27, 2011, by the Clerk of the Court for Minidoka County, pursuant to *Idaho Supreme Court Administrative Order*, dated December 9, 2009.

## TABLE OF CONTENTS

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### VOLUME 1

Register of Action (Subcase Summary Sheet).....	1
Final Order on Remand Regarding the A&B Irrigation District Delivery Call, filed April 27, 2011 .....	3
Notice of Appeal and Petition for Judicial Review of Agency Action, filed June 27, 2011 .....	26
IDWR Motion and Memorandum in Support of Dismissal of A&B Irrigation District's June 24, 2011 Notice of Appeal and Petition for Judicial Review of Agency Record, filed July 7, 2011 .....	40
Affidavit of Chris M. Bromley, filed July 7, 2011 .....	44
Petitioner's Statement of Initial Issues, filed July 11, 2011 .....	103
A&B's Response to IDWR's Motion to Dismiss, filed July 21, 2011 .....	107
A&B's Motion to Strike Affidavit of Chris M. Bromley in Support of IDWR's Motion to Dismiss, filed July 21, 2011.....	118
IDWR Response to A&B's Motion to Strike Affidavit of Chris M. Bromley, filed July 26, 2011 .....	122
IDWR Reply in Support of its Motion to Dismiss, filed August 2, 2011 .....	126
Second Affidavit of Chris M. Bromley, filed August 2, 2011.....	133
Order on Motion to Dismiss and Motion to Strike, filed August 11, 2011 .....	155
Amended Order on Motion to Dismiss and Motion to Strike (with Rule 54(b) Certification), filed August 29, 2011 .....	167
Notice of Appeal, filed September 15, 2011.....	178
Request for Transcripts, filed September 22, 2011.....	182
Notice of Transcript Lodged, filed October 4, 2011.....	186

Clerk's Certificate .....187  
Clerk's Certificate of Service.....189

# INDEX

---

## VOLUME 1

A&B's Motion to Strike Affidavit of Chris M. Bromley in Support of IDWR's Motion to Dismiss, filed July 21, 2011.....	118
A&B's Response to IDWR's Motion to Dismiss, filed July 21, 2011 .....	107
Affidavit of Chris M. Bromley, filed July 7, 2011 .....	44
Amended Order on Motion to Dismiss and Motion to Strike (with Rule 54(b) Certification), filed August 29, 2011 .....	167
Clerk's Certificate.....	187
Clerk's Certificate of Service.....	189
Final Order on Remand Regarding the A&B Irrigation District Delivery Call, filed April 27, 2011 .....	3
IDWR Motion and Memorandum in Support of Dismissal of A&B Irrigation District's June 24, 2011 Notice of Appeal and Petition for Judicial Review of Agency Record, filed July 7, 2011.....	40
IDWR Reply in Support of its Motion to Dismiss, filed August 2, 2011 .....	126
IDWR Response to A&B's Motion to Strike Affidavit of Chris M. Bromley, filed July 26, 2011 .....	122
Notice of Appeal, filed September 15, 2011 .....	178
Notice of Appeal and Petition for Judicial Review of Agency Action, filed June 27, 2011 .....	26
Notice of Transcript Lodged, filed October 4, 2011.....	186
Order on Motion to Dismiss and Motion to Strike, filed August 11, 2011 .....	155
Petitioner's Statement of Initial Issues, filed July 11, 2011 .....	103
Register of Action (Subcase Summary Sheet).....	1

Request for Transcripts, filed September 22, 2011.....182  
Second Affidavit of Chris M. Bromley, filed August 2, 2011.....133



# VOLUME 1

# ADMINISTRATIVE APPEAL SUMMARY REPORT

## CV-2011-0000512

[Return to Appeals Index](#)

ADMINISTRATIVE APPEAL SUMMARY REPORT

HTML19

10-05-2011

COURT CASE#: CV-2011-0000512  
PETITIONER: A&B IRRIGATION DISTRICT

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

**\*\*\*\* PARTIES INVOLVED \*\*\*\***

A&B IRRIGATION DISTRICT	P ATTY: TRAVIS L THOMPSON
"	ATTY: PAUL L ARRINGTON
"	ATTY: JOHN K SIMPSON
"	ATTY: SARAH W HIGER
IDWR AND GARY SPACKMAN, IN	R ATTY: GARRICK L BAXTER
IDAHO GROUND WATER	I ATTY: CANDICE M MC HUGH
CITY OF POCA TELLO	I ATTY: SARAH A KLAHN
"	ATTY: A. DEAN TRANMER

**\*\*\*\* ROA ENTRIES \*\*\*\***

<u>06-27-2011</u>	NOTICE OF APPEAL AND PETITION FOR JUDICIAL REVIEW OF AGENCY ACTION		
<u>06-27-2011</u>	NOTICE OF REASSIGNMENT (MINIDOKA COUNTY)		
<u>07-01-2011</u>	PROCEDURAL ORDER GOVERNING JUDICIAL REVIEW OF FINAL ORDER OF DIRECTOR OF IDAHO DEPARTMENT OF WATER RESOURCES SETTLED RECORD AND TRANSCRIPT TO BE LODGED W/COURT BY: 08/29/11	ZB	08-29-2011 0500
07-01-2011	ORAL ARGUMENT - 12/08/11	HS	12-08-2011 0130
<u>07-07-2011</u>	IDWR MOTION AND MEMORANDUM IN SUPPORT OF DISMISSAL OF A&B IRRIGATION DISTRICT'S JUNE 24, 2011 NOTICE OF APPEAL AND PETITION FOR JUDICIAL REVIEW OF AGENCY ACTION	MG	08-11-2011
<u>07-07-2011</u>	AFFIDAVIT OF CHRIS BROMLEY		
<u>07-11-2011</u>	PETITIONER'S STATEMENT OF INITIAL ISSUES		
<u>07-12-2011</u>	NOTICE OF HEARING ON MOTION TO DISMISS	HS	08-04-2011 0130
<u>07-21-2011</u>	A&B'S RESPONSE TO IDWR'S MOTION TO DISMISS		07-21-2011
<u>07-21-2011</u>	A&B'S MOTION TO STRIKE AFFIDAVIT OF CHRIS M BROMLEY IN SUPPORT OF IDWR'S MOTION TO DISMISS	MD	08-11-2011
<u>07-22-2011</u>	NOTICE OF HEARING ON MOTION TO STRIKE	HS	08-04-2011 0130
<u>07-26-2011</u>	(FAX) IDWR RESPONSE TO A&B'S MOTION TO STRIKE AFFIDAVIT OF CHRIS M BROMLEY		07-26-2011

<u>08-02-2011</u>	IDWR REPLY IN SUPPORT OF ITS MOTION TO DISMISS		08-02-2011
<u>08-02-2011</u>	SECOND AFFIDAVIT OF CHRIS M BROMLEY		
<u>08-11-2011</u>	ORDER ON MOTION TO DISMISS AND MOTION TO STRIKE		
<u>08-25-2011</u>	A&B IRRIGATION DISTRICT'S AMENDED NOTICE OF APPEAL AND PETITION FOR JUDICIAL REVIEW OF AGENCY ACTION		
<u>08-26-2011</u>	NOTICE OF APPEARANCE OF COUNSEL		
<u>08-26-2011</u>	A&B IRRIGATION DISTRICT'S UNOPPOSED MOTION FOR I.R.C.P. 54(B) CERTIFICATE OF FINAL JUDGMENT	MG	08-29-2011
<u>08-29-2011</u>	ORDER GRANTING MOTION FOR I.R.C.P. 54(B) CERTIFICATE		
<u>08-29-2011</u>	AMENDED ORDER ON MOTION TO DISMISS AND MOTION TO STRIKE (WITH RULE 54(B) CERTIFICATION)		
<u>09-02-2011</u>	POCATELLO'S NOTICE OF APPEARANCE TO SRBA		
<u>09-06-2011</u>	ORDER TREATING APPEARANCE AS MOTION TO INTERVENE AND GRANTING SAME		
<u>09-13-2011</u>	ORDER TREATING APPEARANCE AS MOTION TO INTERVENE AND GRANTING SAME		
<u>09-15-2011</u>	NOTICE OF APPEAL		09-15-2011
<u>09-22-2011</u>	REQUEST FOR TRANSCRIPTS		
<u>10-04-2011</u>	NOTICE OF TRANSCRIPT LODGED - 8/4/11 MOTIONS TO DISMISS AND STRIKE		

[Return to Home Page](#)

0002

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF THE PETITION FOR	)	
DELIVERY CALL OF A&B IRRIGATION	)	CM-DC-2011-001
DISTRICT FOR THE DELIVERY OF GROUND	)	
WATER AND FOR THE CREATION OF A	)	<b>FINAL ORDER ON REMAND</b>
GROUND WATER MANAGEMENT AREA	)	<b>REGARDING THE A&amp;B</b>
	)	<b>IRRIGATION DISTRICT</b>
	)	<b>DELIVERY CALL</b>
_____)		

**FINDINGS OF FACT**

**I. Procedural Background**

1. This matter comes before the Department as a result of a remand from the Fifth Judicial District Court, in and for the County of Minidoka, of the Director of the Department of Water Resources' ("Director" or "Department") June 30, 2009 *Final Order Regarding the A&B Delivery Call* ("June 2009 Final Order"). Before discussion of the court's decision and the specific nature of the remand, a brief procedural history will be recited.

2. This proceeding originally came before the Department on July 26, 1994 when the A&B Irrigation District ("A&B")<sup>1</sup> filed a petition for delivery call ("Petition"). The Petition sought administration of junior-priority ground water rights diverting from the Eastern Snake Plain Aquifer ("ESPA") and the designation of the ESPA as a ground water management area ("GWMA"). On May 1, 1995, A&B, the Department, and other participants entered into an agreement that stayed the petition for delivery call until such time as a motion to proceed ("Motion to Proceed") was filed with the Director. On March 16, 2007, A&B filed a Motion to Proceed seeking the administration of junior-priority ground water rights, and the designation of the ESPA as a GWMA.

3. On January 29, 2008, former Director David R. Tuthill, Jr. issued his initial final order ("January 2008 Final Order"), which found that A&B was not materially injured and denied its petition for creation of a GWMA.

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<sup>1</sup> The A&B Irrigation District is made up of a surface water division, Unit A, and a ground water division, Unit B. Unless specified otherwise, all references to A&B in this order are to the ground water pumping division, Unit B.

4. On December 3, 2008, a hearing on A&B's delivery call was commenced before hearing officer Gerald F. Schroeder ("Hearing Officer"). Over the course of approximately eleven days, evidence and testimony was presented to the Hearing Officer by the Department and participating parties: A&B, the City of Pocatello ("Pocatello"), the Fremont Madison Irrigation District *et al.* ("Fremont Madison"), and the Idaho Ground Water Appropriators, Inc. ("IGWA").

5. On March 27, 2009, the Hearing Officer entered his *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations* ("Recommended Order"). In his Recommended Order, the Hearing Officer agreed with the Director's determination that A&B had not suffered material injury to its senior ground water right. The Hearing Officer disposed of A&B's petitions for reconsideration and clarification in his May 29, 2009 *Order Granting in Part and Denying in Part A&B's Petition for Reconsideration*, and June 19, 2009 *Response to A&B's Petition for Clarification*.

6. The Director subsequently issued his June 30, 2009 Final Order ("June 2009 Final Order"). In the June 2009 Final Order, the Director agreed with the Hearing Officer that A&B was not materially injured and denied its request for creation of a GWMA. Unless specifically discussed and modified, the June 2009 Final Order adopted the findings from the January 2008 Final Order and the recommendations from the Hearing Officer. *June 2009 Final Order* at 4.

7. A&B filed a timely petition for judicial review with the Fifth Judicial District Court, in and for the County of Minidoka. Respondents to the action were the Department, Fremont Madison, IGWA, and Pocatello.

8. On May 4, 2010, the court issued its *Memorandum Decision and Order on Petition for Judicial Review* ("Memorandum Decision") in CV-2009-647.<sup>2</sup> In its *Memorandum Decision*, the court affirmed the Director's decisions that: (1) Idaho's Ground Water Act applies retroactively to A&B's pre-1951 irrigation water right, 36-2080; (2) that A&B was not materially injured and its reasonable pumping levels had not been exceeded; (3) that A&B's water right was properly analyzed as an integrated system; (4) that it was not necessary to create a GWMA because the Director had already created water districts; and (5) that the final order complied with Idaho Code § 67-5248. *Memorandum Decision* at 1-2 & 49-50.

9. In its *Memorandum Decision*, the court held that the proper evidentiary standard of review to apply in response to a conjunctive management delivery call between hydraulically connected ground water rights is clear and convincing. *Id.* 38. Because the June 2009 Final Order was silent on which evidentiary standard of review the Director applied in his material injury analysis, the court remanded the Director's finding that the decreed quantity "exceeds the quantity being put to beneficial use for purposes of determining material injury. No further evidence is required." *Id.* at 49. "On remand, following the application of the appropriate

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<sup>2</sup> The *Memorandum Decision* was signed on May 4, 2010; however, due to errors in service, the court has treated "the date of entry of the *Memorandum Decision* . . . as May 20, 2010." *Order of Extension Re: Filing Date of Memorandum Decision* (May 19, 2010).

evidentiary standard a finding of material injury may require that the Director reevaluate” his finding that A&B has not exceeded its reasonable pumping levels. *Id.* at 50.

10. Petitions for reconsideration regarding the evidentiary standard of review were filed by IGWA and Pocatello. On November 2, 2010, the court reaffirmed its previous holding regarding the clear and convincing evidentiary standard of review. *Memorandum Decision and Order on Petitions for Rehearing* (“Memorandum Decision on Rehearing”). “The [*Memorandum Decision*] contemplates that there are indeed circumstances where the senior making the call may not at the present time require the full decreed quantity and therefore is not entitled to administration based on the full decreed quantity. The [*Memorandum Decision*] holds, however, that any determination by the Director that the senior is entitled to less than the decreed quantity needs to be supported by a high degree of certainty.” *Memorandum Decision on Rehearing* at 7.

11. Notices of appeal to the Idaho Supreme Court were filed by A&B, the Department, IGWA, and Pocatello. The evidentiary standard of review, which is the subject of the remand, was appealed by the Department, IGWA, and Pocatello. No stay of the proceeding has been sought, and the court has directed the Department to “forthwith comply with the remand instructions set forth in the *Memorandum Decision and Order on Petition for Judicial Review . . .*” *Order Granting Motion to Enforce in Part and Denying Motion to Enforce in Part* (February 14, 2011). On April 14, 2011, the Department filed a *Motion to Withdraw Notice of Appeal and Amended Notice of Appeal* with the Idaho Supreme Court.

12. On March 14, 2011, the Department received the *City of Pocatello’s Proposed Order on Remand* and *Motion for the Director to Consider City of Pocatello’s Proposed Order on Remand*. On March 16, 2011, the Department received *A&B Irrigation District’s Motion to Strike* in response to Pocatello’s March 14 motion and proposed order. On March 28, 2011, the Department received IGWA’s *Response to City of Pocatello’s Motion for the Director to Consider the City of Pocatello’s Proposed Order on Remand*. On March 30, 2011, the Department received a second *Motion to Strike* from A&B in response to IGWA’s March 28 filing. On April 4, 2011, IGWA and Pocatello filed a *Joint Response to Motions to Strike*. On April 7, 2011, the Director denied A&B’s motions to strike. *Order Denying Motions to Strike*. On April 12, 2011, the Director granted A&B’s request to file a proposed order no later than April 18, 2011. *Order Authorizing Filing of Proposed Order; and Amended Notice of Intent to Issue Final Order*. On April 18, 2011, the Department received *A&B Irrigation District’s Proposed Order on Remand*.

13. The Director recognizes and considers the record created in CV-2009-647. Consistent with the district court’s Memorandum Decision, no additional evidence has been considered by the Director.

## **II. Review of Evidence in the Record Regarding Material Injury**

14. The A&B Irrigation District (Units A and B) was originally developed by the United States Bureau of Reclamation (“USBR”) to irrigate approximately 78,000 acres of land, of which 62,604 acres would be irrigated by the Unit B ground water division. *January 2008*

*Final Order* at 7. Water right 36-2080 was licensed by the Department to the USBR. *Id.* at 7-8. Water right 36-2080 authorizes diversion of ground water for irrigation purposes and bears a priority date of September 9, 1948. In 1990, a claim was filed for the water right in the Snake River Basin Adjudication (“SRBA”). Water right 36-2080 was partially decreed by the SRBA in 2003. Ex. 139. The right authorizes a maximum diversion rate of 1,100 cfs for irrigation of 62,604.3 acres. *Id.* The authorized maximum, project-wide diversion rate for 36-2080 is 0.88 miner’s inches per acre. *Id.* No rate of diversion or volumetric limitation is decreed to a particular point of diversion or place of use for 36-2080. *Memorandum Decision* at 40.

15. Water right 36-2080 currently authorizes 188 points of diversion (wells), but only 177 wells are in production. *Memorandum Decision* at 5. A&B’s place of use is described by digital boundary. Tr. Vol. VI, p. 1160. Because of this, A&B has 11 wells that may be put into production at any time or the wells may be reconstructed at another location. Tr. Vol. VI, p. 1161-1162. If additional wells are sought, A&B would have to file a transfer with the Department. Tr. Vol. VI, p. 1162.

16. A&B is located in the southern portion of Minidoka County and the southeast part of Jerome County. *January 2008 Final Order* at 7. The north/south line separating Ranges 21 East and 22 East is the boundary line between southeastern Jerome County and western Minidoka County. *Id.* Driller’s logs for project irrigation wells in the northern part of the district and private wells in adjacent areas east and north of A&B show a stratigraphy dominated by basalt with minor sedimentary interbeds of sand, silt, and clay. *Id.* at 23. South of A&B at Burley and Declo, the upper 400 to 500 feet of the subsurface is mostly clastic sediments, which are underlain by basalt to an unknown depth. *Id.* In between the south and north areas of A&B is an inherent geologic transition zone in which the upper 500 feet are characterized by basalt intercalated with clastic sediments (Burley lake bed sediments) with a ratio of approximately 50 percent sediments and 50 percent basalt. *Id.* Based on evaluation of available geologic and hydrogeologic data, the southwestern portion of A&B is located in this geologic transition zone. *Id.* The geologic transition zone is further explained in Findings of Fact 82-95, *January 2008 Final Order*. See also Exhibit 121; *Recommended Order* at 12-15. The transition zone was known to the USBR as early as 1948, but ground water development was not anticipated at the time. *January 2008 Final Order* at 24.

17. The geologic transition zone is visually depicted in Exhibit 106 (“Geologic Cross-Sections”). Cross-sections A-A’ through E-E’ each plots wells from west to east. Ex. 106 at 1-6 (A&B 83-88). The closer the plot is to the southern boundary of the A&B project (historic Lake Burley), the more sedimentary layers are present in the well. *Id.* at 3, B-B’ (A&B 85). As the plots move northward, sediments are replaced by basalt. *Id.* at 6, E-E’ (A&B 88). A review of the south to north plots show that the sedimentary environment is more pronounced in the south and west, but less so in the north and east. *Id.* at 7-14, F-F’ through L-L’ (A&B 89-96).

18. The geologic transition zone greatly effects well yield. Ex. 121 at 19 (A&B 1090). “Wells in sections 9 and 10 of T9S R22E penetrate multiple sedimentary interbeds. About 50 percent of the saturated thickness (water level elevation minus the bottom hole elevation) is composed of sediment in a well in section 9. About 38 percent of the saturated thickness of a well in section 10 is composed of sediment.” *Id.* at 11 (A&B 1082). “The

majority of the ground-water production by the A&B Irrigation District occurs in the northern portion of the project area with about two-thirds in townships T8S R23E, T8S R24E and T8S R25E.” Ex. 121 at 16 (A&B 1091). Because of the basalt environment, the likelihood of achieving additional yield with depth in the northern portion of the project is “high.” Tr. Vol. I, p. 90. Conversely, the likelihood of achieving additional yield with depth in the southern portion of the project is “low” because of the historic Burley lake bed sediments. *Id.* The probabilities of success are “inherently contingent upon the geologic environment.” Tr. Vol. I, pp. 90-91.

19. In its Motion to Proceed and in information provided to the Department after its filing, A&B asserted that it has been forced to abandon certain wells, that certain wells will not yield additional water, and that certain wells have been drilled to replace existing wells that could not provide adequate water. *January 2008 Final Order* at 27-28.

20. With the exception of one well in Township 8 South, Range 25 East, which was replaced because of a crooked borehole, Tr. Vol. IX, p. 1759, every problem well identified by A&B is located in the geologic transition zone described above. Exhibit 215A.<sup>3</sup> Wells located in Townships 9 and 10 South, Range 22 East, have been documented as problematic since they were originally drilled by the USBR. Exs. 152P, 152Q, 152II, 152TT, and 152BBB.<sup>4</sup> Wells that have been drilled, but not used by A&B, are also located in the geologic transition zone.<sup>5</sup> The problems associated with these wells derive from the inherent hydrogeologic environment. *Recommended Order* at 34. “Basically, everything that you want a well to do, is more difficult in the southwest area.” Tr. Vol. IX, pp. 1756-1757.

21. On lands located in the geologic transition zone, A&B has converted approximately 1,447 acres from ground water to surface water. *January 2008 Final Order* at 9. As early as 1960, the USBR discussed the need to import surface water to those lands because of poorly performing wells. *Recommended Order* at 15; Ex. 152QQ; Tr. Vol. IX, pp. 1765-1767. The project was not completed until 1963. *Memorandum Decision* at 5.

22. The A&B project was developed at a time when ground water levels were at or near their peak. *Recommended Order* at 9; *Memorandum Decision* at 5. Because of reduced incidental recharge, a sustained period of drought, and ground water pumping, aquifer levels have declined since A&B appropriated its right. *Recommended Order* at 9; *January 2008 Final Order* at 4.<sup>6</sup> Because of the Department’s 1992 moratorium for permits, the best evidence at the time of the hearing was that the depletive effect of ground water pumping is within 5 percent of being fully realized. *Recommended Order* at 39.

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<sup>3</sup> Circled in red on Exhibit 215A are the abandoned wells, circled in black are the wells with no additional yield, and circled in blue are wells that have been replaced or drilled deeper.

<sup>4</sup> Circled in silver on Exhibit 215A are the wells characterized as problematic by the USBR.

<sup>5</sup> Circled in green on Exhibit 215A are the unused wells.

<sup>6</sup> According to the USBR in its report entitled Minidoka Project, Idaho-Wyoming, North Side Pumping Division Extension – Planning Report/Draft EIS, Hydrology Appendix (USRB 1985), the major influence upon ground water level declines and recoveries is climate. *January 2008 Final Order* at 43. The declines, according to the USBR, are further aggravated by changes in irrigation practices. *Id.*



23. At the time A&B appropriated its right, wells were sited at geographical high points, with water flowing downhill through a system of mainly unlined ditches and laterals. *January 2008 Final Order* at 7; Tr. Vol. VI, pp. 1164-1165. Originally, 62,604.3 acres were irrigated by gravity flow. *Memorandum Decision* at 6. The original conveyance system included 109.71 miles of laterals and 333 miles of drains. *Id.* at 6. From 1963 through 1982, average conveyance loss was estimated at 8 percent. *January 2008 Final Order* at 12.

24. Currently, the system includes 51 miles of laterals, 138 miles of drains, and 27 miles of distribution piping. *Memorandum Decision* at 6. Sixty-nine injection wells have been eliminated and the water applied to other purposes. *Id.* By 1982, 25 percent of the 62,604.3 acres were irrigated by sprinkler. *January 2008 Final Order* at 10. By 1987, approximately 30 percent of the 62,604.3 acres were irrigated by sprinkler. *Id.* at 11. By 1992, approximately more than 50 percent of the 62,604.3 acres were irrigated by sprinkler. *Id.* By 2007, 96 percent of the 62,604.3 acres were irrigated by sprinkler. *Id.* at 10-11. The use of sprinkler irrigation was expected to reduce the per acre water requirement by 19.6 percent. *Id.* at 11. Through efficiencies, conveyance loss has been reduced to 3 percent. *Recommended Order* at 11; Ex. 200, 4-4, -22. With improved efficiencies, A&B's need for water has decreased. *January 2008 Final Order* 9-15; Tr. Vol. VI, pp. 1201-1202. Other irrigation providers in the vicinity of A&B have similarly converted to sprinkler irrigation. Ex. 473; Tr. Vol. VII, pp. 1367-1368 (down gradient conversions by North Side Canal Company may have had a significant impact on water levels at A&B).

25. Because of sprinklers, A&B is able to irrigate acres that it could not irrigate with its gravity system. Ex. 200, 4-24. Presently, A&B irrigates 66,686.2 acres. *January 2008 Final Order* at 8. In order to irrigate the additional 4,081.9 acres that could not be irrigated under 36-2080, A&B obtained junior and enlargement water rights. *Id.* None of the junior water rights are the subject of this delivery call. Of the junior acres, 2,063.1 acres are enlargements, which provide no additional rate of flow and are subordinated to April 12, 1994. *Id.*; *Recommended Order* at 41.

26. In its 1994 Petition, A&B stated that the supply for its calling water right, 36-2080, was 974 cfs. R. at 13. In its 2007 Motion to Proceed, A&B stated that the supply for the same water right was 970 cfs. R. at 835. In its Motion to Proceed, A&B stated it "was able to deliver at least 0.75 miner's inch prior to the major impacts caused by junior ground water pumping." R. at 837. In its Motion to Proceed, A&B also asserted it "is unable to divert an average of 0.75 of a miner's inch per acre which is the minimum amount necessary to irrigate lands within A&B during the peek [sic] periods when irrigation water is most needed." R. at 836.

27. In its expert report, A&B stated the "0.75 miner-inch criteria is a minimum rate below which A&B begins the process to improve or deepen wells." Ex. 200 at 4-19. The "0.75 miners-inch is [not] the project's irrigation diversion requirement . . . . The Unit B irrigation diversion requirement needed to meet peak monthly demand as calculated in this study is about 1.09 acre-ft/acre or about 0.89 miners-inch." *Id.* The diversion requirement is based on the authorized diversion rate for its water right over a 62,604.3-acre place of use. *Id.* at 4-22. A&B

supported the 0.89 miner's inches per acre peak demand diversion requirement with a 1995-2007 theoretical analysis. *Id.* at 4-1; Tbl. 4-11. The theoretical information was "used to determine whether A&B's irrigation system has been able to meet their irrigation diversion requirements and whether shortages are occurring on Unit B." *Id.* at 4-1.

28. At the hearing, A&B further explained that 0.75 miner's inches per acre is an internal "rectification standard" for its wells. Tr. Vol. III, p. 639. When a well is no longer capable of producing 0.75 miner's inches per acre, based upon, among other things, its Annual Report, A&B schedules the well for maintenance. Tr. Vol. III, pp. 538-540.

29. At the hearing, the peak season was generally defined as a period in June and July and may extend through the latter part of August. *Recommended Order* at 22. The peak season is a thirty-day period of time. Tr. Vol. IV, pp. 654-655. Since 1972, A&B has kept diversion records from the 15<sup>th</sup> to the 15<sup>th</sup> of each month. Ex. 132 (A&B 1450-1451); Tr. Vol. III, p. 511. The peak season typically runs from June 15 to July 15, but in some years, it has run from July 15 to August 15. Ex. 155; Tr. Vol. VI, p. 1199. During the peak season, A&B goes on what is referred to as "allotment." *Recommended Order* at 23. Allotment occurs when the irrigators' demand for water from a well system exceeds the amount of water the well system will produce. *Id.* During allotment, each well user receives a proportional amount of his or her share from the well system's total output. *Id.*

30. At the hearing, A&B testified that, even during allotment, or the peak season, it has no ability to limit distribution of water under 36-2080 to the original 62,604.3 acres; rather, A&B patrons irrigate all junior and/or subordinated enlargement acres with water pumped under its senior right. Tr. Vol. IV, pp. 742-743. *See also* Ex. 200, Figs. 4-15, 4-16; Ex. 201AC; Ex. 201AD. Therefore, A&B irrigates 4,081.9 more acres than is authorized by its calling water right. *January 2008 Final Order* at 14. A&B refers to the practice of irrigating junior and subordinated enlargement acres with water from 36-2080 as water spreading. Tr. Vol. III, pp. 525-526, 605-606.

31. A&B takes instantaneous flow rate measurements for each well and compiles this information in its Annual Report, Part 2. Ex. 132 (A&B 2281-2516); Ex. 133. A&B also measures the total volume pumped for each well by month, which is contained in a spreadsheet titled "WaterPumpedrevised.xls." Ex. 132 (A&B 1145-2276).

32. The Annual Report describes "high" and "low" open valve discharge readings or well capacity. *January 2008 Final Order* at 14; Ex. 132 (A&B 2281-2516); Ex. 133. The high flow measurements are usually taken early in the irrigation season; whereas the low flow measurements are usually taken during the peak irrigation season (i.e., June 15 to July 15). Tr. Vol. VI, pp. 1284-1289. The open valve readings represent maximum discharge or well capacity. *Id.* The low flow reading in the WaterPumpedrevised.xls spreadsheet shows actual diversions during the peak season. Ex. 132 (A&B 1445, 1450).

33. The flows cited in the Petition and Motion to Proceed—974 and 970 cfs, respectively—were low flow well capacity readings from the peak season taken from A&B's Annual Report, Part 2. *January 2008 Final Order* at 14; Ex. 132 (A&B 2281-2516); Ex. 133. In

the January 2008 Final Order, the Director confirmed that the low flow well capacity for 2006 was 970 cfs. *January 2008 Final Order* at 14. However, the low flow well capacity for 1994 was 956 cfs, not 974. *Id.* “Therefore, based on A&B’s method of calculating total water supply, the 2006 supply actually increased from 1994 by about 14 cfs.” *Id.*

34. In the January 2008 Final Order, the Director found that the peak season low flow capacity from A&B production wells was 1,007 cfs in 1963 and 1,034 cfs in 1982. *January 2008 Final Order* at 14. In reviewing the Annual Reports for purposes of this order, the Director finds that the greatest peak season low flow capacity from A&B production wells was 1,087 cfs in 1974 (0.87 miner’s inches per acre). Ex. 132. The next greatest low flow capacity measurement from A&B production wells was 1,079 cfs in 1971. *Id.* The Director also finds that the greatest high flow capacity from A&B production wells, 1,100 cfs (0.88 miner’s inches per acre), occurred in 1973. *Id.* In 1987, the Director finds that the peak season low flow well capacity was 1,054 cfs. *Id.*

35. The 2006 peak season low flow capacity of 970 cfs, as cited in the Motion to Proceed, equates to 0.77 miner’s inches per acre for the 62,604.3-acre place of use for water right 36-2080. *January 2008 Final Order* at 15. Adjusted for 3 percent conveyance loss, *Recommended Order* at 11, the on-farm delivery is 0.75 miner’s inches per acre. When water diverted under 36-2080 is applied to 66,686.2 acres, and adjusted for 3 percent conveyance loss, the on-farm delivery is 0.71 miner’s inches per acre. The place of use for water right 36-2080 is 62,604.3 acres. *January 2008 Final Order* at 8.

36. Analyzing A&B’s actual diversions contained in the WaterPumpedrevised.xls spreadsheet, the Department converted the low flow volumetric total from the peak season to miner’s inches per acre. Ex. 155; Tr. Vol. VI, p. 1196, lns. 4-25; p. 1197, lns. 1-25; p. 1198, lns. 1-25; p. 1199, lns. 1-9. From 1960 through 1969, the mean peak season water use was 0.72 miner’s inches per acre. Ex. 155. From 1970 through 1980, the mean peak season water use for A&B was 0.69 miner’s inches per acre. *Id.* From 1981 through 1990, the mean peak season water use for A&B was 0.69 miner’s inches per acre. *Id.* From 1991 through 2000, the mean peak season water use for A&B was 0.66 miner’s inches per acre. *Id.* From 1994 through 2007, the mean peak season water use for A&B was 0.65 miner’s inches per acre. *Id.* From 1960 through 2007, the mean peak season water use for A&B was 0.69 miner’s inches per acre. *Id.* This information is graphically depicted in Exhibit 155A.

37. Only during three occasions in the 47 years of actual diversion data available in the record (1963, 1964, and 1967) did A&B meet or exceed 0.75 miner’s inches per acre during the peak season. *Id.* In those three years, the low diversions were 0.76, 0.75, and 0.76 miner’s inches per acre, respectively. *Id.* As stated above, during those years water was diverted through unlined ditches and laterals and applied predominantly by gravity systems.

38. From 1982, when 25 percent of A&B was irrigated by sprinkler, to 1991, when approximately less than 50 percent of the project was irrigated by sprinkler, actual diversions during the peak season averaged 0.69 miner’s inches per acre. Ex. 155; *January 2008 Final Order* at 10-11. A&B’s most junior water right, which is also its largest enlargement right

(1,751.5 acres), bears an April 1, 1984 priority date. *January 2008 Final Order* at 8. All enlargement rights are subordinated to April 12, 1994.

39. From 1992, when approximately more than 50 percent of the project was irrigated by sprinkler, to 2007, when 96 percent of the project was irrigated by sprinkler, the actual diversions during the peak season averaged 0.65 miner's inches per acre. Ex. 155; *January 2008 Final Order* at 10-11.

40. The Preliminary Report of C.E. Brockway, titled A&B Irrigation District—Use of Drain Water In Re: SRBA Case No. 39576, dated August 2, 2000, states that, "elimination of all drainage wells and pumping back surface runoff to existing irrigated lands allows reduction of pumped ground water, reduction in retention pond size, and increased project irrigation efficiency . . . the amount of water pumped from the aquifer can be reduced by 21,920 acre-feet per year." *January 2008 Final Order* at 9.

41. A review of the Department's Resource Protection Bureau database shows eight active drainage (injection disposal) wells within A&B. *January 2008 Final Order* at 35. During a January 4, 2008 meeting with Department staff at the Department's state office in Boise, A&B representatives stated that the drainage wells are primarily used for storm water runoff disposal. It was also indicated that piping and pressurized irrigation and pump back systems for re-use on crops has nearly eliminated return flows and very little irrigation waste water has been discharged into wetlands or drainage wells in recent irrigation seasons. *Id.*

42. The average annual amount of ground water pumped by A&B from 1963 through 1982 was 201,736 acre-feet. The mean annual amount of ground water pumped from 1994 through 2007 was 180,095 acre-feet. *January 2008 Order* at 9. The difference in mean annual diversion volume between the periods 1963-1982 and 1994-2007 is 21,641 acre-feet, a 10.7 percent decrease.

43. Based on ground water delivery records provided by A&B, the mean peak water use from 1963 through 1982 was 54,468 acre-feet. *January 2008 Final Order* at 14. By 1982, 25 percent of A&B was irrigated by sprinkler. *Id.* at 10-11. The mean peak water use from 1994 through 2007 was 50,262 acre-feet, a total average decrease of 4,206 acre-feet from the period 1963 through 1982, or 7.7 percent. *Id.* at 14. By 1994, 58 percent of the project was irrigated by sprinkler, and by 2006, 96 percent was irrigated by sprinkler. *Id.* at 10-11.

44. Converted to a monthly volume of water, the 2006 peak season low flow well capacity of 970 cfs is 59,643 acre-feet. As reported in the WaterPumpedrevised.xls spreadsheet, the 2006 low flow volume of water actually pumped during the peak season was 49,855.3 acre-feet. Ex. 132 (A&B 1450). Therefore, in 2006, A&B had the ability or capacity on a project-wide basis to pump nearly 10,000 acre-feet of additional water during the peak demand period.

45. Reductions in peak water use by A&B, over time, reasonably parallels its conversion from predominantly flood irrigation to predominantly sprinkler irrigation, and its improvements in irrigation efficiency. *January 2008 Final Order* at 11-15; Ex. 156; Tr. Vol. VI, pp. 1201-1202. Other irrigation providers have similarly converted from flood to sprinkler

irrigation. Ex. 473. “Comparison of the historic and projected on-farm delivery requirements suggests that the use of sprinkler irrigation was expected to reduce the per acre water requirement by 19.6 percent.” *January 2008 Final Order* at 11. Conveyance loss has been reduced from 8 to 3 percent.

46. Due to efficiency measures, A&B’s percent reduction in water use is similar to surrounding surface water providers. Tr. Vol. VI, p. 1179-1180. “Burley Irrigation District has had decreases in these same time periods of about 20 percent. Miler Irrigation District has had decreases more similar to A&B. . . . But I believe theirs was also around 8 percent. And that’s annual diversions for the same time period.” Tr. Vol. VI, p. 1180.

47. A&B’s response to the *Order Requesting Information* indicates that the District is now irrigating approximately 1,323 acres of Unit B land with Unit A surface water. *January 2008 Final Order* at 9. Department analysis of the shapefile, *B\_Land\_Temp\_Served\_by\_A*, provided by A&B, indicates that the total conversion acreage is 1,447 acres, which is approximately 2.3 percent of the 62,604.3 acres that are the subject of A&B’s delivery call under water right 36-2080. *January 2008 Final Order* at 9.

48. During the hearing, A&B farmers were called by A&B and IGWA to testify about water use on the A&B project and adjacent areas. A&B farmers called by A&B testified uniformly that they could put additional water to beneficial use. An A&B farmer called by IGWA testified that, “[a]s a general rule, farmers want more water not less.” Tr. Vol. X, p. 2106 (Stevenson).

49. Witnesses called by A&B and IGWA testified that pivot corners are routinely not irrigated. Some witnesses testified that pivot corners are not irrigated because of reduced water supply, while other witnesses testified that pivot corners are not irrigated because of labor costs. See e.g. Tr. Vol. V, pp. 962-963 (Kostka); Tr. Vol. X, p. 2086 (Stevenson).

50. A&B farmers called by A&B testified they meet their producer contracts for crops such as potatoes, sugar beets, and barley. Tr. Vol. IV, pp. 826-828 (Eames); Tr. Vol. V, pp. 1027-1030 (Mohlman); Tr. Vol. V, pp. 907-908 (Adams); Tr. Vol. V, p. 994 (Kostka).

51. Three of the four farmers called by A&B were “plaintiffs in a federal lawsuit claiming crop damage and yield reductions due to the application of a herbicide called ‘Oust.’” *Recommended Order* at 27. The lawsuit “precluded inquiry into crop yields and the circumstances surrounding those yields for the period from 2001-2005 . . . .” *Id.*

52. A&B farmers called by IGWA, which included an A&B board member, testified they were able to raise crops to full maturity on A&B lands. Tr. Vol. X, p. 2088 (Stevenson); Tr. Vol. X, p. 2138 (Maughan). An A&B farmer called by IGWA testified that on lands immediately adjacent to the A&B project, he was able to raise crops to full maturity with less water from private wells. Tr. Vol. X, pp. 2074-2076, 2090 (Stevenson).

53. An A&B farmer called by IGWA testified that on his A&B acres, he “replace[s] water with management.” Tr. Vol. X, p. 2102 (Stevenson). Speaking to management, an A&B

farmer called by A&B testified “there is no comfort zone. There is no getting ahead. There is no point in the irrigation season that I can say: Maybe I’d like to go camping this weekend. It’s a lot more intense management . . .” Tr. Vol. V, p. 966 (Kostka).

54. An IGWA witness who farms in the American Falls area testified that he grows crops to full maturity with a delivery rate of 0.41 miner’s inches per acre on one farm, and 0.90 miner’s inches per acre on another farm. Tr. Vol. X, p. 1070 (Deeg). The witness testified that the 0.90 delivery rate has likely gone down because he converted to “center pivot and we’re [using] much less water now, but I don’t know exactly what it is.” *Id.* An IGWA witness who farms within the boundary of the North Side Canal testified that for grain crops he irrigates with 0.60 to 0.65 miner’s inches per acre. Tr. Vol. X, p. 2036 (Carlquist).

55. Witnesses testified that crop yields have generally increased over time. Tr. Vol. X, p. 2042 (Carlquist); Tr. Vol. X, p. 2090-2091 (Stevenson); Tr. Vol. X, pp. 2139-2140; Tr. Vol. IV, pp. 721-722 (Temple); Tr. Vol. IV, pp. 845-846 (Eames). This is consistent with evidence submitted at the hearing showing an increase in Minidoka County crop yields, over time. Ex. 357. Two A&B farmers who testified at the hearing, for whom data was prepared, had higher crop yields than the Minidoka County average. Ex. 355A (Eames); Ex. 358 (Mohlman).

56. The testimony and exhibits concerning crop yield is supported by a Department analysis of evapotranspiration (“ET”) on and around the A&B project. *January 2008 Final Order* 19-23. Vol. VI p. 1104, 1106. Alfalfa is used as the reference crop because it “has the highest ET of all the crops.” Tr. Vol. VI p. 1104. Because all other crops are less consumptive, the analysis did not require knowledge of cropping, rotation practices, or diversions. Tr. Vol. VI, pp. 1117-1118.

57. METRIC<sup>7</sup> ET data were used to compute and map consumptive water use on and around the A&B project. ET data were analyzed from three 2006 Landsat image dates: June 20, July 22 (hottest day of the summer), and August 7. Tr. Vol. VI, pp. 1108-1109; *January 2008 Final Order* at 21. While images are taken every 16 days and could be analyzed, monthly images depict the necessary fluctuations in ET upon which to base the analysis. Tr. Vol. VI, p. 1109. METRIC has been peer reviewed, is used by other western states for water use analyses, and is recommended for use by the ESPA modeling committee. Tr. Vol. VI, pp. 1198-1103. The analysis compared the mean ET for acres within A&B that were specifically alleged by A&B as water short (Item-G lands), acres within A&B that were not alleged by A&B as water short, and adjacent acres outside the A&B project boundary that were not alleged as water short. Tr. Vol. VI, pp. 1107-1108; *January 2008 Final Order* at 20.

58. Imagery from 2006 was selected because it was the only year specific acres were alleged by A&B to be water short. Tr. Vol. VI, p. 1106. Further analysis normalized the ET data using NDVI (Normalized Difference Vegetation Index) to adjust for any differences caused

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<sup>7</sup> “METRIC is an acronym for mapping evapotranspiration at high resolution with internalized calibration. It is a model developed by the University of Idaho to take Landsat data, and using a remote sensing and energy-balanced approach, convert that to evapotranspiration data.” Tr. Vol. VI, p. 1098. METRIC was developed by Dr. Rick Allen of the University of Idaho, Kimberly Research Station. *Id.*

by cropping patterns. *January 2008 Final Order* at 21-23. The NDVI analysis showed crop health and the amount of vegetation on the ground. Tr. Vol. VI, pp. 1105-1106. NDVI is also a peer reviewed analysis. *Id.*

59. On the hottest day of the summer, July 22, the Item-G lands had the highest consumptive use of all acres analyzed for purposes of mean ET and mean ETrF. *January 2008 Final Order* at 21-22, Figs. 10-12. In terms of the ratio of ETrF and NDVI, Item-G lands had the highest consumptive use per amount of vegetation of all acres analyzed on June 20 and August 7. *January 2008 Final Order* at 23, Fig. 13. Item-G lands generally had higher consumptive use than other ground water irrigated acres within A&B. *January 2008 Final Order* at 21-23, Figs. 10-13. Consumptive use on A&B acres was generally higher than other acres analyzed. *Id.* The higher consumptive use by crops on Item-G lands supports the conclusion that A&B is not water short. Tr. Vol. VI, pp. 1116-1117, 1136.

60. A&B's crop distribution records show that its lands are planted with a variety of crops. In its expert report, A&B presented its "average current crop distribution for the study period [1995 to 2007]." Ex. 200, 4-2. In Table 4-3, A&B reports that 49 percent of its lands are planted with grains, 24 percent are planted with beets, 12 percent are planted with beans, 7 percent are planted with alfalfa, 1 percent is planted with corn and peas, and 1 percent is pasture. Ex. 200, Tbl. 4-3.<sup>8</sup> The results of the ET analyses showed that with its diverse crop mix A&B was not water short. *January 2008 Final Order* at 21-23, Figs. 10-13; Tr. Vol. VI, pp. 1143-1144.

## CONCLUSIONS OF LAW

1. In its Memorandum Decision, the district court remanded the Director's finding of no material injury because he did not state which evidentiary standard of proof he applied. *Memorandum Decision* at 37-38. The district court held that the burden of proof required in conjunctive administration of hydraulically connected ground water rights is "clear and convincing evidence." *Id.* at 34. "No further evidence is required." *Id.* at 49.

2. In ordinary civil actions, "the burden of proof is by a preponderance of the evidence, which means more probable than not." *Bourgeois v. Murphy*, 119 Idaho 611, 622, 809 P.2d 472, 483 (1991). "Preponderance of evidence means such evidence as, when weighed with that opposed to it, has more convincing force and from which it results that the greater probability of truth lies therein." *Id.* Under the preponderance standard, when the evidence is evenly balanced then the finding must be against the party who bears the burden of persuasion. *Big Butte Ranch, Inc. v. Grasmick*, 91 Idaho 6, 9, 415 P.2d 48, 51 (1966).

3. "Clear and convincing evidence refers to a degree of proof greater than a mere preponderance." *Idaho State Bar v. Topp*, 129 Idaho 414, 416, 925 P.2d 1113, 1115 (1996) (internal quotations removed). "Clear and convincing evidence is generally understood to be

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<sup>8</sup> In its expert report, Pocatello averaged A&B's crop distribution as follows: 26.9 percent spring grain, 26.1 percent sugar beets, 20.1 percent winter grain, 11.4 percent potatoes, 6.7 percent alfalfa, 5.7 percent dry beans, 1.5 percent silage corn, 0.9 percent pasture, 0.5 percent peas, and 0.2 percent sweet corn. Ex. 301, A-4-5.

‘[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.’” *State v. Kimball*, 145 Idaho 542, 546, 181 P.3d 468, 472 (2008) citing *In re Adoption of Doe*, 143 Idaho 188, 191, 141 P.3d 1057, 1060 (2006); see also *Idaho Dept. of Health & Welfare v. Doe*, 150 Idaho 36, 41, 244 P.3d 180, 185 (2010).

4. On remand, the Director is required to apply the clear and convincing evidentiary standard of proof to the evidence in the record in order to determine if “the quantity decreed to A&B’s 36-2080 exceeds the quantity being put to beneficial use for purposes of determining material injury.” *Memorandum Decision* at 49. “[T]he senior is not guaranteed the decreed quantity nor is the Director required to administer strictly in accordance with the decreed quantity. While a senior may not be guaranteed the decreed quantity in a delivery call, he should have assurances that any reduced quantity determined to be sufficient to satisfy current needs is indeed sufficient.” *Memorandum Decision on Rehearing* at 7. “Simply put, the senior is entitled to the quantity reflected in the decree unless it can be shown by clear and convincing evidence that the full quantity is not or would not be put to beneficial use.” *Memorandum Decision* at 34, fn. 12.

5. “In Idaho, water rights are real property.” *Olson v. Idaho Dept. of Water Resources*, 105 Idaho 98, 101, 666 P.2d 188, 191 (1983); Idaho Code § 55-101. “[T]he right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use. . . . [R]unning water, so long as it continues to flow in its natural course, is not, and cannot be made, the subject of private ownership. A right may be acquired to its use which will be regarded and protected as property, but it has been distinctly declared in several cases that this right carries with it no specific property of the water itself.” Samuel C. Wiel, *Water Rights in the Western States* § 18 (1911). See also *Joyce Livestock Co. v. United States*, 144 Idaho 1, 7, 156 P.3d 502, 508 (2007) (a water right “does not constitute ownership of the water”). “All waters within the state when flowing in their natural channels and all ground waters are property of the State. Idaho Code §§ 42-101 & 42-226. The state has the duty to supervise their appropriation and allotment to those diverting such waters for any beneficial purpose. *Id.*” *Clear Springs Foods, Inc. v. Spackman*, 2011 WL 907115 \*26 (March 17, 2011).

6. Idaho Code § 42-602, addressing the authority of the Director over the supervision of water distribution within water districts, provides:

The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

7. “Given the nature of the decisions which must be made in determining how to respond to a delivery call, there must be some exercise of discretion by the Director.” *American*



*Falls Res. Dist. No. 2 v. Idaho Dept. Water Resources*, 143 Idaho 862, 875, 154 P.3d 433, 446 (2007). “The agency’s experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.” Idaho Code § 67-5251(5); IDAPA 37.01.01.600.

8. Idaho Code § 42-603, which grants the Director authority to adopt rules governing water distribution, provides as follows:

The director of the department of water resources is authorized to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof. Promulgation of rules and regulations shall be in accordance with the procedures of chapter 52, title 67, Idaho Code.

9. In addition, Idaho Code § 42-1805(8) provides the Director with authority to “promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department.” In accordance with the authority granted to him, the Director promulgated the *Rules for Conjunctive Management of Surface and Ground Water Resources* (“CM Rules”). IDAPA 37.03.11.000. “The policy of securing the maximum use and benefit, and least wasteful use, of the State’s water resources applies to both surface and underground waters, and it requires that they be managed conjunctively.” *Clear Springs* at \*19.

10. Water district nos. 100, 110, 120, 130, and 140 were created to provide for the administration of ground water rights in areas overlying the ESPA, pursuant to the provisions of chapter 6, title 42, Idaho Code, for the protection of prior surface and ground water rights.

11. Injury to senior-priority water rights by diversion and use of junior-priority ground water rights occurs when diversion under the junior rights intercept a sufficient quantity of water to interfere with the exercise of the senior water right for the authorized beneficial use. CM Rule 10.14. Depletion does not automatically constitute material injury. *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 868, 154 P.3d 433, 439 (2007).

12. The prior appropriation doctrine, as established by Idaho law, protects holders of senior-priority water rights. Idaho Const. Art. XV, § 3. This protection is not, however, absolute. A senior’s use must be reasonable, beneficial, and not result in monopolization or waste of the resource. CM Rule 20.03; *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1911); *Clear Springs* at \*19; *Mountain Home Irrigation District v. Duffy*, 79 Idaho 435, 319 P.2d 965 (1957). “Economy must be required and demanded in the use and application of water.” *Clear Springs* at \*19 citing *Farmer’s Co-operative Ditch Co. v. Riverside Irrigation District, Ltd.*, 16 Idaho 525, 535, 102 P. 481, 483 (1909). The Director must “equally guard all the various interests involved.” *Clear Springs* at \*19 citing Idaho Code § 42-101.

13. Because the amount of water necessary for beneficial use can be less than decreed or licensed quantities, it is possible for a senior to receive less than the decreed or licensed amount, but not suffer injury. *Memorandum Decision on Rehearing* at 7. The “public waters of

this state shall be subjected to the highest and greatest duty.” *Clear Springs* at \*19 citing *Niday v. Barker*, 16 Idaho 73, 79, 101 P. 254, 256 (1909). Thus, a senior water right holder cannot demand that junior ground water right holders diverting water from a hydraulically connected aquifer be required to make water available for diversion unless that water is necessary to accomplish an authorized beneficial use. “The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.” *Clear Springs* at \*19 citing *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960).

14. As between junior- and senior-priority ground water users, Idaho Code § 42-226’s dual principles of full economic development and reasonable pumping levels apply. *Clear Springs* at \*14, 18; *Baker v. Ore-Ida*, 95 Idaho 575, 513 P.2d 627 (1973). In responding to delivery calls under the CM Rules, the Director is required to evaluate all principles of the prior appropriation doctrine. CM Rule 20.03.

15. In *American Falls*, the Court acknowledged the complexities of conjunctive administration:

Typically, the integration of priorities means limiting groundwater use for the benefit of surface water appropriators because surface water generally was developed before groundwater. The physical complications of integrating priorities often have parallels in the administration of solely surface water priorities. The complications are just more frequent and dramatic when groundwater is involved.

....

When water is diverted from a surface stream, the flow is directly reduced, and the reduction is soon felt by downstream users unless the distances involved are great. When water is withdrawn from an aquifer, however, the impact elsewhere in the basin or on a hydrologically connected stream is typically much slower.

*American Falls*, 143 Idaho at , 154 P.3d at 448 citing Douglas L. Grant, *The Complexities of Managing Connected Surface and Ground Water Under the Appropriation Doctrine*, 22 Land & Water L. Rev. 63, 73, 74 (1987).

16. CM Rules 30 and 40 specifically group calls together that are “made by the holders of senior-priority surface or ground water rights against the holders of junior-priority ground water rights . . . .” *See also* CM Rules 1 & 10.03. A delivery call by the holder of a senior-priority ground water right against the holders of junior-priority ground water rights is therefore just as complex as a delivery call by the holder of a senior-priority surface water right against the holders of junior-priority ground water rights, if not more so.

17. CM Rule 40 sets forth procedures to be followed for responses to calls for water delivery made by the holders of senior-priority water rights against the holders of junior-priority ground water rights from areas having a common ground water supply in an organized water district. A&B’s delivery call has proceeded under CM Rule 40. *January 2008 Final Order* at 42.

18. Factors that may be considered by the Director in determining whether junior-priority ground water rights are causing injury to A&B are set forth in CM Rule 42:

**01. Factors.** Factors the Director may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste include, but are not limited to, the following:

- a. The amount of water available in the source from which the water right is diverted.
- b. The effort or expense of the holder of the water right to divert water from the source.
- c. Whether the exercise of junior-priority ground water rights individually or collectively affects the quantity and timing of when water is available to, and the cost of exercising, a senior-priority surface or ground water right. This may include the seasonal as well as the multi-year and cumulative impacts of all ground water withdrawals from the area having a common ground water supply.
- d. If for irrigation, the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application.
- e. The amount of water being diverted and used compared to the water rights.
- f. The existence of water measuring and recording devices.
- g. The extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices; provided, however, the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years. In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system.
- h. The extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells to divert and use water from the area having a common ground water supply under the petitioner's surface water right priority.

19. In its Petition A&B asserted that:

By reason of the diversions of water by junior ground water appropriators located within the E[SPA], the Petitioner is suffering material injury as a result of the lowering of the ground water pumping level within the E[SPA] by an average of twenty (20) feet since 1959, with some areas of the Aquifer lowered in excess of forty (40) feet since 1959, reducing the diversions of A&B . . . to nine hundred seventy-four (974) cfs, a reduction of one hundred twenty-six (126) cfs from the diversion rate provided in the water right referenced above.

R at 13.

20. In its Motion to Proceed, A&B requested that:

the Director to lift the stay agreed to by the parties . . . for the delivery of ground water . . . and that said Director proceed, without delay, in the administration of the E[SPA] in such a manner as to provide ground water to A&B under its ground water rights that are being interfered with and materially injured by junior ground water appropriators in the ESPA . . . .

R. at 830.

21. Contrary to the assertion of A&B, and as previously stated, depletion does not equate to material injury. Material injury is a highly fact specific inquiry that must be determined in accordance with CM Rule 42.

22. A&B's delivery call is based upon alleged shortages to its senior water right, 36-2080. The place of use for 36-2080 is 62,604.3 acres. A&B holds additional junior and subordinated enlargement rights that authorize irrigation of 4,081.9 acres. A&B's junior and subordinated enlargement rights are not part of its delivery call.

23. A&B admits it has no mechanism to limit water diverted under water right no. 36-2080 to its place of use, 62,604.3 acres. A&B admits it applies water diverted under 36-2080 to junior and subordinated enlargement acres. Therefore, A&B irrigates 4,081.9 more acres than are authorized to be irrigated under its calling water right, 36-2080. Before seeking curtailment of junior-priority ground water rights under 36-2080, A&B must have mechanisms in place to self-regulate its junior and subordinated enlargement acres.

24. Regarding A&B's enlargement rights—totaling 2,063.1 acres—the district court explained as follows: “The indirect result is that the enlargement rights are protected under the September 9, 1948, priority date and the subordination provision that applies to all enlargement rights is circumvented.” *Memorandum Decision* at 41. The Director concurs with this statement. To conclude otherwise would result in injury to water right holders who are junior to A&B's 36-2080 right, but senior to its enlargement rights. Idaho Code § 42-1426; *Fremont-Madison Irr. Dist. and Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 460-61, 926 P.2d 1301, 1307-08 (1996).

25. In its 1994 Petition, A&B stated its “diversions” under water right 36-2080 were 974 cfs.<sup>9</sup> In its 2007 Motion to Proceed, A&B stated its “diversions” under the same right were 970 cfs. As stated in the Findings of Fact, the measurements provided by A&B in its Petition and Motion to Proceed are peak season low flow well capacity measurements, not actual diversions. In its Motion to Proceed, A&B stated it “was able to deliver at least 0.75 miner’s inch prior to the major impacts caused by junior ground water pumping.”

26. The 2006 water supply of 970 cfs is the low flow capacity of A&B’s pumps during the peak season, which equates to 0.77 miner’s inches per acre for the 62,604.3-acre place of use for water right 36-2080. Adjusted for 3 percent conveyance loss, the on-farm delivery is 0.75 miner’s inches per acre. However, because A&B does not limit irrigation to 62,604.3, the on-farm delivery for 66,686.2 acres, adjusted for 3 percent conveyance loss, is 0.71 miner’s inches per acre. The Director concludes with reasonable certainty that if A&B limited irrigation under 36-2080 to 62,604.3 acres, it would satisfy the criteria set forth in its Motion to Proceed.

27. While A&B is authorized to divert from 188 points of diversion, the record established that only 177 wells are in production. Therefore, A&B has 11 additional wells that must be put to use if more water is needed to fully utilize its existing facilities before seeking curtailment of junior-priority ground water rights. CM Rule 42.01.g, h.

28. In its Motion to Proceed, A&B stated that 0.75 miner’s inches is “the minimum amount necessary to irrigate lands within A&B during the peek [sic] periods when irrigation water is most needed.” R. at 836. At the hearing and in its expert report, A&B stated that 0.75 is a well rectification standard, not an irrigation requirement. In its expert report, A&B presented a theoretical analysis to support its position that 0.89 miner’s inches per acre is its diversion requirement during the peak season. As will be explained below, A&B theoretical analysis ignores that its actual diversions during the peak season have never met its stated diversion requirement.

29. A&B is authorized to divert 1,100 cfs (0.88 miner’s inches per acre) under water right 36-2080, and the record supports the fact that A&B is capable of diverting 1,100 cfs. The evidence in the record establishes that 1,100 cfs has not been available for diversion during the peak season when demand for water is at its greatest. Based on the Annual Report, Part 2, the Director concludes with reasonable certainty that the maximum low flow capacity of A&B production wells during the peak season, 1,087 cfs (0.87 miner’s inches per acre), occurred in 1974. Adjusted for 3 percent conveyance loss, the amount of water available for on-farm delivery during the peak season is 1,055 cfs, or 0.84 miner’s inches per acre. Therefore, the Director concludes with reasonable certainty that 0.88 miner’s inches per acre has not been available for diversion during the peak season. CM Rule 42.01.c. *See also Order on Petition for Judicial Review*, CV-2008-444, pp. 21-22 (Fifth Jud. Dist., June 19, 2009) (Director’s consideration of a water right’s seasonal variability is authorized by the CM Rules).

30. Based on the WaterPumpedrevised.xls spreadsheet, the Director concludes with reasonable certainty that the maximum amount of water actually diverted during the peak season was 0.76 miner’s inches per acre in 1963 and 1967. CM Rule 42.01.c. In 1964, A&B actually

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<sup>9</sup> As stated in Finding of Fact 33, the low flow peak season well capacity for 1994 is 956 cfs, not 974 cfs.

diverted 0.75 miner's inches per acre. *Id.* In those years, water was diverted through unlined ditches and laterals and applied by gravity systems.

31. In comparing peak season low flow well capacity from the Annual Report, Part 2 with actual diversions from the WaterPumpedrevised.xls spreadsheet, the Director concludes with reasonable certainty that A&B is not making full use of its diversion works during the peak season. CM Rule 42.01.a, d, e, h. For example, in 2006, the year A&B filed its Motion to Proceed, 970 cfs (0.77 miner's inches per acre) was available for diversion; however, A&B actually diverted 0.65 miner's inches per acre.

32. Converted to a monthly volume, the 2006 peak season low flow discharge of 970 cfs is 59,643 acre-feet. In 2006, A&B pumped 49,855.3 acre-feet. Therefore, A&B had the ability or capacity on a project-wide basis to pump nearly 10,000 acre-feet of additional water during the peak demand period. Moreover, A&B accomplished its diversions in 2006 from 177 of 188 wells.

33. The Director concludes with reasonable certainty that, during the peak season, A&B could divert additional water for irrigation purposes. CM Rule 42.01.e. Further, if more water is needed, A&B has additional wells that could be put into production. CM Rule 42.01.g. Requiring curtailment when there are sufficient reasonable alternative means of diversion is contrary to the full economic development of the State's water resources. CM Rule 20.03; Idaho Code § 42-226.

34. The Director concludes with reasonable certainty that A&B has the capacity to pump more water if it in fact needs more water. For purposes of conjunctive administration, A&B may not seek curtailment of junior-priority ground water rights when it is not fully utilizing its capacity to divert water. CM Rule 20.03; Idaho Code § 42-226.

35. The Director concludes with reasonable certainty that ground water declines across the ESPA and within A&B's boundary have occurred because of conversion from application by gravity flood/furrow irrigation to sprinkler systems, a sequence of prolonged drought, and ground water diversions for irrigation and other consumptive purposes.

36. The record establishes with reasonable certainty that A&B has successfully implemented numerous measures that have reduced the amount of water required to irrigate the 62,604.3 acres under its calling water right, 36-2080. These measures include: 1) conversion of 1,447 acres, or 2.3 percent of 62,604.3 acres, from ground water irrigation to surface water irrigation; 2) reduction of conveyance losses from approximately 8 percent to 3 percent; 3) conversion of 96 percent of the project from gravity to sprinkler irrigation (sprinkler irrigation was expected to reduce the per acre water requirement by 19.6 percent); and 4) near completion of a drain well elimination program, which provides for re-use of storm water and waste water for the irrigation of crops.

37. It is reasonably certain that the total average decrease in peak monthly well production of 4,206 acre-feet, between the periods 1963 through 1982 and 1994 through 2007 (7.7 percent), is attributable to measures discussed above and the fact that A&B added 4,081.9

acres of irrigation development (junior and subordinated enlargement acres) beyond the 62,604.3 acres licensed under its calling water right, 36-2080. CM Rule 42.d, e.

38. The Director concludes with reasonable certainty that had A&B limited its ground water use to irrigation of the 62,604.3 acres under water right 36-2080, or if it had not developed 4,081.9 additional acres of irrigation (junior and subordinated enlargement acres), mean annual ground water use between 1982 and 2007 would be lower than the mean annual use actually recorded for that period. CM Rule 42.d, e.

39. An analysis of 2006 ET data using METRIC and NDVI modeling showed that A&B acres had higher consumptive use and biomass than surrounding irrigated acres that were not alleged to be water short. In 2006, A&B did not pump to its full capacity and actual peak season diversions were 0.65 miner's inches per acre. The METRIC and NDVI models have been published, peer reviewed, and are scientifically reliable. The Director concludes with reasonable certainty that A&B lands alleged to be water short have higher consumptive use and biomass than lands not alleged to be water short. Based on these analyses, it is reasonably certain that A&B lands are not water short.

40. While witnesses called by A&B testified that they could put more water to beneficial use, based on the testimony and crop yield records, the Director concludes with reasonable certainty that A&B's crop mix is grown to maturity on A&B lands with the current water supply.

41. The southwestern area of the A&B project has been noted for its lack of productivity. The Director concludes with reasonable certainty that the inherent hydrogeologic environment in the southwestern area of the project—not depletions caused by junior-priority ground water users—is the primary cause of A&B's reduced pumping yields and the need to convert 1,447 acres from ground water to surface water irrigation. Wells placed in a poor hydrogeologic environment do not constitute a reasonable means of diversion. CM Rule 42.01.g, h. To curtail junior-priority ground water rights because of a poor hydrogeologic environment would countenance unreasonableness of diversion and hinder full economic development of the State's water resources. CM Rule 20.03; Idaho Code § 42-226; *Clear Springs* \*20-21 (a senior appropriator's means of diversion must be reasonable to sustain a delivery call).

42. In its *Memorandum Decision*, the district court stated that the Director must conclude by clear and convincing evidence “that the quantity decreed to A&B's 36-2080 exceeds the quantity being put to beneficial use for purposes of determining material injury.” *Memorandum Decision* at 49. “Conditions surrounding the use of water are not static. Post-adjudication circumstances can result where a senior may not require the full quantity decreed.” *Id.* at 30. “Efficiencies, new technologies and improvements in delivery systems that reduce conveyance losses can result in a circumstance where the full decreed quantity may not be required to irrigate the total number of decreed acres. The subsequent lining or piping of a ditch or the conversion from gravity fed furrow irrigation to sprinkler irrigation can reduce the quantity of water needed to accomplish the purpose of use for which the right was decreed.” *Id.* at 30.

43. The district court went on to say: “Idaho law prohibits a senior from depriving a junior of water if the water called for is not being put to beneficial use. Therefore a decree or license does not insulate a senior appropriator from an allegation of waste or the failure to put the decreed quantity to beneficial use.” *Id.* at 33. “[T]here are indeed circumstances where the senior making the call may not at the present time require the full decreed quantity and therefore is not entitled to administration based on the full decreed quantity.” *Memorandum Decision on Rehearing* at 7.

44. The Idaho Supreme Court recently stated: “The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.” *Clear Springs* at \*19. “Economy must be required and demanded in the use and application of water.” *Id.*

45. The record establishes that A&B is authorized to divert up to 1,100 cfs for irrigation of 62,604.3 acres. The record establishes with reasonable certainty that A&B irrigates 4,081.9 acres more than are authorized under its calling water right. The record establishes with reasonable certainty that A&B’s water use has decreased as a result of converting its project from gravity to sprinkler irrigation and employing other efficiency measures. The record establishes with reasonable certainty that A&B has not had the capacity to divert its full water right during the peak season, and does not utilize the capacity it has during the peak season when water is most needed. While A&B is authorized to divert from 188 points of diversion, it only pumps from 177 wells. The record establishes with reasonable certainty that since 1992, when a majority of the project had been converted to sprinklers—and not taking into consideration the 1,447 acres that were converted from ground water to surface water in the southwestern area of the project, or the capacity that could be gained from putting the 11 unused wells into production—A&B’s actual diversions have averaged 0.65 miner’s inches per acre during the peak season. Importantly, testimony from farmers that grow crops on and around A&B, combined with crop data and the Department’s METRIC and NDVI modeling, demonstrate with reasonable certainty that, in spite of irrigating more acres than are authorized under 36-2080, not pumping to full capacity, and not utilizing all of its wells, crops are grown to full maturity on A&B lands. The clear and convincing evidence in the record supports the Director’s conclusion that the 1,100 cfs (0.88 miner’s inches per acre) decreed to A&B under 36-2080 exceeds the quantity being put to beneficial use for purposes of determining material injury. *Memorandum Decision* at 49. The clear and convincing evidence in the record supports the Director’s conclusion that the quantity available to A&B is sufficient for the purpose of irrigating crops. *Memorandum Decision on Rehearing* at 7. The Director concludes, by clear and convincing evidence, that A&B is not materially injured.

46. Because A&B is not materially injured, it is not necessary to determine if A&B has exceeded its reasonable pumping levels. *Memorandum Decision* at 22-24; *January 2008 Final Order* at 5.



**ORDER**

Based upon and consistent with the foregoing, the Director hereby orders as follows:

IT IS HEREBY ORDERED that the Director concludes by clear and convincing evidence that A&B Irrigation District is not materially injured and its delivery call is DENIED.

IT IS FURTHER ORDERED that prior to seeking curtailment of junior-priority ground water users, A&B must have mechanisms in place to limit its place of use to the place of use for the calling water right. Prior to seeking curtailment of junior-priority ground water users, A&B must exercise all of its appurtenant points of diversion.

IT IS FURTHER ORDERED that pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order may appeal the final order to district court by filing a petition in the district court of the county in which a hearing was held, the final agency action was taken, the party seeking review of the order resides, or the real property or personal property that was the subject of the agency action is located. The appeal must be filed within twenty-eight (28) days: (a) of the service date of the final order; (b) of an order denying petition for reconsideration; or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. *See* Idaho Code § 67-5273. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

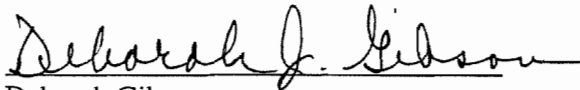
Dated this 27<sup>th</sup> day of April, 2011.

  
GARY SPACKMAN  
Interim Director

**CERTIFICATE OF SERVICE**

I hereby certify that I served a true and correct copy of the following attached document on the persons listed below by mailing in the United States mail, first class with the correct postage affixed thereto, as well as by e-mail to those persons listed with e-mail addresses, on this 27<sup>th</sup> day of April, 2011.

<p>John K. Simpson          Travis L. Thompson          Barker Rosholt &amp; Simpson          113 Main Ave W., Ste. 303          P.O. Box 485          Twin Falls, ID 83303-0485  <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a>  <a href="mailto:tlt@idahowaters.com">tlt@idahowaters.com</a></p>	<p>Randall C. Budge          Candice M. McHugh          Racine Olson Nye Budge &amp; Bailey          P.O. Box 1391          201 E. Center St.          Pocatello, ID 83204-1391  <a href="mailto:rcb@racinelaw.net">rcb@racinelaw.net</a>  <a href="mailto:cmm@racinelaw.net">cmm@racinelaw.net</a></p>	<p>Sarah A. Klahn          Mitra Pemberton          White &amp; Jankowski LLP          511 Sixteenth St., Ste. 500          Denver, CO 80202  <a href="mailto:sarahk@white-jankowski.com">sarahk@white-jankowski.com</a>  <a href="mailto:mitrap@white-jankowski.com">mitrap@white-jankowski.com</a></p>
<p>Jerry Rigby          Rigby Andrus          25 North Second East          P.O. Box 250          Rexburg, ID 83440  <a href="mailto:jrigby@rex-law.com">jrigby@rex-law.com</a></p>	<p>A. Dean Tranmer          City of Pocatello          P.O. Box 4169          Pocatello, ID 83201  <a href="mailto:dtranmer@pocatello.us">dtranmer@pocatello.us</a></p>	<p><i>Courtesy Copy:</i>          Honorable Eric. J. Wildman          253 3<sup>rd</sup> Ave. N.          P.O. Box 2707          Twin Falls, ID 83303-2707  <a href="mailto:pharrington@srba.state.id.us">pharrington@srba.state.id.us</a></p>



Deborah Gibson  
 Idaho Department of Water Resources

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FILED IN DISTRICT COURT  
 CASE NO. 2011-512

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CLERK OF DISTRICT COURT  
 TWIN FALLS, IDAHO  
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*Attorneys for Petitioner 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 <u>2011-512</u>
	)	
Petitioner,	)	
	)	Fee Category L.3 - \$88.00
vs.	)	
	)	
THE IDAHO DEPARTMENT OF WATER	)	<b>NOTICE OF APPEAL AND</b>
RESOURCES and GARY SPACKMAN in his	)	<b>PETITION FOR JUDICIAL</b>
official capacity as Interim Director of the Idaho	)	<b>REVIEW OF AGENCY ACTION</b>
Department of Water Resources,	)	
	)	
Respondents.	)	
_____	)	
	)	
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 Notice of Appeal and Petition for Judicial Review as follows:

NOTICE OF APPEAL AND PETITION FOR JUDICIAL REVIEW OF AGENCY ACTION

**1  
 SCANNED**

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## STATEMENT OF THE CASE

1. This is a civil action pursuant to Idaho Code §§ 67-5270 and 5279 seeking judicial review of the *Final Order on Remand Regarding the A&B Irrigation District Delivery Call* (“*Remand Order*”) issued by the Director of the Idaho Department of Water Resources on April 27, 2011. Given the Director’s recent order granting A&B’s petition for reconsideration of the *Remand Order* it is A&B’s position that an appeal is unnecessary. However, in order to preserve its legal rights, A&B is filing this petition for judicial review.

2. Pursuant to Idaho Code § 67-5246(4), A&B petitioned the Interim Director to reconsider the *Remand Order* on May 11, 2011. By law, the Director was required to dispose of A&B’s petition within 21 days, otherwise it was deemed denied. See I.C. § 67-5246(4), (5). On June 1, 2011 the Director issued an *Order Granting Petition for Reconsideration to Allow Time for Further Review*. See **Ex. A**. In that order, the Director stated A&B’s petition was granted “for the sole purpose of allowing additional time for the Department to respond to the Petition” and that he would issue an order by June 9, 2011. Based upon the plain terms of the order, A&B’s petition has been granted and the Director is obligated to revise his *Remand Order* consistent with A&B’s requested relief. Consequently, the Director has a duty to immediately administer hydraulically connected junior water rights that are injuring A&B’s senior water right 36-2080 during the 2011 irrigation season. A&B is in the process of making that request with the Director and will withdraw this notice of appeal once the Director confirms he is proceeding in accordance with A&B’s request.

3. The Director later issued an *Amended Order Granting Petition for Reconsideration to Allow Time for Further Review* on June 9, 2011. See **Ex. B**. In that order the Director stated that “an order responding to the merits of the Petition shall issue no later than

June 30, 2011.” In effect, the Director has unlawfully attempted to delay his response to A&B’s petition until the middle of the 2011 irrigation season. Since the Director “granted” A&B’s petition by order of June 1<sup>st</sup>, this attempted delay is unavailing. Nothing in Idaho’s APA or IDWR’s Rules of Procedure (37.01.01 *et seq.*) authorizes the Director to “grant” a petition for reconsideration solely for the purpose of “allowing additional time for the Department to respond” to A&B’s petition for reconsideration. Alternatively, if the Director’s order results in a failure to dispose of A&B’s petition by June 1, 2011, the petition would be deemed denied by operation of law on that day. A&B is filing the present petition for judicial review to protect its right to appeal in the event the Director’s June 1, 2011 order is deemed to deny A&B’s petition by operation of law.

2. A hearing before the agency on the underlying administrative matter was held in the matter from December 3 - 18, 2008. After judicial review on the Director’s initial final order, the case was remanded to IDWR which resulted in the *Remand Order*. A&B requested a hearing on the *Remand Order* pursuant to Idaho Code § 42-1701A(3), and that request has yet to be addressed by the Interim Director.

3. A Statement of Issues which A&B intends to assert in this matter will be filed with the Court within 14 days. Pursuant to I.R.C.P. 84(d)(5), A&B reserves the right to assert additional issues and/or clarify or further specify the issues for judicial review stated in this petition or which become later discovered.

#### **JURISDICTION AND VENUE**

4. This petition is authorized by Idaho Code §§ 67-5270 and 5279.

5. This Court has jurisdiction over this action pursuant to Idaho Code §§ 42-1401D and 67-5272.

6. Venue lies in this Court pursuant to Idaho Code §§ 42-1701D and 67-5272. A&B's principal place of business is located in Minidoka County and real property (water right number 36-2080) which was the subject matter of the agency action is appurtenant to lands located in Minidoka County.

7. Pursuant to the Idaho Supreme Court's *Administrative Order* issued on December 9, 2009 "all petitions for judicial review of any decision regarding administration of water rights from the Department of Water Resources shall be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District." The SRBA Court's procedures instruct the clerk of the district court in which the petition is filed to issue a *Notice of Reassignment*. A&B has attached a copy of the SRBA Court's *Notice of Reassignment* form for the convenience of the clerk.

8. The Director's *Remand Order* is a final agency action subject to judicial review pursuant to Idaho Code § 67-5270.

#### PARTIES

9. Petitioner A&B is an Idaho irrigation district, with its principal office located in Minidoka County, specifically Rupert, Idaho.

10. Respondent Idaho Department of Water Resources is a state agency with its main office located at 322 E. Front St., Boise, Idaho. Respondent Gary Spackman is the interim director of the Idaho Department of Water Resources.

#### AGENCY RECORD

11. Judicial review is sought of the Director's April 27, 2011 *Final Order on Remand Regarding the A&B Irrigation District Delivery Call*.

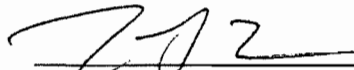
12. The agency held a hearing on the underlying administrative matter from December 3 – 18, 2008, which was recorded and a transcript created, which transcript should be made a part of the agency record in this matter. The transcript exists and is part of the record in *A&B Irrigation Dist. v. IDWR*, Minidoka County Dist Ct. Case No. 2009-000647. The parties to the administrative case previously paid for the creation of the transcript of the hearing.

13. A&B anticipates that it can reach a stipulation regarding the agency record with the Respondents and the other parties, and will pay its necessary share of the fee for preparation of the record at such time.

14. Service of this Notice of Appeal and Petition for Judicial Review of Agency Action has been made on the Respondents at the time of the filing of this Petition.

DATED this 24<sup>th</sup> day of June 2011.

**BARKER ROSHOLT & SIMPSON LLP**

  
\_\_\_\_\_  
Travis L. Thompson

*Attorneys for Petitioner A&B Irrigation District*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 24<sup>th</sup> day of June, 2011, I served true and correct copies of the *Notice of Appeal and Petition for Judicial Review of Agency Action* upon the following by U.S. Mail, postage prepaid:


Deputy Clerk  
 Minidoka County District Court  
 715 G Street  
 P.O. Box 368  
 Rupert, Idaho 83350  
 Fax: (208) 436-5272

- 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

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Jerry R. Rigby Rigby Andrus and Moeller 25 N 2 <sup>nd</sup> East Rexburg, ID 83440	Randall C. Budge Candice M. McHugh Racine Olson P.O. Box 1391 201 E Center Street Pocatello, ID 83204-1391	Sarah A. Klahn White & Jankowski LLP 511 Sixteenth Street, Suite 500 Denver, CO 80202
A. Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83201		

  
 \_\_\_\_\_  
 Travis L. Thompson



# Exhibit A

0032

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF THE PETITION FOR )  
DELIVERY CALL OF A&B IRRIGATION ) CM-DC-2011-001  
DISTRICT FOR THE DELIVERY OF GROUND )  
WATER AND FOR THE CREATION OF A ) **ORDER GRANTING PETITION**  
GROUND WATER MANAGEMENT AREA ) **FOR RECONSIDERATION TO**  
 ) **ALLOW TIME FOR FURTHER**  
 ) **REVIEW**  
 )

---

On April 27, 2011, the Director of the Idaho Department of Water Resources ("Director" or "Department") issued a *Final Order on Remand Regarding A&B Irrigation District's Delivery Call* ("Final Order on Remand"). The Final Order on Remand was served on April 27, 2011.

On May 11, 2011, A&B Irrigation District ("A&B") filed a timely *Petition for Reconsideration of Interim Director's April 27, 2011 Final Order on Remand/Request for Hearing* ("Petition").

Department Rule of Procedure 740.02.a provides that any party may file a petition for reconsideration within fourteen days of the service date of a final order. IDAPA 37.01.01.740.02.a. *See also* Idaho Code § 67-5246(4). The rule further provides, "The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law." *Id.*

A&B filed its Petition on May 11, 2011, and it will be deemed denied by operation of law if not acted upon by the Department by June 1, 2011. Because the Department requires additional time to review the merits of the Petition, the Director shall grant A&B's Petition for the sole purpose of allowing additional time for the Department to respond to the Petition. An order responding to the merits of the Petition will issue no later than June 9, 2011.

**ORDER**

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Petition is GRANTED for the sole purpose of allowing additional time for the Department to

respond to the Petition. An order responding to the merits of the Petition shall issue no later than June 9, 2011.

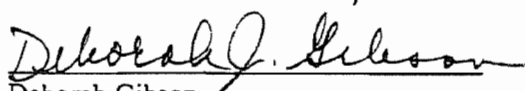
Dated this 1<sup>st</sup> day of June, 2011.

  
GARY SPACKMAN  
Interim Director

**CERTIFICATE OF SERVICE**

I hereby certify that I served a true and correct copy of the following attached document on the persons listed below by mailing in the United States mail, first class with the correct postage affixed thereto, as well as by e-mail to those persons listed with e-mail addresses, on this 15<sup>th</sup> day of June, 2011.

John K. Simpson Travis L. Thompson Barker Rosholt & Simpson 113 Main Ave W., Ste. 303 P.O. Box 485 Twin Falls, ID 83303-0485 <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a> <a href="mailto:tl@idahowaters.com">tl@idahowaters.com</a>	Randall C. Budge Candice M. McHugh Racine Olson Nye Budge & Bailey P.O. Box 1391 201 E. Center St. Pocatello, ID 83204-1391 <a href="mailto:rcb@racinelaw.net">rcb@racinelaw.net</a> <a href="mailto:cmm@racinelaw.net">cmm@racinelaw.net</a>	Sarah A. Klahn Mitra Pemberton White & Jankowski LLP 511 Sixteenth St., Ste. 500 Denver, CO 80202 <a href="mailto:sarahk@white-jankowski.com">sarahk@white-jankowski.com</a> <a href="mailto:mitrap@white-jankowski.com">mitrap@white-jankowski.com</a>
Jerry Rigby Rigby Andrus 25 North Second East P.O. Box 250 Rexburg, ID 83440 <a href="mailto:jrigby@rex-law.com">jrigby@rex-law.com</a>	A. Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83201 <a href="mailto:dtranmer@pocatello.us">dtranmer@pocatello.us</a>	

  
Deborah Gibson  
Idaho Department of Water Resources

# Exhibit B

0036

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF THE PETITION FOR )  
DELIVERY CALL OF A&B IRRIGATION ) CM-DC-2011-001  
DISTRICT FOR THE DELIVERY OF GROUND )  
WATER AND FOR THE CREATION OF A ) **AMENDED ORDER**  
GROUND WATER MANAGEMENT AREA ) **GRANTING PETITION**  
 ) **FOR RECONSIDERATION**  
 ) **TO ALLOW TIME**  
 ) **FOR FURTHER REVIEW**  
 )

---

On April 27, 2011, the Director of the Idaho Department of Water Resources ("Director" or "Department") issued a *Final Order on Remand Regarding A&B Irrigation District's Delivery Call* ("Final Order on Remand"). The Final Order on Remand was served on April 27, 2011.

On May 11, 2011, A&B Irrigation District ("A&B") filed a timely *Petition for Reconsideration of Interim Director's April 27, 2011 Final Order on Remand/Request for Hearing* ("Petition").

Department Rule of Procedure 740.02.a provides that any party may file a petition for reconsideration within fourteen days of the service date of a final order. IDAPA 37.01.01.740.02.a. *See also* Idaho Code § 67-5246(4). The rule further provides, "The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law." *Id.*

A&B filed its Petition on May 11, 2011, and it will be deemed denied by operation of law if not acted upon by the Department by June 1, 2011. Because the Department requires additional time to review the merits of the Petition, the Director shall grant A&B's Petition for the sole purpose of allowing additional time for the Department to respond to the Petition. An order responding to the merits of the Petition will issue no later than June 30, 2011.

**ORDER**

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Petition is GRANTED for the sole purpose of allowing additional time for the Department to

respond to the Petition. An order responding to the merits of the Petition shall issue no later than June 30, 2011.

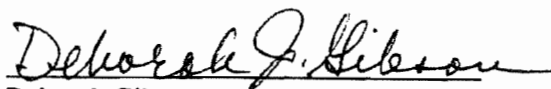
Dated this 9<sup>th</sup> day of June, 2011.

  
GARY SPACKMAN  
Interim Director

**CERTIFICATE OF SERVICE**

I hereby certify that I served a true and correct copy of the following attached document on the persons listed below by mailing in the United States mail, first class with the correct postage affixed thereto, as well as by e-mail to those persons listed with e-mail addresses, on this 9th day of June, 2011.

John K. Simpson Travis L. Thompson Barker Rosholt & Simpson 113 Main Ave W., Ste. 303 P.O. Box 485 Twin Falls, ID 83303-0485 <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a> <a href="mailto:tlt@idahowaters.com">tlt@idahowaters.com</a>	Randall C. Budge Candice M. McHugh Racine Olson Nye Budge & Bailey P.O. Box 1391 201 E. Center St. Pocatello, ID 83204-1391 <a href="mailto:rcb@racinelaw.net">rcb@racinelaw.net</a> <a href="mailto:cmm@racinelaw.net">cmm@racinelaw.net</a>	Sarah A. Klahn Mitra Pemberton White & Jankowski LLP 511 Sixteenth St., Ste. 500 Denver, CO 80202 <a href="mailto:sarahk@white-jankowski.com">sarahk@white-jankowski.com</a> <a href="mailto:mitrap@white-jankowski.com">mitrap@white-jankowski.com</a>
Jerry Rigby Rigby Andrus 25 North Second East P.O. Box 250 Rexburg, ID 83440 <a href="mailto:jrigby@rex-law.com">jrigby@rex-law.com</a>	A. Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83201 <a href="mailto:dtranmer@pocatello.us">dtranmer@pocatello.us</a>	

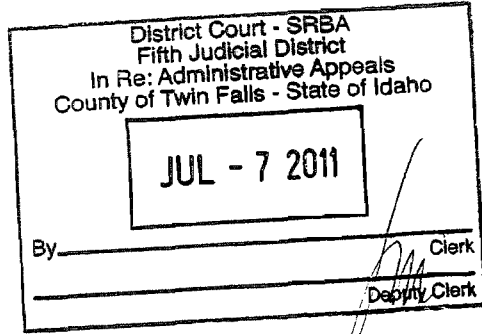
  
Deborah Gibson  
Idaho Department of Water Resources



LAWRENCE G. WASDEN  
ATTORNEY GENERAL

CLIVE J. STRONG  
Deputy Attorney General  
Chief, Natural Resources Division

GARRICK L. BAXTER, ISB No. 6301  
CHRIS M. BROMLEY, ISB No. 6530  
Deputy Attorneys General  
P.O. Box 83720  
Boise, ID 83720-0098  
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Facsimile: (208) 287-6700



Attorneys for Respondents

**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,  
Petitioner,

vs.

THE IDAHO DEPARTMENT OF WATER  
RESOURCES and GARY SPACKMAN in his  
official capacity as Interim Director of the  
Idaho Department of Water Resources,  
Respondent.

Case No. CV-2011-512

**IDWR MOTION AND MEMORANDUM  
IN SUPPORT OF DISMISSAL OF A&B  
IRRIGATION DISTRICT'S JUNE 24,  
2011 NOTICE OF APPEAL AND  
PETITION FOR JUDICIAL REVIEW  
OF AGENCY ACTION**

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

COME NOW the Idaho Department of Water Resources and Gary Spackman, Interim  
Director (collectively referred to herein as "IDWR") and move this Court to dismiss the A&B  
Irrigation District's ("A&B") June 24, 2011 *Notice of Appeal and Petition for Judicial of Agency*

*Action* (“Petition for Judicial Review”). I.R.C.P. 84(b) & (o); Idaho Code § 67-5246. As will be explained below, the Petition should be dismissed because the April 27, 2011 final order that A&B seeks judicial review of has been superseded by a June 30, 2011 amended final order, and is not ripe for review.

In its Petition for Judicial Review, A&B seeks review of the IDWR’s April 27, 2011 *Final Order on Remand Regarding the A&B Irrigation District Delivery Call* (“April 27 Final Order on Remand”). As indicated in the Petition for Judicial Review, on May 11, 2011, after issuance of the April 27 Final Order on Remand, A&B filed a petition for reconsideration (“Petition for Reconsideration”), asking IDWR to reconsider certain findings and conclusions in said order. *Petition for Judicial Review* at 2, ¶ 2. On June 1, 2011, IDWR issued an *Order Granting Petition for Reconsideration to Allow Time for Further Review* (“June 1 Order”). The June 1 Order granted A&B’s request for reconsideration “for the sole purpose of allowing additional time for the Department to respond to the Petition.” *Id.* at Exhibit A. The June 1 Order stated that IDWR would issue an order on reconsideration by June 9, 2011. *Id.* IDWR later extended the June 9 deadline to June 30, 2011. *Id.* at Exhibit B.

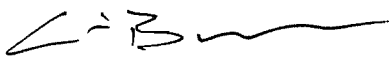
On June 30, 2011, IDWR issued an *Order Regarding Petition for Reconsideration* (“Order Regarding Reconsideration”) and an *Amended Final Order on Remand Regarding the A&B Irrigation District Delivery Call* (“June 30 Amended Final Order on Remand”). These orders are attached as exhibits A and B to the *Affidavit of Chris M. Bromley*. In the Order Regarding Reconsideration, IDWR stated: “Issued contemporaneously with this decision is [the June 30 Amended Final Order on Remand] . . . . The [June 30] Amended Final Order on Remand incorporates the findings and conclusions discussed herein and supersedes the April 27, 2011 Final Order on Remand.” Emphasis added. *Affidavit of Chris M. Bromley*, Exhibit A at 1.

The June 30 Amended Final Order on Remand also stated that it “supersedes the April 27, 2011 Final Order on Remand . . . .” *Id.*, Exhibit B at 1 (emphasis added).

On July 1, 2011, this Court entered a *Procedural Order Governing Judicial Review of Final Order of Director of Idaho Department of Water Resources* (“Procedural Order”). The Procedural Order acknowledged the filing of the Petition for Judicial Review, based on the April 27 Final Order on Remand, and instructed IDWR to prepare the record and transcript. *Procedural Order* at 3. Therefore, A&B’s Petition for Judicial Review to IDWR’s April 27 Final Order on Remand is now proceeding before the Court.

By its own volition, A&B sought reconsideration of the April 27 Final Order on Remand. In response, IDWR granted A&B’s request to have certain issues reconsidered and subsequently issued the Order Regarding Reconsideration and June 30 Amended Final Order on Remand. Because the April 27 Final Order on Remand was expressly superseded by the June 30 Amended Final Order on Remand, IDWR respectfully requests dismissal of A&B’s Petition for Judicial Review. The only final agency action that A&B may seek judicial review from is the June 30 Amended Final Order on Remand. I.R.C.P. 84(b); Idaho Code § 67-5246.

DATED this 6<sup>th</sup> day of July 2011.

  
\_\_\_\_\_  
CHRIS M. BROMLEY  
Deputy Attorney General  
Idaho Department of Water Resources


**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am a duly licensed attorney in the State of Idaho, employed by the Attorney General of the State of Idaho and residing in Boise, Idaho; and that I served one (1) true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 6<sup>th</sup> day of July 2011.

Document(s) served: **IDWR MOTION AND MEMORANDUM IN SUPPORT OF DISMISSAL OR A&B IRRIGATION DISTRICT'S JUNE 24, 2011 NOTICE OF APPEAL AND PETITION FOR JUDICIAL REVIEW OF AGENCY ACTION**

Person(s) served:

John K. Simpson Travis L. Thompson Barker Rosholt & Simpson 113 Main Ave W., Ste. 303 P.O. Box 485 Twin Falls, ID 83303-0485 <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a> <a href="mailto:tlt@idahowaters.com">tlt@idahowaters.com</a>	Randall C. Budge Candice M. McHugh Racine Olson Nye Budge & Bailey P.O. Box 1391 201 E. Center St. Pocatello, ID 83204-1391 <a href="mailto:rcb@racinelaw.net">rcb@racinelaw.net</a> <a href="mailto:cmm@racinelaw.net">cmm@racinelaw.net</a>	Sarah A. Klahn Mitra Pemberton White & Jankowski LLP 511 Sixteenth St., Ste. 500 Denver, CO 80202 <a href="mailto:sarahk@white-jankowski.com">sarahk@white-jankowski.com</a> <a href="mailto:mitrap@white-jankowski.com">mitrap@white-jankowski.com</a>
Jerry Rigby Rigby Andrus 25 North Second East P.O. Box 250 Rexburg, ID 83440 <a href="mailto:jrigby@rex-law.com">jrigby@rex-law.com</a>	A. Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83201 <a href="mailto:dtranmer@pocatello.us">dtranmer@pocatello.us</a>	

  
\_\_\_\_\_  
CHRIS M. BROMLEY  
Deputy Attorney General  
Idaho Department of Water Resources



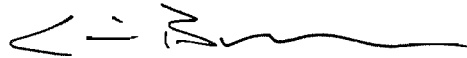
1. I am one of the Deputy Attorneys General of record for the Respondents, Idaho Department of Water Resources and Gary Spackman, Interim Director. I am over the age of 18 and state the following based upon my own personal knowledge.

2. Attached hereto as **Exhibit A** is a true and correct copy of the June 30, 2011, *Order Regarding Petition for Reconsideration*.

3. Attached hereto as **Exhibit B** is a true and correct copy of June 30, 2011, *Amended Final Order on Remand Regarding the A&B Irrigation District Delivery Call*.

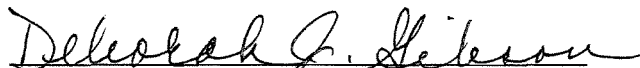
Further your Affiant sayeth naught.

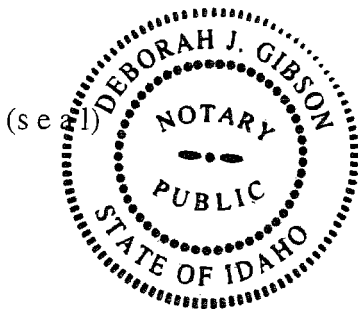
DATED this 6<sup>th</sup> day of July 2011.



CHRIS M. BROMLEY  
Deputy Attorney General  
Idaho Department of Water Resources

SUBSCRIBED AND SWORN TO BEFORE ME this 6<sup>th</sup> day of July 2011.

  
NOTARY PUBLIC for Idaho  
Residing at: Parma, Idaho  
My Commission Expires: 8/10/2015



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am a duly licensed attorney in the State of Idaho, employed by the Attorney General of the State of Idaho and residing in Boise, Idaho; and that I served one (1) true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 6<sup>th</sup> day of July 2011.

Document(s) served: AFFIDAVIT OF CHRIS M. BROMLEY

Person(s) served:

<p>John K. Simpson          Travis L. Thompson          Barker Rosholt &amp; Simpson          113 Main Ave W., Ste. 303          P.O. Box 485          Twin Falls, ID 83303-0485  <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a>  <a href="mailto:ilt@idahowaters.com">ilt@idahowaters.com</a></p>	<p>Randall C. Budge          Candice M. McHugh          Racine Olson Nye Budge &amp; Bailey          P.O. Box 1391          201 E. Center St.          Pocatello, ID 83204-1391  <a href="mailto:rcb@racinelaw.net">rcb@racinelaw.net</a>  <a href="mailto:cmm@racinelaw.net">cmm@racinelaw.net</a></p>	<p>Sarah A. Klahn          Mitra Pemberton          White &amp; Jankowski LLP          511 Sixteenth St., Ste. 500          Denver, CO 80202  <a href="mailto:sarahk@white-jankowski.com">sarahk@white-jankowski.com</a>  <a href="mailto:mitrap@white-jankowski.com">mitrap@white-jankowski.com</a></p>
<p>Jerry Rigby          Rigby Andrus          25 North Second East          P.O. Box 250          Rexburg, ID 83440  <a href="mailto:jrigby@rex-law.com">jrigby@rex-law.com</a></p>	<p>A. Dean Tranmer          City of Pocatello          P.O. Box 4169          Pocatello, ID 83201  <a href="mailto:dtranmer@pocatello.us">dtranmer@pocatello.us</a></p>	



CHRIS M. BROMLEY  
 Deputy Attorney General  
 Idaho Department of Water Resources

# EXHIBIT A



**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF THE PETITION FOR )  
DELIVERY CALL OF A&B IRRIGATION ) CM-DC-2011-001  
DISTRICT FOR THE DELIVERY OF GROUND )  
WATER AND FOR THE CREATION OF A ) **ORDER REGARDING PETITION**  
GROUND WATER MANAGEMENT AREA ) **FOR RECONSIDERATION**  
)  
)  
\_\_\_\_\_)

On April 27, 2011, the Director of the Idaho Department of Water Resources (“Director” or “Department”) issued a *Final Order on Remand Regarding A&B Irrigation District’s Delivery Call* (“Final Order on Remand”). The Final Order on Remand found, by clear and convincing evidence, that A&B was not materially injured. Pursuant to Idaho Code § 67-5246, petitions for reconsideration, if any, were required to be filed with the Department within fourteen days of the date of service of the Final Order. *Final Order on Remand* at 22. The Final Order on Remand was served on April 27, 2011.

On May 11, 2011, A&B Irrigation District (“A&B”) filed a *Petition for Reconsideration of Interim Director’s April 27, 2011 Final Order on Remand/Request for Hearing* (“Petition”). The Petition identifies several issues with the Final Order on Remand that will be addressed in the order in which they were raised.

On June 1, 2011, the Director issued his *Order Granting Petition for Reconsideration to Allow Time for Further Review*, in which he stated that an order on reconsideration would issue no later than June 9, 2011. On June 9, 2011, the Director issued his *Amended Order Granting Petition for Reconsideration to Allow Time for Further Review*, in which he stated he would issue an order on reconsideration no later than June 30, 2011.

Issued contemporaneously with this decision is an *Amended Final Order on Remand Regarding the A&B Irrigation District Delivery Call* (“Amended Final Order on Remand”). The Amended Final Order on Remand incorporates the findings and conclusions discussed herein and supersedes the April 27, 2011 Final Order on Remand.

If an issue is not addressed herein, it is deemed denied.

**1. Readjudication of A&B's Water Right, 36-2080 (*Petition 2-4*)**

In its Petition, A&B argues that the “Director gives no presumption to A&B’s decree and unlawfully re-adjudicates the water right.” It is undisputed that A&B’s senior water right, 36-2080, authorizes the diversion of 1,100 cfs for the irrigation of 62,604.3 acres. A&B is authorized to divert water within the limits of its decree. The Director’s examination of A&B’s water right, in the context of conjunctive administration, is in accord with Idaho law. The amount of water necessary for beneficial use may be less than the decreed quantity; therefore, a senior may receive less than the decreed quantity, but not suffer injury.

On November 2, 2010, the district court reaffirmed its previous holding regarding the clear and convincing evidentiary standard of review. *Memorandum Decision and Order on Petitions for Rehearing*, CV-2009-647 (Fifth Jud. Dist., Nov. 2, 2010) (“Memorandum Decision on Rehearing”). “[A]ny determination by the Director that the senior is entitled to less than the decreed quantity needs to be supported by [clear and convincing evidence].” *Memorandum Decision on Rehearing* at 7. Pursuant to the district court’s instructions on remand, *Memorandum Decision and Order on Petition for Judicial Review*, CV-2009-647 (Fifth Jud. Dist., May 4, 2010) (“Memorandum Decision”),<sup>1</sup> the Director applied the clear and convincing evidentiary standard of proof to the record, and found that A&B was not materially injured. The Director denies A&B’s request.

**2. Request for Hearing (*Petition 4-5*)**

Citing Idaho Code § 42-1701A(3), A&B requests a hearing. Idaho Code § 42-1701A(3) states that a hearing may occur if a hearing “has not previously been afforded . . . .” Here, an 11-day administrative hearing was conducted in which argument, evidence, and testimony were presented. Each of the issues raised by A&B is based on the record before the district court. The Director denies A&B’s request.

**3. A&B’s Well System (*Petition 5-7*)**

**A. Interconnection**

A&B asks the Director to reconsider the requirement that A&B interconnect wells that comprise the project’s delivery system. A&B is factually correct that all of its wells are not interconnected. According to the district court, “The decision of the Director to evaluate material injury to the 36-2080 water right based on depletion to the cumulative quantity as opposed to determining injury based on depletions to individual points of diversion is affirmed.” *Memorandum Decision* at 50. This holding was not appealed. The Director denies A&B’s request.

---

<sup>1</sup> The *Memorandum Decision* was signed on May 4, 2010; however, due to errors in service, the court has treated “the date of entry of the *Memorandum Decision* . . . as May 20, 2010.” *Order of Extension Re: Filing Date of Memorandum Decision* (May 19, 2010).

## B. Diversion Data/Irrigation Requirement

A&B asks the Director to reconsider his use of diversion data. In its Petition, A&B criticized the Department's use of monthly data for purposes of determining material injury. According to one of its experts, Dr. Charles C. Brockway ("Brockway"), "the peak capacity period for irrigation occurs on a daily basis and . . . failure to obtain sufficient water within an irrigation week will cause crop damage during a high-demand period." *Petition* at 7. A&B claims this means it needs a maximum diversion requirement of 0.89 miner's inches per acre at the wellhead to meet its crop needs during the peak period. Ex. 200 at 4-7; Tr. Vol. XI, pp. 2240-2241.

The irony of this criticism is that Brockway used annual and monthly diversion evapotranspiration ("ET") data to theoretically compute the 0.89 miner's inches per acre maximum crop need. Use of monthly ET values is consistent with A&B's evidentiary reliance on monthly diversion data. In addition, the Department used the monthly diversion data provided by A&B and relied upon by A&B's experts to examine injury. Expert witnesses for junior ground water users also used the same annual and monthly diversion data to develop their responses to A&B's claim of injury. *See e.g.* Ex. 301. These data were testified to at the hearing, admitted into evidence, and made part of this record. Using the data offered and relied upon by A&B, the Department can evaluate A&B's claimed need of 0.89 miner's inches per acre.

A&B's hypothetical maximum instantaneous wellhead flow rate requirement of 0.89 miner's inch per acre is not supported by annual measurements of wellhead instantaneous flow measurements converted to calculated consumptive use. In addition, A&B's assertion that 68,047 acre-feet is its peak monthly wellhead volume demand cannot be reconciled with actual measured peak monthly pumping by A&B over the history of the project.

### i. How A&B computed its maximum instantaneous wellhead requirement of 0.89 miner's inches per acre

In its expert report, which was co-authored by Brockway, A&B calculated a peak pumping rate of 0.89 miner's inches per acre to satisfy the maximum water consumption of a growing crop. Brockway's cross examination testimony by counsel for Pocatello offers some insight into the method of calculation:

Q. [BY MS. KLAHN] Okay. And would you agree that the rate of delivery to the B unit farmers during the peak demand period is among the most important disputes in this case?

A. Among the most important, yes.

Q. Okay. And the rate of delivery that the A & B consultants and you, including you, computed for the peak delivery for the B unit farmers is .89 miner's inches per acre; is that correct?

A. Yes.

Tr. Vol. XI, pp. 2239.

And further in Brockway's testimony:

Q. [BY MS. KLAHN] And your .89 miner's inches per acre irrigation requirement was a number at the well, was it not?

A. It was, yes.

Q. So if we wanted to compute the amount of water at the farm turnout that you're recommending, we would apply a -- what? -- 3 percent conveyance loss to that?

A. I believe we said it was between zero and 5 and that 3 would be a good number to use.

Q. Okay. Does that work out to about .86 miner's inches per acre?

A. Well, it would be 97 percent of .88 [sic]. Whatever that is.

Q. Will you accept .86, subject to check?

A. Subject to your calculation, yes.

Tr. Vol. XI, pp. 2240-2241.

The following quoted cross examination exchange between Brockway and counsel for Pocatello about computation of the instantaneous rate explains the process by which irrigation application losses are accounted for in the relationship between the field headgate requirement and the consumptive use requirement of the crop. The examination appears to establish that the maximum instantaneous water diversion requirement of 0.89 miner's inches per acre was computed using ET for the peak monthly consumption. The discussion is about monthly periods.

Q. [BY MS. KLAHN] So is it true that your irrigation requirements analysis included ET for the crops on the B unit? So is it true that your irrigation requirements analysis included ET for the crops on the B unit?

A. Yes.

Q. That's one of the inputs?

A. Yeah.

Q. Okay. Inputs. So it included ET. And it included crop distribution; correct?

- A. It did.
- Q. Okay. And it included acreage; is that correct?
- A. Yes.
- Q. Acreage for each well system; right?
- A. Yes.
- Q. It included a farm efficiency number, farm application efficiency?
- A. Yes.
- Q. How would you like me to indicate that? Just "efficiency?" Is that okay?
- A. Well, I think "application efficiency" is appropriate.
- Q. Okay. And conveyance loss; is that correct?
- A. Yes.
- Q. Have I left out any inputs?
- A. I don't think so.
- Q. Okay. Now, for these data for ET, this was a month-by-month, year-by-year ET value, right, based on each crop? So it was districtwide; right?
- A. It was weighted, yes.
- Q. And it was a districtwide number in the sense that you used the districtwide crop distribution to figure out how the ET was distributed?
- A. I believe we did, but the analysis was for individual well systems.

Tr. Vol. XI, pp. 2246-2247.

Finally, Brockway testified again about the method of accounting for application efficiency losses:

- Q. [BY MS. KLAHN] Okay. So starting at the field, you took the ET and crop distribution and acreage and then applied the application efficiency and then another conveyance loss to sort of back up from the field to the well, is that fair, as far as how you did your irrigation requirements?
- A. That's fair.

Q. Okay. Because your irrigation requirement is at the well, isn't it?

A. That's right, uh-huh.

Q. Okay. And you did that on a monthly basis over your study period for each well system; right?

A. That's right. And we varied the efficiency -- application efficiency by month, by the period.

Tr. Vol. XI, pp. 2249-2250.

This information, taken together, shows that, to compute its maximum instantaneous wellhead diversion flow rate requirement, A&B started at the field with crop irrigation requirement and worked backward to the wellhead. Tr. Vol. XI, pp. 2249-2250. A&B considered ET, crop distribution, irrigated acreage, irrigation efficiency, and conveyance loss from the field headgate to the well. Ex. 200 at 4-1-6; Tr. Vol. XI, pp. 2249-2250. A&B examined this information over the period 1995-2007. Ex. 200 at 4-1. For the 1995-2007 average July<sup>2</sup> conditions, the theoretical irrigation requirement at the wellhead was 0.79 miner's inches per acre. Ex. 200 at Tbl. 4-11.

The greatest computed July theoretical demand occurred in 2007. *Id.* Using July 2007 ET data, and applying the method described in Brockway's testimony, A&B computed a July 2007 maximum monthly pumping demand of 68,047 acre-feet at the wellhead. *See* Ex. 200 at Tbl. 4-9. The July 2007 ET data were adjusted for rainfall and for crop mix to estimate the quantity of water that must be available for the crop to grow. Because additional water is necessary to apply and deliver the irrigation water to the crop, an additional quantity of water was added for application efficiency and conveyance loss. The entire computation resulted in a 68,047 acre-feet maximum monthly water demand at the wellhead. Ex. 200 at 4-1-6. The underlying computations for deriving this volume of water are not clearly established in the exhibits and testimony.

Dividing 68,047 acre feet by the number of acres authorized by A&B's water right (62,604.3 acres) equals approximately 1.09 acre-feet per acre maximum irrigation volume during July 2007. Table 4-11 converts the 1.09 acre-feet per acre per month to 1,107 cfs,<sup>3</sup> or 0.89<sup>4</sup>

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<sup>2</sup> In its expert report, A&B analyzed "July" ET. To "ensure consistency between crop ET estimates and pumping volumes . . . the Agrimet crop ET data was reduced from the daily data to monthly data using the same period as A&B's pumping data (middle of the previous month to middle of the current month)." Ex. 200 at 4-2. Therefore, A&B's reference to July ET is actually a reference to ET data collected over a 30-day period, June 15 to July 15.

<sup>3</sup> In order to calculate 1,107 cfs, the monthly volume has to be divided by 31 days, instead of the actual 30 days between June 15 and July 15.

<sup>4</sup> The 68,047 acre-feet volume is equivalent to 0.88 miner's inches per acre for a 31-day month, and 0.91 miner's inches per acre for a 30-day month. A flow rate of 0.89 miner's inches per acre converts to an equivalent flow rate of 0.0178 cfs per acre, or 1,114 cfs for the entire project, which slightly exceeds A&B's asserted flow rate of 1,107

miner's inches per acre. Ex. 200 at 4-7. A&B's water right authorizes diversion of 1,100 cfs over 62,604.3 acres, which equates to 0.88 miner's inches per acre.

**ii. A&B's computed theoretical flow of 0.89 miner's inches per acre maximum instantaneous wellhead requirement is not supported by the record**

A&B asked the Director to examine peak water use for purposes of assessing material injury. *Petition* at 7. Although A&B refers to "peak capacity" or "peak water use" as a daily or weekly value, the 0.89 miner's inches is interpreted as an instantaneous flow rate.

In addition to recording monthly pumping volumes, A&B periodically measures its well capacities, or instantaneous flow rates, across the project. Instantaneous flow rate data is compiled in its Annual Report for the years 1963 through 2007. Ex. 132 (A&B 2281-2516); Ex. 133; Tr. Vol. VI, pp. 1284-1289. The Annual Report describes "high" and "low" open valve discharge readings or well capacity. *Id.* When these flow rates are measured, the well valves are completely open, and are not throttled back. Tr. Vol. VI, p. 1286. The high flow measurements are usually taken early in the irrigation season. Ex. 132 (A&B 2281-2516); Ex. 133; R. at 1118; Tr. Vol. VI, pp. 1284-1289. The low flow rates are usually measured over a period of days during the peak irrigation season (i.e., June 15 to July 15). *Id.* The low flow open valve readings represent maximum daily discharge or well capacity during the peak season. Tr. Vol. VI, p. 1285-1286. A&B relied on these low flow data in its 1994 *Petition for Delivery Call* and 2007 *Motion to Proceed* to demonstrate that its available peak water supply was less than 1,100 cfs. R. at 13 ("974 cfs") & 835 ("970 cfs"). By converting past year's low flow measurements to water available for crop consumption using the methods described by Brockway's testimony, converting the 0.89 miner's inches to a consumptive irrigation flow rate applying 2007 conveyance and application efficiencies, and comparing the two values, the Director can determine whether A&B is injured by a decline in wellhead capacity flow rates.

In its expert report, A&B asserted a maximum peak diversion requirement of 0.89 miner's inches per acre at the wellhead. Using the licensed flow rate of 1,100 cfs, adjusted for A&B's 2007 efficiency estimate of 3 percent conveyance loss, Ex. 200 at 4-4, and July 2007 irrigation efficiency of 79.2 percent,<sup>5</sup> the theoretical maximum instantaneous consumptive use flow rate is 845 cfs (0.67 miner's inches per acre). This theoretical maximum crop demand will be compared to the measured instantaneous low flow rates available in past years after adjusting for efficiencies in each of the target years to determine whether the theoretical maximum consumptive instantaneous flow has ever been delivered or needed by crops growing on A&B lands.

A&B's water right was licensed on June 10, 1965. Ex. 157B; Tr. Vol. VI, pp. 1151-1152. The peak low flow measurement for 1965 was 1,035.7 cfs. Ex. 132 (1965 Annual Report

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cfs from its expert report. For purposes of discussion, the Director will accept A&B's stated wellhead flow rate requirement of 0.89 miner's inches per acre.

<sup>5</sup> In its expert report for the months May-August, A&B estimated gravity efficiency at 60 percent and sprinkler efficiency at 80 percent. Ex. 200 at Tbl. 4-7. In 2007, 4 percent of A&B acres were irrigated by gravity, and 96 percent of acres were irrigated by sprinkler. *Id.* at Tbl. 4-6. Combining the percent gravity and sprinkler systems in July 2007 results in a weighted irrigation efficiency of 79.2 percent.

Part 2). In 1965, conveyance loss and irrigation efficiency were estimated at 8 percent and 56 percent, respectively. R. at 1115 & 1148; Ex. 113 at 58 (A&B 609) (As stated by the USBR, "The 20-year (1963-82) average annual conveyance losses . . . in Unit B were 8 percent . . ."). Adjusting for conveyance loss and irrigation efficiency, the maximum amount of water available for consumptive use by crops in 1965 was 534 cfs (0.43 miner's inches per acre),<sup>6</sup> or 311 cfs less than the computed instantaneous consumptive demand of 845 cfs.

Assuming water was available in 1965 to divert the full decreed flow rate of 1,100 cfs, adjusted for 8 percent conveyance loss and 56 percent application efficiency, the computed total instantaneous flow rate available for crop consumption would have been 567 cfs (0.45 miner's inches per acre), or 278 cfs less than the computed instantaneous consumptive demand of 845 cfs.<sup>7</sup>

Applying conveyance and application efficiencies existing in 1965, A&B would have had to divert 1,640 cfs to achieve 845 cfs of consumptive use. This exceeds the authorized diversion rate of 1,100 cfs, and the greatest recorded peak season low flow capacity of 1,087 cfs.

In 1987, the actual peak low flow capacity of A&B production wells was 1,024.6 cfs. Ex. 132 (1987 Annual Report Part 2).<sup>8</sup> In 1987, 67 percent of A&B acres were irrigated by gravity, and 33 percent of acres were irrigated by sprinkler. R. at 1115, Fig. 4. In its expert report for the months May-August, A&B estimated gravity efficiency at 60 percent and sprinkler efficiency at 80 percent. Ex. 200 at Tbl. 4-7. Combining the percent gravity and sprinkler systems in July 1987 results in a weighted irrigation efficiency of 66.6 percent. In a 1985 planning study, the USBR estimated conveyance loss as 5 percent. R. at 1115; Ex. 113 at 58 (A&B 609). Five percent is the best evidence available for determining conveyance loss in 1987.

Beginning with a diversion of 1,024.6 cfs, and adjusting for 5 percent conveyance loss and 66.6 percent irrigation efficiency, the maximum amount of water available for consumptive use by crops in July 1987 was 648 cfs (0.52 miner's inches per acre), or 197 cfs less than the computed instantaneous consumptive use demand of 845 cfs.

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<sup>6</sup> The consumptive use requirement computed here is virtually identical to the consumptive use requirement planned for by the USBR in the 1955 Definite Plan Report, Ex. 111A. In the 1955 Definite Plan Report, the USBR stated that the Unit B system "will provide 1.01 acre-feet per acre at the pump or 0.96 acre-feet per acre at the farm head gates during a 31-day peak demand period." Ex. 111A at 50. The 1.01 acre-feet per acre at the pump and 0.96 acre-feet per acre at the farm head gate delivery amounts are equivalent to 0.82 miner's inches per acre and 0.78 miner's inches per acre, respectively. Applying 56 percent irrigation efficiency to the 0.78 miner's inches per acre farm head gate delivery rate means that, as designed, the Unit B system provided 0.44 miner's inches per acre for consumptive use by crops during the peak demand period.

<sup>7</sup> The greatest recorded peak season low flow capacity, 1,087 cfs, occurred in 1974. CM Rule 42.01.c.

<sup>8</sup> The *Final Order on Remand* incorrectly found that the 1987 peak low flow capacity was 1,054 cfs. *Final Order on Remand* at 8. The high flow well capacity for 1987 was 1,054 cfs. The peak low flow well capacity for 1987 was 1,024.6 cfs. The Department inadvertently transposed the values.



Assuming that a diversion rate of 1,100 cfs was available in July 1987, and adjusting that diversion for 5 percent conveyance loss and 66.6 percent irrigation efficiency, the amount of water available for consumptive use by crops would have been 696 cfs (0.56 miner's inches per acre), or 149 cfs less than the computed instantaneous consumptive use demand of 845 cfs.

Applying conveyance and application efficiencies existing in July 1987, A&B would have had to divert 1,336 cfs to achieve 845 cfs of consumptive use. This exceeds the authorized diversion rate of 1,100 cfs, and the greatest recorded peak season low flow capacity of 1,087 cfs.

In 1991, the peak low flow capacity of A&B production wells was 1,013.4 cfs. Ex. 133 (1991 Annual Report Part 2). In 1991, 50 percent of A&B acres were irrigated by gravity, and 50 percent of acres were irrigated by sprinkler. R. at 1115, Fig. 4. Using A&B's efficiency values for gravity and sprinkler irrigation systems, Ex. 200 at Tbl. 4-7, for July 1991, weighted irrigation application efficiency was 70 percent.

Beginning with a diversion of 1,013.4 cfs, and adjusting for 5 percent conveyance loss and 70 percent irrigation efficiency, the maximum amount of water available for consumptive use by crops in July 1991 was 674 cfs (0.54 miner's inches per acre), or 171 cfs less than the computed instantaneous consumptive use demand of 845 cfs.

Assuming that a diversion rate of 1,100 cfs was available in July 1991, and adjusting that diversion for 5 percent conveyance loss and 70 percent irrigation efficiency, the amount of water available for consumptive use by crops would have been 732 cfs (0.58 miner's inches per acre), or 114 cfs less than the computed instantaneous consumptive use demand of 845 cfs.

Applying conveyance and application efficiencies existing in July 1991, A&B would have had to divert 1,271 cfs to achieve 845 cfs of consumptive use. This exceeds the authorized diversion rate of 1,100 cfs, and the greatest recorded peak season low flow capacity of 1,087 cfs.

In 2002, the peak low flow well capacity of A&B production wells was 973.9 cfs. Ex. 133 (2002 Annual Report Part 2). In 2002, 14 percent of A&B acres were irrigated by gravity, and 86 percent of acres were irrigated by sprinkler. R. at 1115, Fig. 4. Using A&B's efficiency values for gravity and sprinkler irrigation systems, Ex. 200 at Tbl. 4-7, for July 2002, weighted irrigation efficiency was 77.2 percent. In A&B's expert report and at the hearing, conveyance loss for this time period was established as 3 percent. Ex. 200 at 4-4; R. at 3088.

Beginning with a diversion of 973.9 cfs, and adjusting for 3 percent conveyance loss and 77.2 percent irrigation efficiency, the amount of water available for consumptive use by crops was 729 cfs (0.58 miner's inches per acre), or 116 cfs less than the computed instantaneous consumptive use demand of 845 cfs.

If it is assumed that a diversion rate of 1,100 cfs was available in July 2002, and adjusting that diversion for 3 percent conveyance loss and 77.2 percent irrigation efficiency, the amount of water available for consumptive use by crops would have been 824 cfs (0.66 miner's inches per acre), or 21 cfs less than the computed instantaneous consumptive use demand of 845 cfs.

Applying conveyance and application efficiencies existing in July 2002, A&B would have had to divert 1,128 cfs to achieve 845 cfs of consumptive use. This exceeds the authorized diversion rate of 1,100 cfs, and the greatest recorded peak season low flow capacity of 1,087 cfs.

In 2006, the peak low flow capacity of A&B production wells was 970 cfs. Ex. 133 (2006 Annual Report Part 2); *Final Order on Remand* at 18. In 2006, 6 percent of A&B acres were irrigated by gravity, and 94 percent of acres were irrigated by sprinkler. R. at 1115, Fig. 4. For July 2006, weighted irrigation efficiency was 78.8 percent.

Beginning with a diversion of 970 cfs, and adjusting for 3 percent conveyance loss and 78.8 percent irrigation efficiency, the amount of water available for consumptive use by crops was 741 cfs (0.59 miner's inches per acre), or 104 cfs less than the computed instantaneous consumptive use demand of 845 cfs.

Assuming that a diversion rate of 1,100 cfs was available in July 2006, and adjusting that diversion for 3 percent conveyance loss and 78.8 percent irrigation efficiency, the amount of water available for consumptive use by crops would have been 841 cfs (0.67 miner's inches per acre), or 4 cfs less than the computed instantaneous consumptive use demand of 845 cfs.

Applying conveyance and application efficiencies existing in July 2006, A&B would have had to divert 1,106 cfs to achieve 845 cfs of consumptive use. This exceeds the authorized diversion rate of 1,100 cfs, and the greatest recorded peak season low flow capacity of 1,087 cfs.

Therefore, despite reduced peak low flow diversions that are less than 1,100 cfs, A&B's improved efficiencies, over time, have allowed it to provide more water for consumptive use by crops than was available at the time the right was licensed. A&B's calculated maximum peak diversion rate requirement (1,107 cfs) is greater than the licensed maximum rate of diversion (1,100 cfs), and the greatest recorded peak season low flow (1,087 cfs). During its historical record, the Unit B well system has never been able to produce the licensed maximum rate during the peak demand period or been able to satisfy the maximum peak period consumptive use requirement asserted by A&B in its expert report.

**iii. A&B's assertion that increases in efficiency have been "offset" by increased ET and a change in crop mix are not supported by the record**

A&B argues that any increase in efficiency is "offset" by increased ET. Ex. 200 at 4-18. In its expert report, A&B found an increase in ET by comparing weather data from the Rupert Agrimet station for the period 1995-2007 with a 1955 ET estimate from the USBR's 1955 Definite Plan Report. *Id.* at 4-9-10, Tbl. 4-12. A&B concluded in its expert report that average July crop ET has increased by 40 percent, and that peak July crop ET has increased by 53 percent. *Id.* at 4-18. A&B asserts the increase in ET "offsets the decrease in demand that may occur from efficiency gains from installing sprinklers." *Id.*

A&B's comparison of ET, based on the 1955 Definite Plan Report, and 1995-2007 ET from Rupert Agrimet is not reliable. The estimates were determined for different time periods using different methods and different data.

The Agrimet ET estimate is based on application of a physically based, standardized ET equation using daily data from a single weather station. In contrast, the 1955 Definite Plan Report's original irrigation season diversion requirement was semi-quantitatively determined by comparing results from a different temperature-based consumptive use algorithm with observations of irrigation requirements for crops grown on project lands in the vicinity of A&B. Ex. 111A at 39, 42-43. The monthly distribution of farm deliveries was assumed to be the same as that for the South Side Pumping Unit of the Minidoka Project (i.e., Twin Falls Canal Company). *Id.* at 45.

In its expert report, Pocatello examined June, July, and August ET from 1907-2002 from the National Weather Service's Rupert weather station. Ex. 334 at 20. The source of the analysis was a University of Idaho publication, authored by Richard G. Allen and Clarence W. Robison, and titled *Evapotranspiration and Consumptive Irrigation Water Requirements for Idaho*. In analyzing the data, Pocatello concluded that there is no "long-term trend in ET." *Id.*

The Director agrees with Pocatello's conclusion. Instead of comparing a period of recent record with a single historical year—based on two different methods for determining ET from different locations—Pocatello's analysis examined nearly 100 years' worth of data from the same weather station. The Director finds there is no reasonably discernable long-term July ET trend, and that A&B's improved efficiencies have not been "offset" by increased ET.

In addition to arguing that an increase in ET has "offset" its improved irrigation efficiencies, A&B also asserts that, "one reason for the higher current evapotranspiration requirements and the higher peak month ET requirements is the change in crop distribution." Ex. 200 at 4-10. A&B considered impacts on mid-season crop water demand of a change in crop mix from what was originally assumed in the USBR's 1955 Definite Plan Report to support its theoretically based consumptive use requirement. *Id.* As shown in the table below, the following crop mixes were evaluated in A&B's ET analysis:

Crop Type	1955 Definite Plan Report	A&B's 1995-2007 study period
Grain	13%	49%
Potatoes	15%	12%
Sugar Beets	11%	24%
Beans & Peas	14%	7%
Alfalfa & Clover	36%	7%
Pasture	9%	1%
Miscellaneous	2%	1%

Ex. 200 at Tbls. 4-3 & 4-14. *See also* Ex. 111A at 47.

According to A&B, "it is reasonable to assume that this crop mix represents the average current crop distribution for the study period." *Id.* at 4-2.

In Table 7 of the 1955 Definite Plan Report, the farm delivery requirements for Unit A during the peak demand period were identified. Ex. 111A at 47. The USBR considered the same crop mix for Unit B but the peak demand rates for Unit B had to be adjusted based on the relative proportions of different land classifications. *Id.* at 47-48. The USBR's justification for assuming the same crop mix was that, "There is only a very slight difference in the anticipated cropping programs. The only significant difference which would affect the farm delivery is the distribution of land classes." *Id.* at 46. The highest crop-specific, peak period water application depth was for potatoes (16 inches) followed by alfalfa and pasture (12 inches). *Id.* at 47. The lowest peak period water application depth was for grain (6 inches). *Id.*

As shown in the table below, applying the USBR's estimates for the peak period water demand depths for Unit A soils, Ex. 111A at 47, to the crop mixes used in the A&B expert report analysis, Ex. 200 at Tbl. 4-3, results in the prediction of a lower peak water demand for the crop mix evaluated for A&B's 1995-2007 study period (8.4 in.) than for the crop mix assumed in the Definite Plan Report (10.7 in.). This result is consistent with the USBR's determination that, "The July and August water requirement for row crops is considerably higher than that for grain" *Id.* at 42.

Crop Type	1955 Definite Plan Report		Study period for A&B's expert report (1995-2007)	
	Percent	Water Application Depth During Peak Demand Period (in.)	Percent	Water Application Depth During Peak Demand Period (in.)
Grain	13	6	49	6
Potatoes	15	16	12	16
Sugar Beets	11	8	24	8
Beans & Peas	14	8	7	8
Alfalfa & Clover	36	12	7	12
Pasture	9	12	1	12
Miscellaneous	2	6	1	6
Total	100	weighted average = 10.7	101	weighted average = 8.4

Presently, A&B irrigates more sugar beets than it did historically. However, A&B also irrigates considerably more grains than it did historically. A&B no longer irrigates as much alfalfa and clover as it did historically. The Director finds that ET has not increased as a result of changes in crop mix.

Because there is no discernable long-term July ET trend and A&B's crop mix has not become more consumptive, the Director finds that increases in efficiency have not been "offset" by ET or a change in crop mix.

**iv. A&B's asserted 68,047 acre-feet peak monthly pumping volume is theoretically based and not supported by the record**

A&B argues it should be entitled to a maximum instantaneous wellhead flow rate of 0.89 miner's inches per acre. As stated above, A&B derived 0.89 miner's inches per acre from a peak monthly pumping volume of 68,047 acre-feet at the wellhead. This is a theoretical peak monthly volume, not a measured monthly volume. As stated above, the theoretical volume was derived from monthly values. If A&B were to pump 68,047 acre-feet of water over a 30-day period, the equivalent flow rate would be 1,144 cfs.

The maximum, monthly volume of water ever diverted by A&B was 58,528 acre-feet, pumped in July 1963, and occurred over a 31-day period (July 1 to July 31). Ex. 132 (A&B 1450). In 1963, the project was irrigated by gravity systems with greater losses and less efficiencies than today's pressurized systems with the attendant reductions in losses and resulting increases in efficiencies. R. at 1111, 1148. In 2007, the maximum, monthly volume diverted was 51,245 acre-feet, pumped from June 15 to July 15. Ex. 132 (A&B 1450). In 2007, 96 percent of the place of use was converted to sprinkler irrigation and conveyance loss was reduced to 3 percent. Ex. 200 at Tbl. 4-6; R. at 1114-1115; R. at 3088. A&B's theoretically based peak monthly volumetric diversion requirement (68,047 acre-feet) is 9,519 acre-feet more than the greatest monthly volume of water ever pumped on the project (58,528 acre-feet). The testimony by farmers at the hearing, together with crop yield records, and the Department's METRIC and NDVI analyses, supports a determination that the current water supply is sufficient for A&B to grow crops to maturity. *Final Order on Remand* at 10-12.

**v. The Director concludes by clear and convincing evidence that A&B is not materially injured**

As stated by the district court in its May 4, 2010 *Memorandum Decision*,

Conditions surrounding the use of water are not static. Post-adjudication circumstances can result where a senior may not require the full quantity decreed. The most obvious example would be if the senior is not irrigating the full number of acres for which the right was decreed. Efficiencies, new technologies and improvements in delivery systems that reduce conveyance loss can result in a circumstance where the full decreed quantity may not be required to irrigate the total number of decreed acres. The subsequent lining or piping of a ditch or the conversion from gravity fed furrow irrigation to sprinkler irrigation can reduce the quantity of water needed to accomplish the purpose of use for which the right was decreed.

*Memorandum Decision* at 30.

In its November 2, 2010 *Memorandum Decision on Rehearing*, the district court went on to say, “In the delivery call, the senior’s present water requirements are at issue. If it is determined that the senior’s present use does not require the full decreed quantity, then the quantity called for in excess of the senior’s present needs would not be put to beneficial use or put differently would be wasted.” *Memorandum Decision on Rehearing* at 8. “[I]n order to give proper presumptive weight to a decree any finding by the Director that the quantity decreed exceeds that being put to beneficial use must be supported by clear and convincing evidence.” *Memorandum Decision* at 38.

It is undisputed that A&B’s calling water right, 36-2080, authorizes a maximum diversion rate of 1,100 cfs for the irrigation of 62,604.3 acres (0.88 miner’s inches per acre). To the extent water is available, A&B is authorized to divert water within the limits of its water right. It is undisputed that the A&B project has changed from a predominantly gravity fed flood/furrow system to the highly efficient, sprinkler irrigation system that exists today. It is undisputed that conversion of A&B’s system has occurred over time. It is undisputed that the flow rate diverted and volume pumped by A&B has decreased over time.

Due to decreased conveyance loss and improved irrigation efficiencies, the Director concludes that A&B’s efficiencies have allowed it to increase available water to grow crops to maturity. The Director concludes that there is no discernible long-term trend in ET and that A&B’s efficiencies have not been “offset” by increased ET or different cropping patterns. This conclusion further supported by testimony at the hearing by farmers, crop yield records, and the Department’s METRIC and NDVI analyses. A&B may change to a more consumptive crop mix, which could require more water than is available under current circumstances; however, based on examination of historical and current crop mixes contained in this record, the Director concludes that A&B has sufficient water to raise crops to maturity. The Director concludes that A&B’s asserted maximum irrigation requirement, as presented in its expert report, is not supported by its actual water use over the history of the project. The Director concludes by clear and convincing evidence that A&B is not materially injured. A&B is authorized to divert water within the limits of its decree and may revert to less efficient means of irrigation, which could require more water than is available under current conditions. *See Idaho Code* §§ 42-223(9) and 42-250. The Director denies A&B’s request.

#### **4. A&B’s Water Supply (*Petition 7*)**

A&B states that the Director found “that well capacities and available ground water level in 1974 are still available to A&B today.” *Petition* at 7. The Final Order did not find that 1974 well capacities and ground water levels are still available today. The finding and supporting conclusion show that 1974 was the year that had the highest cumulative recorded well capacities during the peak irrigation season (1,087 cfs), and that maximum capacity did not provide A&B the ability to divert 0.88 miner’s inches per acre for the 62,604.3-acre place of use under the calling right during the peak season. CM Rule 42.01.c. Adjusted for 8 percent conveyance loss, R. at 1148; Ex. 113 at 58 (A&B 609), the amount of water available for on-farm delivery during the peak season was 1,000 cfs (0.80 miner’s inches per acre). Further adjusted for 56 percent irrigation efficiency, the computed total instantaneous flow rate available for crop consumption would have been 560 cfs (0.45 miner’s inches per acre). The Director denies A&B’s request.

## 5. The Geologic Transition Zone (*Petition 9-11*)

A&B states that the Director contradicted himself in his discussion of the geologic transition zone in the Final Order. A&B asserts that the Final Order criticizes well construction and well placement. The Final Order does neither. The question is whether A&B may curtail junior ground water pumping because of inherent hydrogeology. The hydrogeology in the southwestern area is inherently poor and was documented as such by numerous letters from the late 1950s to the early 1960s. *Final Order on Remand* at 4-5. The problems discussed in the letters were not the result of junior ground water pumping by others. Additional inherent hydrogeological factors that were not specifically discussed in the Final Order on Remand, but are part of the record, directly impact water availability in the southwestern area.

Compared with the rest of the A&B project, the southwestern area has a high ground water hydraulic gradient. R. at 1128-1129. In 1956, the USGS published a report that mapped, among other things, the water table gradient across the project. *Id.* at 1129, Fig. 14. “The gradient of the water table averages about 3 feet per mile beneath most of Unit B Pumping Division, but under the western part of the Division, the gradient steepens to about 12 feet or more per mile.” *Id.* at 1128. “[D]ifferences in the gradient are probably caused by differences in the permeability of the basalt and by the presence of nonpermeable fine-grained sediments intercalated with the basalt.” *Id.* at 1128-1129. The fine-grained sediments were deposited by historic Lake Burley. The greater hydraulic gradient translates into lower aquifer transmissivity, which, in the southwestern area, directly impacts well yield. Tr. Vol. IX, pp. 1740-1743.

Specific capacity is the pumping rate for a well in the aquifer divided by the drawdown in the well. Tr. Vol. I, p. 59. Low transmissivity contributes to low well yield. Tr. Vol. I, pp. 58-60. *See also* Ex. 113D.<sup>9</sup> The lower the specific capacity, the lower the yield. Tr. Vol. I, p. 80. “All of the irrigation wells with specific capacities that are less than 100 gpm/feet are for wells in the southwest project townships (T8S/R21E, T9S/R21E, T9S/R22E, T9S/R23E, and T10S/R22E). None of the irrigation well specific capacities that are less than 100 gpm/ft are for irrigation wells in the northeast project townships (T8S/R23E, T8S/R24E, T7S/R23E, T7S/R24E, and T7S/R25E).” These are inherent factors that are consistent with the hydrogeology of the area. Tr. Vol. I, pp. 95-97.

In its Petition, A&B says, “the Director now concludes that the U.S. Bureau of Reclamation should have never drilled wells in the southwest area in the first place.” *Petition* at 10. The Final Order does not take issue with well siting in the southwestern area; it does, however, conclude that A&B cannot seek curtailment of junior-priority ground water rights because of inherent hydrogeological facts that cannot be attributed to junior ground water pumping. The Director denies A&B’s request.

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<sup>9</sup> Exhibit 113D is not listed separately as an exhibit in the record index, but can be found within the documents comprising Exhibit 113, at .pdf page 200.

## 6. A&B's Enlargement Acres (*Petition 11*)

A&B asks the Director to reconsider his requirement that, “[b]efore seeking curtailment of junior-priority ground water rights under 36-2080, A&B must have mechanisms in place to self-regulate its junior and subordinated enlargement acres.” *Petition* at 11 citing *Final Order* at 17. A&B states,

[I]t is not obligated to “self-regulate” its enlargement rights. Such a condition results in unconstitutional administration of A&B’s junior priority water rights. Moreover, the Director has no authority to impose a different standard upon A&B’s enlargement water rights than other similarly situated enlargement water rights across the ESPA. If curtailment of junior priority water rights is necessary to satisfy A&B’s senior water right no. 36-2080, then A&B’s junior priority enlargement water rights will be subject to that administration. It’s not the other way around. A&B does not have to curtail its own junior rights before the Director administers any other junior rights.

Under the Director’s flawed reasoning any water user with an enlargement water right could not request administration of its more senior rights until it “self-regulated” or curtailed its own junior right. The Director erroneously applied Idaho law in his analysis on this issue.

*Id.*

A&B admitted during the hearing that even during allotment, or the peak season, it has no ability to limit distribution of water under 36-2080 to the original 62,604.3 acres; rather, A&B patrons irrigate all junior and/or subordinated enlargement acres with water pumped under its senior right. Tr. Vol. IV, pp. 742-743. *See also* Ex. 200, Figs. 4-15-16; Ex. 201AC; Ex. 201AD. Therefore, A&B irrigates 4,081.9 more acres than is authorized by its calling water right.

The Final Order on Remand improperly required A&B to “self-regulate,” and on this point the Director grants A&B’s request. Nonetheless, before the Director will curtail junior water rights, of which A&B’s enlargement acres are potentially a part, A&B must be able to account for how its calling right can be administered without enlargement. The Director will not regulate junior water rights until A&B has provided the accounting of acreage to which water would no longer be delivered.

## 7. A&B's Motion to Proceed (*Petition 12*)

A&B states that the “Director erroneously relied upon A&B’s 2007 *Motion to Proceed*, rather than the decreed diversion rate in analyzing material injury to water right no. 36-2080.” *Petition* at 12. As stated previously, A&B is authorized to divert within the limits of its calling water right, 36-2080. “[I]n order to give the proper presumptive weight to a decree any finding by the Director that the quantity decreed exceeds the quantity being put to beneficial use must be supported by clear and convincing evidence.” *Id.* at 38. In the Final Order on Remand, the Director considered all evidence in the record, including A&B’s 1994 *Petition for Delivery Call*



and 2007 *Motion to Proceed*. As required by the district court's order of remand, the Director applied the clear and convincing evidentiary standard of proof to the record and concluded, by clear and convincing evidence, that A&B was not materially injured. The Director denies A&B's request.

**8. Application of CM Rules to Juniors (*Petition 12-13*)**

Citing CM Rule 20.05 and 40.03, A&B states that the Director must consider "the 'reasonableness' and 'efficiency' of water use of affected junior ground water right holders." *Petition* at 12. In accord with the CM Rules, water use by juniors was considered in the course of these proceedings, discussed, and found to be reasonable. R. at 1117-1118; R. at 3106-3107. The Director denies A&B's request.

**9. Reasonable Pumping Levels (*Petition 13*)**

A&B asks the Director to reconsider his decision not to set a reasonable pumping level. The district court's *Memorandum Decision* states as follows: "The decision of the Director that A&B has not been required to exceed reasonable pumping levels is affirmed. This is based on the finding of no material injury at existing pumping levels. On remand, following application of the appropriate evidentiary standard a finding of material injury may require that the Director reevaluate this determination." *Memorandum Decision* at 50. The Final Order on Remand found that A&B was not materially injured; therefore, the Director did not examine reasonable pumping levels. The Director denies A&B's request.

**10. IGWA Witness Characterization (*Petition 13*)**

The Final Order on Remand characterized an A&B farmer called by IGWA as an A&B board member. The Final Order on Remand cited to a portion of the transcript to support the finding. A&B refers to the same transcript cite and states that the witness is on the board of the Magic Valley Ground Water District, not A&B. Upon further review, A&B correctly states that the IGWA witness is not on the board of A&B. On this point, the Director grants A&B's request.

**ORDER**

Based upon the foregoing, IT IS HEREBY ORDERED that A&B's Petition for Reconsideration is GRANTED in part and DENIED in part.

IT IS FURTHER ORDERED that A&B's request for hearing is DENIED.


Dated this 30<sup>th</sup> day of June, 2011.

  
GARY SPACKMAN  
Interim Director

**CERTIFICATE OF SERVICE**

I hereby certify that I served a true and correct copy of the following attached document on the persons listed below by mailing in the United States mail, first class with the correct postage affixed thereto, as well as by e-mail to those persons listed with e-mail addresses, on this 30<sup>th</sup> day of June, 2011.

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Deborah Gibson  
Idaho Department of Water Resources

# EXHIBIT B

0060

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF THE PETITION FOR )	
DELIVERY CALL OF A&B IRRIGATION )	CM-DC-2011-001
DISTRICT FOR THE DELIVERY OF GROUND )	
WATER AND FOR THE CREATION OF A )	<b>AMENDED FINAL ORDER</b>
GROUND WATER MANAGEMENT AREA )	<b>ON REMAND REGARDING</b>
)	<b>THE A&amp;B IRRIGATION</b>
)	<b>DISTRICT DELIVERY CALL</b>
_____ )	

On June 30, 2011, the Director of the Idaho Department of Water Resources (“Director” or “Department”) issued his *Order Regarding Petition for Reconsideration*, filed by the A&B Irrigation District (“A&B”). The corrections and clarifications contained in the *Order Regarding Petition for Reconsideration* are incorporated herein. This *Amended Final Order on Remand Regarding the A&B Irrigation District Delivery Call* supersedes the April 27, 2011 *Final Order on Remand Regarding the A&B Irrigation District Delivery Call*.

**FINDINGS OF FACT**

**I. Procedural Background**

1. This matter comes before the Department as a result of a remand from the Fifth Judicial District Court, in and for the County of Minidoka, of the Director’s June 30, 2009 *Final Order Regarding the A&B Delivery Call* (“June 2009 Final Order”). Before discussion of the court’s decision and the specific nature of the remand, a brief procedural history will be recited.

2. This proceeding originally came before the Department on July 26, 1994 when A&B<sup>1</sup> filed a petition for delivery call (“Petition for Delivery Call”). The Petition for Delivery Call sought administration of junior-priority ground water rights diverting from the Eastern Snake Plain Aquifer (“ESPA”) and the designation of the ESPA as a ground water management area (“GWMA”). On May 1, 1995, A&B, the Department, and other participants entered into an agreement that stayed the petition for delivery call until such time as a motion to proceed (“Motion to Proceed”) was filed with the Director. On March 16, 2007, A&B filed a Motion to

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<sup>1</sup> The A&B Irrigation District is made up of a surface water division, Unit A, and a ground water division, Unit B. Unless specified otherwise, all references to A&B in this order are to the ground water pumping division, Unit B.

Proceed seeking the administration of junior-priority ground water rights, and the designation of the ESPA as a GWMA.

3. On January 29, 2008, former Director David R. Tuthill, Jr. issued his initial final order ("January 2008 Final Order"), which found that A&B was not materially injured and denied its petition for creation of a GWMA.

4. On December 3, 2008, a hearing on A&B's delivery call was commenced before hearing officer Gerald F. Schroeder ("Hearing Officer"). Over the course of approximately eleven days, evidence and testimony was presented to the Hearing Officer by the Department and participating parties: A&B, the City of Pocatello ("Pocatello"), the Freemont Madison Irrigation District *et al.* ("Freemont Madison"), and the Idaho Ground Water Appropriators, Inc. ("IGWA").

5. On March 27, 2009, the Hearing Officer entered his *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations* ("Recommended Order"). In his Recommended Order, the Hearing Officer agreed with the Director's determination that A&B had not suffered material injury to its senior ground water right. The Hearing Officer disposed of A&B's petitions for reconsideration and clarification in his May 29, 2009 *Order Granting in Part and Denying in Part A&B's Petition for Reconsideration*, and June 19, 2009 *Response to A&B's Petition for Clarification*.

6. The Director subsequently issued his June 30, 2009 Final Order ("June 2009 Final Order"). In the June 2009 Final Order, the Director agreed with the Hearing Officer that A&B was not materially injured and denied its request for creation of a GWMA. Unless specifically discussed and modified, the June 2009 Final Order adopted the findings from the January 2008 Final Order and the recommendations from the Hearing Officer. *June 2009 Final Order* at 4.

7. A&B filed a timely petition for judicial review with the Fifth Judicial District Court, in and for the County of Minidoka. Respondents to the action were the Department, Freemont Madison, IGWA, and Pocatello.

8. On May 4, 2010, the court issued its *Memorandum Decision and Order on Petition for Judicial Review* ("Memorandum Decision") in CV-2009-647.<sup>2</sup> In its *Memorandum Decision*, the court affirmed the Director's decisions that: (1) Idaho's Ground Water Act applies retroactively to A&B's pre-1951 irrigation water right, 36-2080; (2) that A&B was not materially injured and its reasonable pumping levels had not been exceeded; (3) that A&B's water right was properly analyzed as an integrated system; (4) that it was not necessary to create a GWMA because the Director had already created water districts; and (5) that the final order complied with Idaho Code § 67-5248. *Memorandum Decision* at 1-2 & 49-50.

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<sup>2</sup> The *Memorandum Decision* was signed on May 4, 2010; however, due to errors in service, the court has treated "the date of entry of the *Memorandum Decision* . . . as May 20, 2010." *Order of Extension Re: Filing Date of Memorandum Decision* (May 19, 2010).

9. In its Memorandum Decision, the court held that the proper evidentiary standard of review to apply in response to a conjunctive management delivery call between hydraulically connected ground water rights is clear and convincing. *Id.* 38. Because the June 2009 Final Order was silent on which evidentiary standard of review the Director applied in his material injury analysis, the court remanded the Director's finding that the decreed quantity "exceeds the quantity being put to beneficial use for purposes of determining material injury. No further evidence is required." *Id.* at 49. "On remand, following the application of the appropriate evidentiary standard a finding of material injury may require that the Director reevaluate" his finding that A&B has not exceeded its reasonable pumping levels. *Id.* at 50.

10. Petitions for reconsideration regarding the evidentiary standard of review were filed by IGWA and Pocatello. On November 2, 2010, the court reaffirmed its previous holding regarding the clear and convincing evidentiary standard of review. *Memorandum Decision and Order on Petitions for Rehearing* ("Memorandum Decision on Rehearing"). "The [Memorandum Decision] contemplates that there are indeed circumstances where the senior making the call may not at the present time require the full decreed quantity and therefore is not entitled to administration based on the full decreed quantity. The [Memorandum Decision] holds, however, that any determination by the Director that the senior is entitled to less than the decreed quantity needs to be supported by a high degree of certainty." *Memorandum Decision on Rehearing* at 7.

11. Notices of appeal to the Idaho Supreme Court were filed by A&B, the Department, IGWA, and Pocatello. The evidentiary standard of review, which is the subject of the remand, was appealed by the Department, IGWA, and Pocatello. No stay of the proceeding has been sought, and the court has directed the Department to "forthwith comply with the remand instructions set forth in the *Memorandum Decision and Order on Petition for Judicial Review . . .*" *Order Granting Motion to Enforce in Part and Denying Motion to Enforce in Part* (February 14, 2011). On April 14, 2011, the Department filed a *Motion to Withdraw Notice of Appeal and Amended Notice of Appeal* with the Idaho Supreme Court.

12. On March 14, 2011, the Department received the *City of Pocatello's Proposed Order on Remand and Motion for the Director to Consider City of Pocatello's Proposed Order on Remand*. On March 16, 2011, the Department received *A&B Irrigation District's Motion to Strike* in response to Pocatello's March 14 motion and proposed order. On March 28, 2011, the Department received IGWA's *Response to City of Pocatello's Motion for the Director to Consider the City of Pocatello's Proposed Order on Remand*. On March 30, 2011, the Department received a second *Motion to Strike* from A&B in response to IGWA's March 28 filing. On April 4, 2011, IGWA and Pocatello filed a *Joint Response to Motions to Strike*. On April 7, 2011, the Director denied A&B's motions to strike. *Order Denying Motions to Strike*. On April 12, 2011, the Director granted A&B's request to file a proposed order no later than April 18, 2011. *Order Authorizing Filing of Proposed Order; and Amended Notice of Intent to Issue Final Order*. On April 18, 2011, the Department received *A&B Irrigation District's Proposed Order on Remand*.

13. The Director recognizes and considers the record created in CV-2009-647. Consistent with the district court's Memorandum Decision, no additional evidence has been considered by the Director.

## II. Review of Evidence in the Record Regarding Material Injury

### A. Water Right No. 36-2080

14. The A&B Irrigation District (Units A and B) was originally developed by the United States Bureau of Reclamation ("USBR") to irrigate approximately 78,000 acres of land, of which 62,604 acres would be irrigated by the Unit B ground water division. *January 2008 Final Order* at 7. A license for water right 36-2080 was issued by the Department to the USBR on June 10, 1965. Ex. 157B; Tr. Vol. VI, pp. 1151-1152. Water right 36-2080 authorizes diversion of ground water for irrigation purposes and bears a priority date of September 9, 1948. In 1990, a claim was filed for the water right in the Snake River Basin Adjudication ("SRBA"). Water right 36-2080 was partially decreed by the SRBA on May 7, 2003. Ex. 139. The right authorizes a maximum diversion rate of 1,100 cfs for irrigation of 62,604.3 acres. *Id.* In miner's inches per acre, the authorized maximum, project-wide diversion rate for irrigation of 62,604.3 acres is 0.88.

15. While some of A&B's well systems are interconnected, other well systems are not. A&B's water right provides it with flexibility because no rate of diversion or volumetric limitation is decreed to a particular point of diversion or place of use for 36-2080. *Memorandum Decision* at 40.

16. Water right 36-2080 currently authorizes 188 points of diversion (wells), but only 177 wells are in production. *Memorandum Decision* at 5. A&B's place of use is described by digital boundary. Tr. Vol. VI, p. 1160. A&B has 11 wells that may be put into production at any time or the wells may be reconstructed at another location. Tr. Vol. VI, p. 1161-1162. If additional wells are sought, A&B would have to file a transfer with the Department. Tr. Vol. VI, p. 1162.

### B. Geologic and Hydrogeologic Environment

17. A&B is located in the southern portion of Minidoka County and the southeast part of Jerome County. *January 2008 Final Order* at 7. The north/south line separating Ranges 21 East and 22 East is the boundary line between southeastern Jerome County and western Minidoka County. *Id.* Driller's logs for project irrigation wells in the northern part of the district and private wells in adjacent areas east and north of A&B show a stratigraphy dominated by basalt with minor sedimentary interbeds of sand, silt, and clay. *Id.* at 23. South of A&B at Burley and Declo, the upper 400 to 500 feet of the subsurface is mostly clastic sediments, which are underlain by basalt to an unknown depth. *Id.* In between the south and north areas of A&B is an inherent geologic transition zone in which the upper 500 feet are characterized by basalt intercalated with clastic sediments (Burley lake bed sediments) with a ratio of approximately 50 percent sediments and 50 percent basalt. *Id.* Based on evaluation of available geologic and

hydrogeologic data, the southwestern portion of A&B is located in this geologic transition zone. *Id.* See Exhibit 121; *Recommended Order* at 12-15. The transition zone was known to the USBR as early as 1948, but ground water development was not anticipated at the time. *January 2008 Final Order* at 24.

18. The geologic transition zone is visually depicted in Exhibit 106 (“Geologic Cross-Sections”). Cross-sections A-A’ through E-E’ each plots wells from west to east. Ex. 106 at 1-6 (A&B 83-88). The closer the plot is to the southern boundary of the A&B project (historic Lake Burley), the more sedimentary layers are present in the well. *Id.* at 3, B-B’ (A&B 85). As the plots move northward, sediments are replaced by basalt. *Id.* at 6, E-E’ (A&B 88). A review of the south to north plots show that the sedimentary environment is more pronounced in the south and west, but less so in the north and east. *Id.* at 7-14, F-F’ through L-L’ (A&B 89-96).

19. The geologic transition zone greatly effects well yield. Ex. 121 at 19 (A&B 1090). “Wells in sections 9 and 10 of T9S R22E penetrate multiple sedimentary interbeds. About 50 percent of the saturated thickness (water level elevation minus the bottom hole elevation) is composed of sediment in a well in section 9. About 38 percent of the saturated thickness of a well in section 10 is composed of sediment.” *Id.* at 11 (A&B 1082). “The majority of the ground-water production by the A&B Irrigation District occurs in the northern portion of the project area with about two-thirds in townships T8S R23E, T8S R24E and T8S R25E.” Ex. 121 at 16 (A&B 1091). Because of the basalt environment, the likelihood of achieving additional yield with depth in the northern portion of the project is “high.” Tr. Vol. I, p. 90. Conversely, the likelihood of achieving additional yield with depth in the southern portion of the project is “low” because of the historic Burley lake bed sediments. *Id.* The probabilities of success are “inherently contingent upon the geologic environment.” Tr. Vol. I, pp. 90-91.

20. Compared with the rest of the A&B project, the southwestern area has a high ground water hydraulic gradient. R. at 1128-1129. In 1956, the USGS published a report that mapped, among other things, the water table gradient across the project. *Id.* at 1129, Fig. 14. “The gradient of the water table averages about 3 feet per mile beneath most of Unit B Pumping Division, but under the western part of the Division, the gradient steepens to about 12 feet or more per mile.” *January 2008 Final Order* at 24. “[D]ifferences in the gradient are probably caused by differences in the permeability of the basalt and by the presence of nonpermeable fine-grained sediments intercalated with the basalt.” *Id.* at 24-25. The fine-grained sediments were deposited by historic Lake Burley. The greater hydraulic gradient translates into lower aquifer transmissivity, which, in the southwestern area, directly impacts well yield. Tr. Vol. IX, pp. 1740-1743.

21. Specific capacity is the pumping rate for a well in the aquifer divided by the drawdown in the well. Tr. Vol. I, p. 59. Low transmissivity contributes to low well yield. Tr. Vol. I, pp. 58-60. See also Ex. 113D.<sup>3</sup> The lower the specific capacity, the lower the yield. Tr. Vol. I, p. 80. “All of the irrigation wells with specific capacities that are less than 100 gpm/feet are for wells in the southwest project townships (T8S/R21E, T9S/R21E, T9S/R22E, T9S/R23E, and T10S/R22E). None of the irrigation well specific capacities that are less than 100 gpm/ft are

<sup>3</sup> Exhibit 113D is not listed separately as an exhibit in the record index, but can be found within the documents comprising Exhibit 113, at .pdf page 200.



for irrigation wells in the northeast project townships (T8S/R23E, T8S/R24E, T7S/R23E, T7S/R24E, and T7S/R25E).” These are inherent factors that are consistent with the hydrogeology of the area. Tr. Vol. I, pp. 95-97.

22. In its Motion to Proceed and in information provided to the Department after its filing, A&B asserted that it has been forced to abandon certain wells, that certain wells will not yield additional water, and that certain wells have been drilled to replace existing wells that could not provide adequate water. *January 2008 Final Order* at 27-28.

23. With the exception of one well in Township 8 South, Range 25 East, which was replaced because of a crooked borehole, Tr. Vol. IX, p. 1759, every problem well identified by A&B is located in the geologic transition zone described above. Exhibit 215A.<sup>4</sup> Wells located in Townships 9 and 10 South, Range 22 East, have been documented as problematic since they were originally drilled by the USBR. Exs. 152P, 152Q, 152BB, 152II, 152 QQ, 152TT, and 152BBB (USBR letters documenting well problems from the late 1950s to early 1960s).<sup>5</sup> Wells that have been drilled, but not used by A&B, are also located in the geologic transition zone.<sup>6</sup> The problems associated with these wells derive from the inherent hydrogeologic environment. *Recommended Order* at 34. “Basically, everything that you want a well to do, is more difficult in the southwest area.” Tr. Vol. IX, pp. 1756-1757.

24. On lands located in the geologic transition zone, A&B has converted approximately 1,447 acres from ground water to surface water. *January 2008 Final Order* at 9. As early as 1960, the USBR discussed the need to import surface water to those lands because of poorly performing wells. *Recommended Order* at 15; Ex. 152QQ; Tr. Vol. IX, pp. 1765-1767. The project was not completed until 1963. *Memorandum Decision* at 5.

### C. Development of the Project

25. The A&B project was developed at a time when ground water levels were at or near their peak. *Recommended Order* at 9; *Memorandum Decision* at 5. Because of reduced incidental recharge, a sustained period of drought, and ground water pumping, aquifer levels have declined since A&B appropriated its right. *Recommended Order* at 9; *January 2008 Final Order* at 4.<sup>7</sup> Because of the Department’s 1992 moratorium for permits, the best evidence at the time of the hearing was that the depletive effect of ground water pumping is within 5 percent of being fully realized, “not more than ten percent and perhaps lower than five percent.” *Recommended Order* at 39.

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<sup>4</sup> Circled in red on Exhibit 215A are the abandoned wells, circled in black are the wells with no additional yield, and circled in blue are wells that have been replaced or drilled deeper.

<sup>5</sup> Circled in silver on Exhibit 215A are the wells characterized as problematic by the USBR.

<sup>6</sup> Circled in green on Exhibit 215A are the unused wells.

<sup>7</sup> According to the USBR in its report entitled Minidoka Project, Idaho-Wyoming, North Side Pumping Division Extension – Planning Report/Draft EIS, Hydrology Appendix (USRB 1985), the major influence upon ground water level declines and recoveries is climate. *January 2008 Final Order* at 43. The declines, according to the USBR, are further aggravated by changes in irrigation practices. *Id.*

26. At the time A&B appropriated its right, wells were sited at geographical high points, with water flowing downhill through a system of mainly unlined ditches and laterals. *January 2008 Final Order* at 7; Tr. Vol. VI, pp. 1164-1165. Originally, 62,604.3 acres were irrigated by gravity flow. *Memorandum Decision* at 6. The original conveyance system included 109.71 miles of laterals and 333 miles of drains. *Id.* at 6. From 1963 through 1982, average conveyance loss was estimated by the USBR at 8 percent. *January 2008 Final Order* at 12; Ex. 113 at 58 (A&B 609) (“The 20-year (1963-82) average annual conveyance losses . . . in Unit B were 8 percent . . .”).

27. Currently, the system includes 51 miles of laterals, 138 miles of drains, and 27 miles of distribution piping. *Memorandum Decision* at 6. Sixty-nine injection wells have been eliminated and the water applied to other purposes. *Id.* By 1982, 25 percent of the 62,604.3 acres were irrigated by sprinkler. *January 2008 Final Order* at 10. By 1987, approximately 30 percent of the 62,604.3 acres were irrigated by sprinkler. *Id.* at 11. By 1992, approximately more than 50 percent of the 62,604.3 acres were irrigated by sprinkler. *Id.* By 2007, 96 percent of the 62,604.3 acres were irrigated by sprinkler. *Id.* at 10-11. The use of sprinkler irrigation was expected to reduce the per acre water requirement by 19.6 percent. *Id.* at 11. Through efficiencies, conveyance loss has been reduced to 3 percent. *Recommended Order* at 11; Ex. 200, 4-4, -22. With improved efficiencies, A&B’s need for water has decreased. *January 2008 Final Order* 9-15; Tr. Vol. VI, pp. 1201-1202. Other irrigation providers in the vicinity of A&B have similarly converted to sprinkler irrigation. Ex. 473; Tr. Vol. VII, pp. 1367-1368 (down gradient conversions by North Side Canal Company may have had a significant impact on water levels at A&B).

28. Because of sprinklers, A&B is able to irrigate acres that it could not irrigate with its gravity system. Ex. 200, 4-24. Presently, A&B irrigates 66,686.2 acres. *January 2008 Final Order* at 8. In order to irrigate the additional 4,081.9 acres that could not be irrigated under 36-2080, A&B obtained junior and enlargement water rights. *Id.* None of the junior water rights are the subject of this delivery call. Of the junior acres, 2,063.1 acres are enlargements, which provide no additional rate of flow and are subordinated to April 12, 1994. *Id.*; *Recommended Order* at 41.

#### **D. Analysis of A&B Pumping and Diversion Records**

29. In its 1994 Petition for Delivery Call, A&B stated that the supply for its calling water right, 36-2080, was 974 cfs. R. at 13. In its 2007 Motion to Proceed, A&B stated that the supply for the same water right was 970 cfs. R. at 835. In its Motion to Proceed, A&B stated it “was able to deliver at least 0.75 miner’s inch prior to the major impacts caused by junior ground water pumping.” R. at 837. In its Motion to Proceed, A&B also asserted it “is unable to divert an average of 0.75 of a miner’s inch per acre which is the minimum amount necessary to irrigate lands within A&B during the peek [sic] periods when irrigation water is most needed.” R. at 836.

30. In its expert report, A&B stated the “0.75 miner-inch criteria is a minimum rate below which A&B begins the process to improve or deepen wells.” Ex. 200 at 4-19. The “0.75

miners-inch is [not] the project's irrigation diversion requirement . . . . The Unit B irrigation diversion requirement needed to meet peak monthly demand as calculated in this study is about 1.09 acre-ft/acre or about 0.89 miners-inch." *Id.* A&B supported the 0.89 miner's inches per acre peak demand diversion requirement with a 1995-2007 theoretical analysis. *Id.* at 4-1; Tbl. 4-11. The theoretical information was "used to determine whether A&B's irrigation system has been able to meet their irrigation diversion requirements and whether shortages are occurring on Unit B." *Id.* at 4-1.

31. At the hearing, A&B further explained that 0.75 miner's inches per acre is an internal "rectification standard" for its wells. Tr. Vol. III, p. 639. When a well is no longer capable of producing 0.75 miner's inches per acre, based upon, among other things, its Annual Report, A&B schedules the well for maintenance. Tr. Vol. III, pp. 538-540.

32. At the hearing, the peak season was generally defined as a period in June and July and may extend through the latter part of August. *Recommended Order* at 22. The peak season is a thirty-day period of time. Tr. Vol. IV, pp. 654-655. Since 1972, A&B has kept diversion records from the 15<sup>th</sup> to the 15<sup>th</sup> of each month. Ex. 132 (A&B 1450-1451); Tr. Vol. III, p. 511. The peak season typically runs from June 15 to July 15, but in some years, it has run from July 15 to August 15. Ex. 155; Tr. Vol. VI, p. 1199. During the peak season, A&B goes on what is referred to as "allotment." *Recommended Order* at 23. Allotment occurs when the irrigators' demand for water from a well system exceeds the amount of water the well system will produce. *Id.* During allotment, each well user receives a proportional amount of his or her share from the well system's total output. *Id.*

33. A&B admitted during the hearing that even during the hot summer months when demand for water is at its greatest, it has no ability to limit distribution of water under 36-2080 to the original 62,604.3-acre place of use; rather, A&B patrons irrigate all junior and/or subordinated enlargement acres with water pumped under its senior right. Tr. Vol. III, pp. 605-606; Tr. Vol. IV, pp. 741-743. *See also* Ex. 200, Figs. 4-15, 4-16; Ex. 201AC; Ex. 201AD. The practice of irrigating all beneficial use and enlargement acres with water diverted under water right 36-2080 is referred to as "water spread[ing]." Tr. Vol. III, p. 525. Therefore, A&B irrigates 4,081.9 more acres than is authorized under its calling water right.

34. In addition to recording monthly pumping volumes at the wellhead, which is contained in a spreadsheet titled "WaterPumpedrevised.xls," Ex. 132 (A&B 1145-2276), A&B periodically measures its well capacity, or instantaneous flow rate, across the project. Instantaneous flow rate data is compiled in its Annual Report for the years 1963 through 2007. Ex. 132 (A&B 2281-2516); Ex. 133; Tr. Vol. VI, pp. 1284-1289.

35. The Annual Report describes "high" and "low" open valve discharge readings or well capacity. *Id.* When these flow rates are measured, the well valves are completely open, and are not throttled back. Tr. Vol. VI, p. 1286. The high flow measurements are usually taken early in the irrigation season. Ex. 132 (A&B 2281-2516); Ex. 133; R. at 1118; Tr. Vol. VI, pp. 1284-1289. The low flow rates are usually measured over a period of days during the peak irrigation season (i.e., June 15 to July 15). *Id.* The low flow open valve readings represent maximum daily discharge or well capacity during the peak season. Tr. Vol. VI, p. 1285-1286.

36. A&B relied on these low flow data in its 1994 Petition for Delivery Call and 2007 Motion to Proceed to demonstrate that its available peak water supply was less than 1,100 cfs. R. at 13 ("974 cfs") & 835 ("970 cfs").

37. In the January 2008 Final Order, the Director found that the peak season low flow capacity from A&B production wells was 1,007 cfs in 1963 and 1,034 cfs in 1982. *January 2008 Final Order* at 14. In reviewing the Annual Reports for purposes of this order, the Director finds that the greatest peak season low flow capacity from A&B production wells was 1,087 cfs in 1974 (0.87 miner's inches per acre). Ex. 132. The next greatest low flow capacity measurement from A&B production wells was 1,079 cfs in 1971. *Id.* The Director also finds that the greatest high flow capacity from A&B production wells, 1,100 cfs (0.88 miner's inches per acre), occurred in 1973. *Id.* In 1987, the Director finds that the peak season low flow well capacity was 1,024.6 cfs. *Id.* In 1991, the Director finds that the peak season low flow well capacity was 1,013.4 cfs. Ex. 133 (1991 Annual Report Part 2). In 2002, the Director finds that the peak season low flow well capacity was 973.9 cfs. *Id.* (2002 Annual Report Part 2).

38. The 2006 peak season low flow capacity of 970 cfs, as cited in the Motion to Proceed, equates to 0.77 miner's inches per acre for the 62,604.3-acre place of use for water right 36-2080. *January 2008 Final Order* at 15. Adjusted for 3 percent conveyance loss, *Recommended Order* at 11, the on-farm delivery is 0.75 miner's inches per acre. When water diverted under 36-2080 is applied to 66,686.2 acres, and adjusted for 3 percent conveyance loss, Ex. 200 at 4-4, the on-farm delivery is 0.71 miner's inches per acre. The place of use for water right 36-2080 is 62,604.3 acres. *January 2008 Final Order* at 8.

39. Analyzing A&B's actual diversions at the wellhead contained in the WaterPumpedrevised.xls spreadsheet, the Department converted the low flow volumetric total from the peak season to miner's inches per acre. Ex. 155; Tr. Vol. VI, p. 1196, lns. 4-25; p. 1197, lns. 1-25; p. 1198, lns. 1-25; p. 1199, lns. 1-9. From 1960 through 1969, the mean peak season water use was 0.72 miner's inches per acre. Ex. 155. From 1970 through 1980, the mean peak season water use for A&B was 0.69 miner's inches per acre. *Id.* From 1981 through 1990, the mean peak season water use for A&B was 0.69 miner's inches per acre. *Id.* From 1991 through 2000, the mean peak season water use for A&B was 0.66 miner's inches per acre. *Id.* From 1994 through 2007, the mean peak season water use for A&B was 0.65 miner's inches per acre. *Id.* From 1960 through 2007, the mean peak season water use for A&B was 0.69 miner's inches per acre. *Id.* This information is graphically depicted in Exhibit 155A. All values presented are unadjusted for conveyance loss and irrigation efficiency.

40. Only during three occasions in the 47 years of actual diversion data available in the record (1963, 1964, and 1967) did A&B meet or exceed 0.75 miner's inches per acre during the peak season. *Id.* In those three years, the low flow diversions were 0.76, 0.75, and 0.76 miner's inches per acre, respectively. *Id.* As stated above, during those years water was diverted through unlined ditches and laterals, with conveyance losses of 8 percent, and applied predominantly by gravity systems. R. at 1115 & 1148; Ex. 113 at 58 (A&B 609).

41. From 1982, when 25 percent of A&B was irrigated by sprinkler, to 1991, when 50 percent of the project was irrigated by sprinkler, actual diversions during the peak season averaged 0.69 miner's inches per acre. Ex. 155; *January 2008 Final Order* at 10-11. A&B's most junior water right, which is also its largest enlargement right (1,751.5 acres), bears an April 1, 1984 priority date. *January 2008 Final Order* at 8. All enlargement rights are subordinated to April 12, 1994.

42. From 1992, when more than 50 percent of the project was irrigated by sprinkler, to 2007, when 96 percent of the project was irrigated by sprinkler, the actual diversions during the peak season averaged 0.65 miner's inches per acre. Ex. 155; *January 2008 Final Order* at 10-11.

43. The Preliminary Report of C.E. Brockway, titled *A&B Irrigation District—Use of Drain Water In Re: SRBA Case No. 39576*, dated August 2, 2000, states that, "elimination of all drainage wells and pumping back surface runoff to existing irrigated lands allows reduction of pumped ground water, reduction in retention pond size, and increased project irrigation efficiency . . . the amount of water pumped from the aquifer can be reduced by 21,920 acre-feet per year." *January 2008 Final Order* at 9.

44. A review of the Department's Resource Protection Bureau database shows eight active drainage (injection disposal) wells within A&B. *January 2008 Final Order* at 35. During a January 4, 2008 meeting with Department staff at the Department's state office in Boise, A&B representatives stated that the drainage wells are primarily used for storm water runoff disposal. It was also indicated that piping and pressurized irrigation and pump back systems for re-use on crops has nearly eliminated return flows and very little irrigation waste water has been discharged into wetlands or drainage wells in recent irrigation seasons. *Id.*

45. The average annual amount of ground water pumped by A&B from 1963 through 1982 was 201,736 acre-feet. The mean annual amount of ground water pumped from 1994 through 2007 was 180,095 acre-feet. *January 2008 Order* at 9. The difference in mean annual diversion volume between the periods 1963-1982 and 1994-2007 is 21,641 acre-feet, a 10.7 percent decrease.

46. Based on ground water delivery records provided by A&B, the mean peak water use from 1963 through 1982 was 54,468 acre-feet. *January 2008 Final Order* at 14. By 1982, 25 percent of A&B was irrigated by sprinkler. *Id.* at 10-11. The mean peak water use from 1994 through 2007 was 50,262 acre-feet, a total average decrease of 4,206 acre-feet from the period 1963 through 1982, or 7.7 percent. *Id.* at 14. By 1994, 58 percent of the project was irrigated by sprinkler, and by 2006, 96 percent was irrigated by sprinkler. *Id.* at 10-11.

47. Converted to a monthly volume of water, the 2006 peak season low flow well capacity of 970 cfs is 59,643 acre-feet. As reported in the *WaterPumpedrevised.xls* spreadsheet, the 2006 low flow volume of water actually pumped during the peak season was 49,855.3 acre-feet. Ex. 132 (A&B 1450). Therefore, in 2006, A&B had the ability or capacity on a project-wide basis to pump nearly 10,000 acre-feet of additional water during the peak demand period.

48. Reductions in peak water use by A&B, over time, reasonably parallels its conversion from predominantly flood irrigation to predominantly sprinkler irrigation, and its improvements in irrigation efficiency. *January 2008 Final Order* at 11-15; Ex. 156; Tr. Vol. VI, pp. 1201-1202. Other irrigation providers have similarly converted from flood to sprinkler irrigation. Ex. 473. "Comparison of the historic and projected on-farm delivery requirements suggests that the use of sprinkler irrigation was expected to reduce the per acre water requirement by 19.6 percent." *January 2008 Final Order* at 11. Conveyance loss has been reduced from 8 to 3 percent. *Id.* at 44.

49. Due to efficiency measures, A&B's percent reduction in water use is similar to surrounding surface water providers. Tr. Vol. VI, p. 1179-1180. "Burley Irrigation District has had decreases in these same time periods of about 20 percent. Miler Irrigation District has had decreases more similar to A&B. . . . But I believe theirs was also around 8 percent. And that's annual diversions for the same time period." Tr. Vol. VI, p. 1180.

50. A&B's response to the *Order Requesting Information* indicates that the District is now irrigating approximately 1,323 acres of Unit B land with Unit A surface water. *January 2008 Final Order* at 9. Department analysis of the shapefile, *B\_Land\_Temp\_Served\_by\_A*, provided by A&B, indicates that the total conversion acreage is 1,447 acres, which is approximately 2.3 percent of the 62,604.3 acres that are the subject of A&B's delivery call under water right 36-2080. *January 2008 Final Order* at 9.

#### **E. Analysis of A&B's Asserted Irrigation Requirement**

51. In its *Petition for Reconsideration of Interim Director's April 27, 2011 Final Order on Remand/Request for Hearing* ("Petition for Reconsideration"),<sup>8</sup> A&B criticized the Department's use of monthly data for purposes of determining material injury. According to one of its experts, Dr. Charles C. Brockway ("Brockway"), "the peak capacity period for irrigation occurs on a daily basis and . . . failure to obtain sufficient water within an irrigation week will cause crop damage during a high-demand period." *Petition for Reconsideration* at 7. A&B claims this means it needs a maximum diversion requirement of 0.89 miner's inches per acre at the wellhead to meet its crop needs during the peak period. Ex. 200 at 4-7; Tr. Vol. XI, pp. 2240-2241.

52. The irony of this criticism is that Brockway used annual and monthly diversion evapotranspiration ("ET") data to theoretically compute the 0.89 miner's inches per acre maximum crop need. Use of monthly ET values is consistent with A&B's evidentiary reliance on monthly diversion data. In addition, the Department used the monthly diversion data provided by A&B and relied upon by A&B's experts to examine injury. Expert witnesses for junior ground water users also used the same annual and monthly diversion data to develop their responses to A&B's claim of injury. *See e.g.* Ex. 301. These data were testified to at the hearing, admitted into evidence, and made part of this record. Using the data offered and relied upon by A&B, the Department can evaluate A&B's claimed need of 0.89 miner's inches per acre.

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<sup>8</sup> In its *Petition for Reconsideration*, A&B requested a hearing. The Director denied A&B's request in his June 30, 2011 *Order Regarding Petition for Reconsideration*.

53. A&B's hypothetical maximum instantaneous wellhead flow rate requirement of 0.89 miner's inch per acre is not supported by annual measurements of wellhead instantaneous flow measurements converted to calculated consumptive use. In addition, A&B's assertion that 68,047 acre-feet is its peak monthly wellhead volume demand cannot be reconciled with actual measured peak monthly pumping by A&B over the history of the project.

**i. How A&B computed its maximum instantaneous wellhead requirement of 0.89 miner's inches per acre**

54. In its expert report, which was co-authored by Brockway, A&B calculated a peak pumping rate of 0.89 miner's inches per acre to satisfy the maximum water consumption of a growing crop. Brockway's cross examination testimony by counsel for Pocatello offers some insight into the method of calculation:

Q. [BY MS. KLAHN] Okay. And would you agree that the rate of delivery to the B unit farmers during the peak demand period is among the most important disputes in this case?

A. Among the most important, yes.

Q. Okay. And the rate of delivery that the A & B consultants and you, including you, computed for the peak delivery for the B unit farmers is .89 miner's inches per acre; is that correct?

A. Yes.

Tr. Vol. XI, pp. 2239.

55. And further in Brockway's testimony:

Q. [BY MS. KLAHN] And your .89 miner's inches per acre irrigation requirement was a number at the well, was it not?

A. It was, yes.

Q. So if we wanted to compute the amount of water at the farm turnout that you're recommending, we would apply a -- what? -- 3 percent conveyance loss to that?

A. I believe we said it was between zero and 5 and that 3 would be a good number to use.

Q. Okay. Does that work out to about .86 miner's inches per acre?

A. Well, it would be 97 percent of .88 [sic]. Whatever that is.

Q. Will you accept .86, subject to check?

A. Subject to your calculation, yes.

Tr. Vol. XI, pp. 2240-2241.

56. The following quoted cross examination exchange between Brockway and counsel for Pocatello about computation of the instantaneous rate explains the process by which irrigation application losses are accounted for in the relationship between the field headgate requirement and the consumptive use requirement of the crop. The examination appears to establish that the maximum instantaneous water diversion requirement of 0.89 miner's inches per acre was computed using ET for the peak monthly consumption. The discussion is about monthly periods.

Q. [BY MS. KLAHN] So is it true that your irrigation requirements analysis included ET for the crops on the B unit? So is it true that your irrigation requirements analysis included ET for the crops on the B unit?

A. Yes.

Q. That's one of the inputs?

A. Yeah.

Q. Okay. Inputs. So it included ET. And it included crop distribution; correct?

A. It did.

Q. Okay. And it included acreage; is that correct?

A. Yes.

Q. Acreage for each well system; right?

A. Yes.

Q. It included a farm efficiency number, farm application efficiency?

A. Yes.

Q. How would you like me to indicate that? Just "efficiency?" Is that okay?

A. Well, I think "application efficiency" is appropriate.



Q. Okay. And conveyance loss; is that correct?

A. Yes.

Q. Have I left out any inputs?

A. I don't think so.

Q. Okay. Now, for these data for ET, this was a month-by-month, year-by-year ET value, right, based on each crop? So it was districtwide; right?

A. It was weighted, yes.

Q. And it was a districtwide number in the sense that you used the districtwide crop distribution to figure out how the ET was distributed?

A. I believe we did, but the analysis was for individual well systems.

Tr. Vol. XI, pp. 2246-2247.

57. Finally, Brockway testified again about the method of accounting for application efficiency losses:

Q. [BY MS. KLAHN] Okay. So starting at the field, you took the ET and crop distribution and acreage and then applied the application efficiency and then another conveyance loss to sort of back up from the field to the well, is that fair, as far as how you did your irrigation requirements?

A. That's fair.

Q. Okay. Because your irrigation requirement is at the well, isn't it?

A. That's right, uh-huh.

Q. Okay. And you did that on a monthly basis over your study period for each well system; right?

A. That's right. And we varied the efficiency -- application efficiency by month, by the period.

Tr. Vol. XI, pp. 2249-2250.

58. This information, taken together, shows that, to compute its maximum instantaneous wellhead diversion flow rate requirement, A&B started at the field with crop irrigation requirement and worked backward to the wellhead. Tr. Vol. XI, pp. 2249-2250. A&B considered ET, crop distribution, irrigated acreage, irrigation efficiency, and conveyance loss

from the field headgate to the well. Ex. 200 at 4-1-6; Tr. Vol. XI, pp. 2249-2250. A&B examined this information over the period 1995-2007. Ex. 200 at 4-1. For the 1995-2007 average July<sup>9</sup> conditions, the theoretical irrigation requirement at the wellhead was 0.79 miner's inches per acre. Ex. 200 at Tbl. 4-11.

59. The greatest computed July theoretical demand occurred in 2007. *Id.* Using July 2007 ET data, and applying the method described in Brockway's testimony, A&B computed a July 2007 maximum monthly pumping demand of 68,047 acre-feet at the wellhead. *See* Ex. 200 at Tbl. 4-9. The July 2007 ET data were adjusted for rainfall and for crop mix to estimate the quantity of water that must be available for the crop to grow. Because additional water is necessary to apply and deliver the irrigation water to the crop, an additional quantity of water was added for application efficiency, and conveyance loss. The entire computation resulting in a 68,047 acre-feet maximum monthly water demand at the wellhead. Ex. 200 at 4-1-6. The underlying computations for deriving this volume of water are not clearly established in the exhibits and testimony.

60. Dividing 68,047 acre feet by the number of acres authorized by A&B's water right (62,604.3 acres) equals approximately 1.09 acre-feet per acre maximum irrigation volume during July 2007. Table 4-11 converts the 1.09 acre-feet per acre per month to 1,107 cfs,<sup>10</sup> or 0.89<sup>11</sup> miner's inches per acre. Ex. 200 at 4-7. A&B's water right authorizes diversion of 1,100 cfs over 62,604.3 acres, which equates to 0.88 miner's inches per acre.

**ii. A&B's computed theoretical flow of 0.89 miner's inches per acre maximum instantaneous wellhead requirement is not supported by the record**

61. In its Petition for Reconsideration, A&B asked the Director to examine peak water use for purposes of assessing material injury. *Petition for Reconsideration* at 7. Although A&B refers to "peak capacity" or "peak water use" as a daily or weekly value, the 0.89 miner's inches is interpreted as an instantaneous flow rate.

62. As explained previously, in addition to recording monthly pumping volumes, A&B periodically measures its well capacities, or instantaneous flow rates, across the project. Instantaneous flow rate data is compiled in its Annual Report for the years 1963 through 2007.

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<sup>9</sup> In its expert report, A&B analyzed "July" ET. To "ensure consistency between crop ET estimates and pumping volumes . . . the Agrimet crop ET data was reduced from the daily data to monthly data using the same period as A&B's pumping data (middle of the previous month to middle of the current month)." Ex. 200 at 4-2. Therefore, A&B's reference to July ET is actually a reference to ET data collected over a 30-day period, June 15 to July 15.

<sup>10</sup> In order to calculate 1,107 cfs, the monthly volume has to be divided by 31 days, instead of the actual 30 days between June 15 and July 15.

<sup>11</sup> The 68,047 acre-feet volume is equivalent to 0.88 miner's inches per acre for a 31-day month, and 0.91 miner's inches per acre for a 30-day month. A flow rate of 0.89 miner's inches per acre converts to an equivalent flow rate of 0.0178 cfs per acre, or 1,114 cfs for the entire project, which slightly exceeds A&B's asserted flow rate of 1,107 cfs from its expert report. For purposes of discussion, the Director will accept A&B's stated wellhead flow rate requirement of 0.89 miner's inches per acre.

Ex. 132 (A&B 2281-2516); Ex. 133; Tr. Vol. VI, pp. 1284-1289. The Annual Report describes “high” and “low” open valve discharge readings or well capacity. *Id.* When these flow rates are measured, the well valves are completely open, and are not throttled back. Tr. Vol. VI, p. 1286. The high flow measurements are usually taken early in the irrigation season. Ex. 132 (A&B 2281-2516); Ex. 133; R. at 1118; Tr. Vol. VI, pp. 1284-1289. The low flow rates are usually measured over a period of days during the peak irrigation season (i.e., June 15 to July 15). *Id.* The low flow open valve readings represent maximum daily discharge or well capacity during the peak season. Tr. Vol. VI, p. 1285-1286. A&B relied on these low flow data in its 1994 Petition for Delivery Call and 2007 Motion to Proceed to demonstrate that its available peak water supply was less than 1,100 cfs. R. at 13 (“974 cfs”) & 835 (“970 cfs”). By converting past year’s low flow measurements to water available for crop consumption using the methods described by Brockway’s testimony, converting the 0.89 miner’s inches to a consumptive irrigation flow rate applying 2007 conveyance and application efficiencies, and comparing the two values, the Director can determine whether A&B is injured by a decline in wellhead capacity flow rates.

63. In its expert report, A&B asserted a maximum peak diversion requirement of 0.89 miner’s inches per acre at the wellhead. Using the licensed flow rate of 1,100 cfs, adjusted for A&B’s 2007 efficiency estimate of 3 percent conveyance loss, Ex. 200 at 4-4, and July 2007 irrigation efficiency of 79.2 percent,<sup>12</sup> the theoretical maximum instantaneous consumptive use flow rate is 845 cfs (0.67 miner’s inches per acre). This theoretical maximum crop demand will be compared to the measured low flow instantaneous flow rates available in past years after adjusting for efficiencies in each of the target years to determine whether the theoretical maximum consumptive instantaneous flow has ever been delivered or needed by crops growing on A&B lands.

64. A&B’s water right was licensed on June 10, 1965. Ex. 157B; Tr. Vol. VI, pp. 1151-1152. The peak low flow measurement for 1965 was 1,035.7 cfs. Ex. 132 (1965 Annual Report Part 2). In 1965, conveyance loss and irrigation efficiency were estimated at 8 percent and 56 percent, respectively. R. at 1115 & 1148; Ex. 113 at 58 (A&B 609) (As stated by the USBR, “The 20-year (1963-82) average annual conveyance losses . . . in Unit B were 8 percent . . .”). Adjusting for conveyance loss and irrigation efficiency, the maximum amount of water available for consumptive use by crops in 1965 was 534 cfs (0.43 miner’s inches per acre),<sup>13</sup> or 311 cfs less than the computed instantaneous consumptive demand of 845 cfs.

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<sup>12</sup> In its expert report for the months May-August, A&B estimated gravity efficiency at 60 percent and sprinkler efficiency at 80 percent. Ex. 200 at Tbl. 4-7. In 2007, 4 percent of A&B acres were irrigated by gravity, and 96 percent of acres were irrigated by sprinkler. *Id.* at Tbl. 4-6. Combining the percent gravity and sprinkler systems in July 2007 results in a weighted irrigation efficiency of 79.2 percent.

<sup>13</sup> The consumptive use requirement computed here is virtually identical to the consumptive use requirement planned for by the USBR in the 1955 Definite Plan Report, Ex. 111A. In the 1955 Definite Plan Report, the USBR stated that the Unit B system “will provide 1.01 acre-feet per acre at the pump or 0.96 acre-feet per acre at the farm head gates during a 31-day peak demand period.” Ex. 111A at 50. The 1.01 acre-feet per acre at the pump and 0.96 acre-feet per acre at the farm head gate delivery amounts are equivalent to 0.82 miner’s inches per acre and 0.78 miner’s inches per acre, respectively. Applying 56 percent irrigation efficiency to the 0.78 miner’s inches per acre farm head gate delivery rate means that, as designed, the Unit B system provided 0.44 miner’s inches per acre for consumptive use by crops during the peak demand period.

65. Assuming water was available in 1965 to divert the full decreed flow rate of 1,100 cfs, adjusted for 8 percent conveyance loss and 56 percent application efficiency, the computed total instantaneous flow rate available for crop consumption would have been 567 cfs (0.45 miner's inches per acre), or 278 cfs less than the computed instantaneous consumptive demand of 845 cfs.<sup>14</sup>

66. Applying conveyance and application efficiencies existing in 1965, A&B would have had to divert 1,640 cfs to achieve 845 cfs of consumptive use. This exceeds the authorized diversion rate of 1,100 cfs, and the greatest recorded peak season low flow capacity of 1,087 cfs.

67. In 1987, the actual peak low flow capacity of A&B production wells was 1,024.6 cfs. Ex. 132 (1987 Annual Report Part 2).<sup>15</sup> In 1987, 67 percent of A&B acres were irrigated by gravity, and 33 percent of acres were irrigated by sprinkler. R. at 1115, Fig. 4. In its expert report for the months May-August, A&B estimated gravity efficiency at 60 percent and sprinkler efficiency at 80 percent. Ex. 200 at Tbl. 4-7. Combining the percent gravity and sprinkler systems in July 1987 results in a weighted irrigation efficiency of 66.6 percent. In a 1985 planning study, the USBR estimated conveyance loss as 5 percent. R. at 1115; Ex. 113 at 58 (A&B 609). Five percent is the best evidence available for determining conveyance loss in 1987.

68. Beginning with a diversion of 1,024.6 cfs, and adjusting for 5 percent conveyance loss and 66.6 percent irrigation efficiency, the maximum amount of water available for consumptive use by crops in July 1987 was 648 cfs (0.52 miner's inches per acre), or 197 cfs less than the computed instantaneous consumptive use demand of 845 cfs.

69. If it is assumed that a diversion rate of 1,100 cfs was available in July 1987, and adjusting that diversion for 5 percent conveyance loss and 66.6 percent irrigation efficiency, the amount of water available for consumptive use by crops would have been 696 cfs (0.56 miner's inches per acre), or 149 cfs less than the computed instantaneous consumptive use demand of 845 cfs.

70. Applying conveyance and application efficiencies existing in July 1987, A&B would have had to divert 1,336 cfs to achieve 845 cfs of consumptive use. This exceeds the authorized diversion rate of 1,100 cfs, and the greatest recorded peak season low flow capacity of 1,087 cfs.

71. In 1991, the peak low flow capacity of A&B production wells was 1,013.4 cfs. Ex. 133 (1991 Annual Report Part 2). In 1991, 50 percent of A&B acres were irrigated by gravity, and 50 percent of acres were irrigated by sprinkler. R. at 1115, Fig. 4. Using A&B's

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<sup>14</sup> The greatest, recorded peak low flow capacity, 1,087 cfs, occurred in 1974. CM Rule 42.01.c. Adjusted for 8 percent conveyance loss and 56 percent irrigation efficiency, the computed total instantaneous flow rate available for crop consumption would have been 560 cfs (0.45 miner's inches per acre).

<sup>15</sup> The *Final Order on Remand* incorrectly found that the 1987 peak low flow capacity was 1,054 cfs. *Final Order on Remand* at 8. The high flow well capacity for 1987 was 1,054 cfs. The peak low flow well capacity for 1987 was 1,024.6 cfs. The Department inadvertently transposed the values.

efficiency values for gravity and sprinkler irrigation systems, Ex. 200 at Tbl. 4-7, for July 1991, weighted irrigation application efficiency was 70 percent.

72. Beginning with a diversion of 1,013.4 cfs, and adjusting for 5 percent conveyance loss and 70 percent irrigation efficiency, the maximum amount of water available for consumptive use by crops in July 1991 was 674 cfs (0.54 miner's inches per acre), or 171 cfs less than the computed instantaneous consumptive use demand of 845 cfs.

73. If it is assumed that a diversion rate of 1,100 cfs was available in July 1991, and adjusting that diversion for 5 percent conveyance loss and 70 percent irrigation efficiency, the amount of water available for consumptive use by crops would have been 732 cfs (0.58 miner's inches per acre), or 114 cfs less than the computed instantaneous consumptive use demand of 845 cfs.

74. Applying conveyance and application efficiencies existing in July 1991, A&B would have had to divert 1,271 cfs to achieve 845 cfs of consumptive use. This exceeds the authorized diversion rate of 1,100 cfs, and the greatest recorded peak season low flow capacity of 1,087 cfs.

75. In 2002, the peak low flow well capacity of A&B production wells was 973.9 cfs. Ex. 133 (2002 Annual Report Part 2). In 2002, 14 percent of A&B acres were irrigated by gravity, and 86 percent of acres were irrigated by sprinkler. R. at 1115, Fig. 4. Using A&B's efficiency values for gravity and sprinkler irrigation systems, Ex. 200 at Tbl. 4-7, for July 2002, weighted irrigation efficiency was 77.2 percent. In A&B's expert report and at the hearing, conveyance loss for this time period was established as 3 percent. Ex. 200 at 4-4; R. at 3088.

76. Beginning with a diversion of 973.9 cfs, and adjusting for 3 percent conveyance loss and 77.2 percent irrigation efficiency, the amount of water available for consumptive use by crops was 729 cfs (0.58 miner's inches per acre), or 116 cfs less than the computed instantaneous consumptive use demand of 845 cfs.

77. If it is assumed that a diversion rate of 1,100 cfs was available in July 2002, and adjusting that diversion for 3 percent conveyance loss and 77.2 percent irrigation efficiency, the amount of water available for consumptive use by crops would have been 824 cfs (0.66 miner's inches per acre), or 21 cfs less than the computed instantaneous consumptive use demand of 845 cfs.

78. Applying conveyance and application efficiencies existing in July 2002, A&B would have had to divert 1,128 cfs to achieve 845 cfs of consumptive use. This exceeds the authorized diversion rate of 1,100 cfs, and the greatest recorded peak season low flow capacity of 1,087 cfs.

79. In 2006, the peak low flow capacity of A&B production wells was 970 cfs. Ex. 133 (2006 Annual Report Part 2); *Final Order on Remand* at 18. In 2006, 6 percent of A&B acres were irrigated by gravity, and 94 percent of acres were irrigated by sprinkler. R. at 1115, Fig. 4. For July 2006, weighted irrigation efficiency was 78.8 percent.

80. Beginning with a diversion of 970 cfs, and adjusting for 3 percent conveyance loss and 78.8 percent irrigation efficiency, the amount of water available for consumptive use by crops was 741 cfs (0.59 miner's inches per acre), or 104 cfs less than the computed instantaneous consumptive use demand of 845 cfs.

81. If it is assumed that a diversion rate of 1,100 cfs was available in July 2006, and adjusting that diversion for 3 percent conveyance loss and 78.8 percent irrigation efficiency, the amount of water available for consumptive use by crops would have been 841 cfs (0.67 miner's inches per acre), or 4 cfs less than the computed instantaneous consumptive use demand of 845 cfs.

82. Applying conveyance and application efficiencies existing in July 2006, A&B would have had to divert 1,106 cfs to achieve 845 cfs of consumptive use. This exceeds the authorized diversion rate of 1,100 cfs, and the greatest recorded peak season low flow capacity of 1,087 cfs.

83. Therefore, despite reduced peak low flow diversions that are less than 1,100 cfs, A&B's improved efficiencies, over time, have allowed it to provide more water for consumptive use by crops than was available at the time the right was licensed. A&B's calculated maximum peak diversion rate requirement (1,107 cfs) is greater than the licensed maximum rate of diversion (1,100 cfs), and the greatest recorded peak season low flow capacity (1,087 cfs). During its historical record, the Unit B well system has never been able to produce the licensed maximum rate during the peak demand period or been able to satisfy the maximum peak period consumptive use requirement asserted by A&B in its expert report.

**iii. A&B's assertion that increases in efficiency have been "offset" by increased ET and a change in crop mix are not supported by the record**

84. A&B argues that any increase in efficiency is "offset" by increased ET. Ex. 200 at 4-18. In its expert report, A&B found an increase in ET by comparing weather data from the Rupert Agrimet station for the period 1995-2007 with a 1955 ET estimate from the USBR's 1955 Definite Plan Report. *Id.* at 4-9-10, Tbl. 4-12. A&B concluded in its expert report that average July crop ET has increased by 40 percent, and that peak July crop ET has increased by 53 percent. *Id.* at 4-18. A&B asserts the increase in ET "offsets the decrease in demand that may occur from efficiency gains from installing sprinklers." *Id.*

85. A&B's comparison of ET, based on the 1955 Definite Plan Report, and 1995-2007 ET from Rupert Agrimet is not reliable. The estimates were determined for different time periods using different methods and different data.

86. The Agrimet ET estimate is based on application of a physically based, standardized ET equation using daily data from a single weather station. In contrast, the 1955 Definite Plan Report's original irrigation season diversion requirement was semi-quantitatively determined by comparing results from a different temperature-based consumptive use algorithm

with observations of irrigation requirements for crops grown on project lands in the vicinity of A&B. Ex. 111A at 39, 42-43. The monthly distribution of farm deliveries was assumed to be the same as that for the South Side Pumping Unit of the Minidoka Project (i.e., Twin Falls Canal Company). *Id.* at 45.

87. In its expert report, Pocatello examined June, July, and August ET from 1907-2002 from the National Weather Service’s Rupert weather station. Ex. 334 at 20. The source of the analysis was a University of Idaho publication, authored by Richard G. Allen and Clarence W. Robison, and titled *Evapotranspiration and Consumptive Irrigation Water Requirements for Idaho*. In analyzing the data, Pocatello concluded that there is no “long-term trend in ET.” *Id.*

88. The Director agrees with Pocatello’s conclusion. Instead of comparing a period of recent record with a single historical year—based on two different methods for determining ET from different locations—Pocatello’s analysis examined nearly 100 years’ worth of data from the same weather station. The Director finds there is no reasonably discernable long-term July ET trend, and that A&B’s improved efficiencies have not been “offset” by increased ET.

89. In addition to arguing that an increase in ET has “offset” its improved irrigation efficiencies, A&B also asserts that, “one reason for the higher current evapotranspiration requirements and the higher peak month ET requirements is the change in crop distribution.” Ex. 200 at 4-10. A&B considered impacts on mid-season crop water demand of a change in crop mix from what was originally assumed in the USBR’s 1955 Definite Plan Report to support its theoretically based consumptive use requirement. *Id.* As shown in the table below, the following crop mixes were evaluated in A&B’s ET analysis:

Crop Type	1955 Definite Plan Report	A&B’s 1995-2007 study period
Grain	13%	49%
Potatoes	15%	12%
Sugar Beets	11%	24%
Beans & Peas	14%	7%
Alfalfa & Clover	36%	7%
Pasture	9%	1%
Miscellaneous	2%	1%

Ex. 200 at Tbls. 4-3 & 4-14. *See also* Ex. 111A at 47.

According to A&B, “it is reasonable to assume that this crop mix represents the average current crop distribution for the study period.” *Id.* at 4-2.

90. In Table 7 of the 1955 Definite Plan Report, the farm delivery requirements for Unit A during the peak demand period were identified. Ex. 111A at 47. The USBR considered the same crop mix for Unit B but the peak demand rates for Unit B had to be adjusted based on

the relative proportions of different land classifications. *Id.* at 47-48. The USBR's justification for assuming the same crop mix was that, "There is only a very slight difference in the anticipated cropping programs. The only significant difference which would affect the farm delivery is the distribution of land classes." *Id.* at 46. The highest crop-specific, peak period water application depth was for potatoes (16 inches) followed by alfalfa and pasture (12 inches). *Id.* at 47. The lowest peak period water application depth was for grain (6 inches). *Id.*

91. As shown in the table below, applying the USBR's estimates for the peak period water demand depths for Unit A soils, Ex. 111A at 47, to the crop mixes used in the A&B expert report analysis, Ex. 200 at Tbl. 4-3, results in the prediction of a lower peak water demand for the crop mix evaluated for A&B's 1995-2007 study period (8.4 in.) than for the crop mix assumed in the Definite Plan Report (10.7 in.). This result is consistent with the USBR's determination that, "The July and August water requirement for row crops is considerably higher than that for grain" *Id.* at 42.

Crop Type	1955 Definite Plan Report		Study period for A&B's expert report (1995-2007)	
	Percent	Water Application Depth During Peak Demand Period (in.)	Percent	Water Application Depth During Peak Demand Period (in.)
Grain	13	6	49	6
Potatoes	15	16	12	16
Sugar Beets	11	8	24	8
Beans & Peas	14	8	7	8
Alfalfa & Clover	36	12	7	12
Pasture	9	12	1	12
Miscellaneous	2	6	1	6
Total	100	weighted average = 10.7	101	weighted average = 8.4

92. Presently, A&B irrigates more sugar beets than it did historically. However, A&B also irrigates considerably more grains than it did historically. A&B no longer irrigates as much alfalfa and clover as it did historically. The Director finds that ET has not increased as a result of changes in crop mix.

93. Because there is no discernable long-term July ET trend and A&B's crop mix has not become more consumptive, the Director finds that increases in efficiency have not been "offset" by ET or a change in crop mix.



iv. **A&B's asserted 68,047 acre-feet peak monthly pumping volume is theoretically based and not supported by the record**

94. A&B argues it should be entitled to a maximum instantaneous wellhead flow rate of 0.89 miner's inches per acre. As stated above, A&B derived 0.89 miner's inches per acre from a peak monthly pumping volume of 68,047 acre-feet at the wellhead. This is a theoretical peak monthly volume, not a measured monthly volume. As stated above, the theoretical volume was derived from monthly values. If A&B were to pump 68,047 acre-feet of water over a 30-day period, the equivalent flow rate would be 1,144 cfs.

95. The maximum, monthly volume of water ever diverted by A&B was 58,528 acre-feet, pumped in July 1963, and occurred over a 31-day period (July 1 to July 31). Ex. 132 (A&B 1450). In 1963, the project was irrigated by gravity systems with greater losses and less efficiencies than today's pressurized systems with the attendant reductions in losses and resulting increases in efficiencies. R. at 1111, 1148. In 2007, the maximum, monthly volume diverted was 51,245 acre-feet, pumped from June 15 to July 15. Ex. 132 (A&B 1450). In 2007, 96 percent of the place of use was converted to sprinkler irrigation and conveyance loss was reduced to 3 percent. Ex. 200 at Tbl. 4-6; R. at 1114-1115; R. at 3088. A&B's theoretically based peak monthly volumetric diversion requirement (68,047 acre-feet) is 9,519 acre-feet more than the greatest monthly volume of water ever pumped on the project (58,528 acre-feet). The testimony by farmers at the hearing, together with crop yield records, and the Department's METRIC and NDVI analyses, supports a determination that the current water supply is sufficient for A&B to grow crops to maturity. *Final Order on Remand* at 10-12.

**F. Analysis of Evidence and Testimony Concerning A&B Cropping**

96. During the hearing, A&B farmers were called by A&B and IGWA to testify about water use on the A&B project and adjacent areas. A&B farmers called by A&B testified uniformly that they could put additional water to beneficial use. An A&B farmer called by IGWA testified that, "[a]s a general rule, farmers want more water not less." Tr. Vol. X, p. 2106 (Stevenson).

97. Witnesses called by A&B and IGWA testified that pivot corners are routinely not irrigated. Some witnesses testified that pivot corners are not irrigated because of reduced water supply, while other witnesses testified that pivot corners are not irrigated because of labor costs. *See e.g.* Tr. Vol. V, pp. 962-963 (Kostka); Tr. Vol. X, p. 2086 (Stevenson).

98. A&B farmers called by A&B testified they meet their producer contracts for crops such as potatoes, sugar beets, and barley. Tr. Vol. IV, pp. 826-828 (Eames); Tr. Vol. V, pp. 1027-1030 (Mohlman); Tr. Vol. V, pp. 907-908 (Adams); Tr. Vol. V, p. 994 (Kostka).

99. Three of the four farmers called by A&B were "plaintiffs in a federal lawsuit claiming crop damage and yield reductions due to the application of a herbicide called 'Oust.'" *Recommended Order* at 27. The lawsuit "precluded inquiry into crop yields and the circumstances surrounding those yields for the period from 2001-2005 . . ." *Id.*

100. A&B farmers called by IGWA testified they were able to raise crops to full maturity on A&B lands. Tr. Vol. X, p. 2088 (Stevenson); Tr. Vol. X, p. 2138 (Maughan). An A&B farmer called by IGWA testified that on lands immediately adjacent to the A&B project, he was able to raise crops to full maturity with less water from private wells. Tr. Vol. X, pp. 2074-2076, 2090 (Stevenson).

101. An A&B farmer called by IGWA testified that on his A&B acres, he “replace[s] water with management.” Tr. Vol. X, p. 2102 (Stevenson). Speaking to management, an A&B farmer called by A&B testified “there is no comfort zone. There is no getting ahead. There is no point in the irrigation season that I can say: Maybe I’d like to go camping this weekend. It’s a lot more intense management . . . .” Tr. Vol. V, p. 966 (Kostka).

102. An IGWA witness who farms in the American Falls area testified that he grows crops to full maturity with a delivery rate of 0.41 miner’s inches per acre on one farm, and 0.90 miner’s inches per acre on another farm. Tr. Vol. X, p. 1070 (Deeg). The witness testified that the 0.90 delivery rate has likely gone down because he converted to “center pivot and we’re [using] much less water now, but I don’t know exactly what it is.” *Id.* An IGWA witness who farms within the boundary of the North Side Canal testified that for grain crops he irrigates with 0.60 to 0.65 miner’s inches per acre. Tr. Vol. X, p. 2036 (Carlquist).

103. In these proceedings, water use by junior-priority ground water users was examined and found to be reasonable. *January 2008 Final Order* at 13-14; *Recommended Order* at 3106-3107.

104. Witnesses testified that crop yields have generally increased over time. Tr. Vol. X, p. 2042 (Carlquist); Tr. Vol. X, p. 2090-2091 (Stevenson); Tr. Vol. X, pp. 2139-2140; Tr. Vol. IV, pp. 721-722 (Temple); Tr. Vol. IV, pp. 845-846 (Eames). This is consistent with evidence submitted at the hearing showing an increase in Minidoka County crop yields, over time. Ex. 357. Two A&B farmers who testified at the hearing, for whom data was prepared, had higher crop yields than the Minidoka County average. Ex. 355A (Eames); Ex. 358 (Mohlman).

105. The testimony and exhibits concerning crop yield is supported by a Department analysis of ET on and around the A&B project. *January 2008 Final Order* 19-23. Vol. VI p. 1104, 1106. Alfalfa is used as the reference crop because it “has the highest ET of all the crops.” Tr. Vol. VI p. 1104. Because all other crops are less consumptive, the analysis did not require knowledge of cropping, rotation practices, or diversions. Tr. Vol. VI, pp. 1117-1118.

106. METRIC<sup>16</sup> ET data were used to compute and map consumptive water use on and around the A&B project. ET data were analyzed from three 2006 Landsat image dates: June 20, July 22 (hottest day of the summer), and August 7. Tr. Vol. VI, pp. 1108-1109; *January 2008 Final Order* at 21. While images are taken every 16 days and could be analyzed, monthly

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<sup>16</sup> “METRIC is an acronym for mapping evapotranspiration at high resolution with internalized calibration. It is a model developed by the University of Idaho to take Landsat data, and using a remote sensing and energy-balanced approach, convert that to evapotranspiration data.” Tr. Vol. VI, p. 1098. METRIC was developed by Dr. Rick Allen of the University of Idaho, Kimberly Research Station. *Id.*

images depict the necessary fluctuations in ET upon which to base the analysis. Tr. Vol. VI, p. 1109. METRIC has been peer reviewed, is used by other western states for water use analyses, and is recommended for use by the ESPA modeling committee. Tr. Vol. VI, pp. 1198-1103. The analysis compared the mean ET for acres within A&B that were specifically alleged by A&B as water short (Item-G lands), acres within A&B that were not alleged by A&B as water short, and adjacent acres outside the A&B project boundary that were not alleged as water short. Tr. Vol. VI, pp. 1107-1108; *January 2008 Final Order* at 20.

107. Imagery from 2006 was selected because it was the only year specific acres were alleged by A&B to be water short. Tr. Vol. VI, p. 1106. Further analysis normalized the ET data using NDVI (Normalized Difference Vegetation Index) to adjust for any differences caused by cropping patterns. *January 2008 Final Order* at 21-23. The NDVI analysis showed crop health and the amount of vegetation on the ground. Tr. Vol. VI, pp. 1105-1106. NDVI is also a peer reviewed analysis. *Id.*

108. On the hottest day of the summer, July 22, the Item-G lands had the highest consumptive use of all acres analyzed for purposes of mean ET and mean ETrF. *January 2008 Final Order* at 21-22, Figs. 10-12. In terms of the ratio of ETrF and NDVI, Item-G lands had the highest consumptive use per amount of vegetation of all acres analyzed on June 20 and August 7. *January 2008 Final Order* at 23, Fig. 13. Item-G lands generally had higher consumptive use than other ground water irrigated acres within A&B. *January 2008 Final Order* at 21-23, Figs. 10-13. Consumptive use on A&B acres was generally higher than other acres analyzed. *Id.* The higher consumptive use by crops on Item-G lands supports the conclusion that A&B is not water short. Tr. Vol. VI, pp. 1116-1117, 1136.

109. A&B's crop distribution records show that its lands are planted with a variety of crops. In its expert report, A&B presented its "average current crop distribution for the study period [1995 to 2007]." Ex. 200, 4-2. In Table 4-3, A&B reports that 49 percent of its lands are planted with grains, 24 percent are planted with beets, 12 percent are planted with potatoes, 7 percent are planted with alfalfa, 1 percent is planted with corn and peas, and 1 percent is pasture. Ex. 200, Tbl. 4-3.<sup>17</sup> The results of the ET analyses showed that with its diverse crop mix A&B was not water short. *January 2008 Final Order* at 21-23, Figs. 10-13; Tr. Vol. VI, pp. 1143-1144.

## CONCLUSIONS OF LAW

1. In its Memorandum Decision, the district court remanded the Director's finding of no material injury because he did not state which evidentiary standard of proof he applied. *Memorandum Decision* at 37-38. The district court held that the burden of proof required in conjunctive administration of hydraulically connected ground water rights is "clear and convincing evidence." *Id.* at 34. "No further evidence is required." *Id.* at 49.

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<sup>17</sup> In its expert report, Pocatello averaged A&B's crop distribution as follows: 26.9 percent spring grain, 26.1 percent sugar beets, 20.1 percent winter grain, 11.4 percent potatoes, 6.7 percent alfalfa, 5.7 percent dry beans, 1.5 percent silage corn, 0.9 percent pasture, 0.5 percent peas, and 0.2 percent sweet corn. Ex. 301, A-4-5.

2. In ordinary civil actions, “the burden of proof is by a preponderance of the evidence, which means more probable than not.” *Bourgeois v. Murphy*, 119 Idaho 611, 622, 809 P.2d 472, 483 (1991). “Preponderance of evidence means such evidence as, when weighed with that opposed to it, has more convincing force and from which it results that the greater probability of truth lies therein.” *Id.* Under the preponderance standard, when the evidence is evenly balanced then the finding must be against the party who bears the burden of persuasion. *Big Butte Ranch, Inc. v. Grasmick*, 91 Idaho 6, 9, 415 P.2d 48, 51 (1966).

3. “Clear and convincing evidence refers to a degree of proof greater than a mere preponderance.” *Idaho State Bar v. Topp*, 129 Idaho 414, 416, 925 P.2d 1113, 1115 (1996) (internal quotations removed). “Clear and convincing evidence is generally understood to be ‘[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.’” *State v. Kimball*, 145 Idaho 542, 546, 181 P.3d 468, 472 (2008) citing *In re Adoption of Doe*, 143 Idaho 188, 191, 141 P.3d 1057, 1060 (2006); see also *Idaho Dept. of Health & Welfare v. Doe*, 150 Idaho 36, 41, 244 P.3d 180, 185 (2010).

4. On remand, the Director is required to apply the clear and convincing evidentiary standard of proof to the evidence in the record in order to determine if “the quantity decreed to A&B’s 36-2080 exceeds the quantity being put to beneficial use for purposes of determining material injury.” *Memorandum Decision* at 49. “[T]he senior is not guaranteed the decreed quantity nor is the Director required to administer strictly in accordance with the decreed quantity. While a senior may not be guaranteed the decreed quantity in a delivery call, he should have assurances that any reduced quantity determined to be sufficient to satisfy current needs is indeed sufficient.” *Memorandum Decision on Rehearing* at 7. “Simply put, the senior is entitled to the quantity reflected in the decree unless it can be shown by clear and convincing evidence that the full quantity is not or would not be put to beneficial use.” *Memorandum Decision* at 34, fn. 12.

5. “In Idaho, water rights are real property.” *Olson v. Idaho Dept. of Water Resources*, 105 Idaho 98, 101, 666 P.2d 188, 191 (1983); Idaho Code § 55-101. “[T]he right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use. . . . [R]unning water, so long as it continues to flow in its natural course, is not, and cannot be made, the subject of private ownership. A right may be acquired to its use which will be regarded and protected as property, but it has been distinctly declared in several cases that this right carries with it no specific property of the water itself.” Samuel C. Wiel, *Water Rights in the Western States* § 18 (1911). See also *Joyce Livestock Co. v. United States*, 144 Idaho 1, 7, 156 P.3d 502, 508 (2007) (a water right “does not constitute ownership of the water”). “All waters within the state when flowing in their natural channels and all ground waters are property of the State. Idaho Code §§ 42-101 & 42-226. The state has the duty to supervise their appropriation and allotment to those diverting such waters for any beneficial purpose. *Id.*” *Clear Springs Foods, Inc. v. Spackman*, \_\_\_ Idaho \_\_\_, 252 P.3d 71, 96 (2011).

6. Idaho Code § 42-602, addressing the authority of the Director over the supervision of water distribution within water districts, provides:

The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

7. “Given the nature of the decisions which must be made in determining how to respond to a delivery call, there must be some exercise of discretion by the Director.” *American Falls Res. Dist. No. 2 v. Idaho Dept. Water Resources*, 143 Idaho 862, 875, 154 P.3d 433, 446 (2007). “The agency’s experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.” Idaho Code § 67-5251(5); IDAPA 37.01.01.600.

8. Idaho Code § 42-603, which grants the Director authority to adopt rules governing water distribution, provides as follows:

The director of the department of water resources is authorized to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof. Promulgation of rules and regulations shall be in accordance with the procedures of chapter 52, title 67, Idaho Code.

9. In addition, Idaho Code § 42-1805(8) provides the Director with authority to “promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department.” In accordance with the authority granted to him, the Director promulgated the *Rules for Conjunctive Management of Surface and Ground Water Resources* (“CM Rules”). IDAPA 37.03.11.000. “The policy of securing the maximum use and benefit, and least wasteful use, of the State’s water resources applies to both surface and underground waters, and it requires that they be managed conjunctively.” *Clear Springs* at 89.

10. Water district nos. 100, 110, 120, 130, and 140 were created to provide for the administration of ground water rights in areas overlying the ESPA, pursuant to the provisions of chapter 6, title 42, Idaho Code, for the protection of prior surface and ground water rights.

11. Injury to senior-priority water rights by diversion and use of junior-priority ground water rights occurs when diversion under the junior rights intercept a sufficient quantity of water to interfere with the exercise of the senior water right for the authorized beneficial use. CM Rule 10.14. Depletion does not automatically constitute material injury. *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 868, 154 P.3d 433, 439 (2007).

12. The prior appropriation doctrine, as established by Idaho law, protects holders of

senior-priority water rights. Idaho Const. Art. XV, § 3. This protection is not, however, absolute. A senior's use must be reasonable, beneficial, and not result in monopolization or waste of the resource. CM Rule 20.03; *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1911); *Clear Springs* at 89-90; *Mountain Home Irrigation District v. Duffy*, 79 Idaho 435, 319 P.2d 965 (1957). "Economy must be required and demanded in the use and application of water." *Clear Springs* at 89 citing *Farmer's Co-operative Ditch Co. v. Riverside Irrigation District, Ltd.*, 16 Idaho 525, 535, 102 P. 481, 483 (1909). The Director must "equally guard all the various interests involved." *Clear Springs* at 89 citing Idaho Code § 42-101.

13. Because the amount of water necessary for beneficial use can be less than decreed or licensed quantities, it is possible for a senior to receive less than the decreed or licensed amount, but not suffer injury. *Memorandum Decision on Rehearing* at 7. The "public waters of this state shall be subjected to the highest and greatest duty." *Clear Springs* at 89 citing *Niday v. Barker*, 16 Idaho 73, 79, 101 P. 254, 256 (1909). Thus, a senior water right holder cannot demand that junior ground water right holders diverting water from a hydraulically connected aquifer be required to make water available for diversion unless that water is necessary to accomplish an authorized beneficial use. "The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources." *Clear Springs* at 89 citing *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960).

14. As between junior- and senior-priority ground water users, Idaho Code § 42-226's dual principles of full economic development and reasonable pumping levels apply. *Clear Springs* at 85, 88-89; *Baker v. Ore-Ida*, 95 Idaho 575, 513 P.2d 627 (1973). In responding to delivery calls under the CM Rules, the Director is required to evaluate all principles of the prior appropriation doctrine. CM Rule 20.03.

15. In *American Falls*, the Court acknowledged the complexities of conjunctive administration:

Typically, the integration of priorities means limiting groundwater use for the benefit of surface water appropriators because surface water generally was developed before groundwater. The physical complications of integrating priorities often have parallels in the administration of solely surface water priorities. The complications are just more frequent and dramatic when groundwater is involved.

....

When water is diverted from a surface stream, the flow is directly reduced, and the reduction is soon felt by downstream users unless the distances involved are great. When water is withdrawn from an aquifer, however, the impact elsewhere in the basin or on a hydrologically connected stream is typically much slower.

*American Falls*, 143 Idaho at , 154 P.3d at 448 citing Douglas L. Grant, *The Complexities of Managing Connected Surface and Ground Water Under the Appropriation Doctrine*, 22 Land & Water L. Rev. 63, 73, 74 (1987).

16. CM Rules 30 and 40 specifically group calls together that are “made by the holders of senior-priority surface or ground water rights against the holders of junior-priority ground water rights . . . .” *See also* CM Rules 1 & 10.03. A delivery call by the holder of a senior-priority ground water right against the holders of junior-priority ground water rights is therefore just as complex as a delivery call by the holder of a senior-priority surface water right against the holders of junior-priority ground water rights, if not more so.

17. CM Rule 40 sets forth procedures to be followed for responses to calls for water delivery made by the holders of senior-priority water rights against the holders of junior-priority ground water rights from areas having a common ground water supply in an organized water district. A&B’s delivery call has proceeded under CM Rule 40. *January 2008 Final Order* at 42.

18. Factors that may be considered by the Director in determining whether junior-priority ground water rights are causing injury to A&B are set forth in CM Rule 42:

**01. Factors.** Factors the Director may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste include, but are not limited to, the following:

- a. The amount of water available in the source from which the water right is diverted.
- b. The effort or expense of the holder of the water right to divert water from the source.
- c. Whether the exercise of junior-priority ground water rights individually or collectively affects the quantity and timing of when water is available to, and the cost of exercising, a senior-priority surface or ground water right. This may include the seasonal as well as the multi-year and cumulative impacts of all ground water withdrawals from the area having a common ground water supply.
- d. If for irrigation, the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application.
- e. The amount of water being diverted and used compared to the water rights.
- f. The existence of water measuring and recording devices.
- g. The extent to which the requirements of the holder of a senior-priority water right could be met with the user’s existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices; provided, however, the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure

water supplies for future dry years. In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system.

h. The extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells to divert and use water from the area having a common ground water supply under the petitioner's surface water right priority.

19. In its 1994 Petition for Delivery Call A&B asserted that:

By reason of the diversions of water by junior ground water appropriators located within the E[SPA], the Petitioner is suffering material injury as a result of the lowering of the ground water pumping level within the E[SPA] by an average of twenty (20) feet since 1959, with some areas of the Aquifer lowered in excess of forty (40) feet since 1959, reducing the diversions of A&B . . . to nine hundred seventy-four (974) cfs, a reduction of one hundred twenty-six (126) cfs from the diversion rate provided in the water right referenced above.

R at 13.

20. In its 2007 Motion to Proceed, A&B requested that:

the Director to lift the stay agreed to by the parties . . . for the delivery of ground water . . . and that said Director proceed, without delay, in the administration of the E[SPA] in such a manner as to provide ground water to A&B under its ground water rights that are being interfered with and materially injured by junior ground water appropriators in the ESPA . . . .

R. at 830.

21. Contrary to the assertion of A&B, and as previously stated, depletion does not equate to material injury. Material injury is a highly fact specific inquiry that must be determined in accordance with CM Rule 42.

22. CM Rule 40.03 asks the Director to "consider" whether junior-priority ground water users are "using water efficiently and without waste." In the course of these proceedings, water use by junior-priority ground water users was examined and found to be reasonable.

23. While some of A&B's well systems are interconnected, other well systems are not. A&B's water right provides it with flexibility because no rate of diversion or volumetric limitation is decreed to a particular point of diversion or place of use for 36-2080. *Memorandum Decision* at 40. A&B has a reasonable duty to interconnect its system prior to seeking curtailment of junior-priority ground water users. "The decision of the Director to evaluate



material injury to the 36-2080 water right based on depletion to the cumulative quantity as opposed to determining injury based on depletions to individual points of diversion is affirmed.” *Memorandum Decision* at 50. The holding of the district court was not appealed.

24. A&B’s delivery call is based upon alleged shortages to its senior water right, 36-2080. It is undisputed that A&B’s senior water right, 36-2080, authorizes the diversion of 1,100 cfs for the irrigation of 62,604.3 acres. A&B is authorized to divert water within the limits of its decree. The Director’s examination of A&B’s water right, in the context of conjunctive administration, is in accord with Idaho law. The amount of water necessary for beneficial use may be less than the decreed quantity; therefore, a senior may receive less than the decreed quantity, but not suffer injury.

25. While A&B is authorized to divert from 188 points of diversion, the record established that only 177 wells are in production. Therefore, A&B has 11 additional wells that must be put to use if more water is needed to fully utilize its existing facilities before seeking curtailment of junior-priority ground water rights. CM Rule 42.01.g, h.

26. A&B holds additional junior and subordinated enlargement rights that authorize irrigation of 4,081.9 acres. A&B’s junior and subordinated enlargement rights are not part of its delivery call. A&B admits it has no mechanism to limit water diverted under water right no. 36-2080 to its place of use, 62,604.3 acres. A&B admits it applies water diverted under 36-2080 to junior and subordinated enlargement acres even during hot summer months when demand for water is at its greatest. Therefore, A&B irrigates 4,081.9 more acres than are authorized to be irrigated under its calling water right, 36-2080. Before the Director will curtail junior-priority ground water rights, of which A&B’s beneficial use and enlargement acres are potentially a part, A&B must be able to account for how its calling right can be administered without those acres. The Director will not curtail junior ground water pumping until A&B has provided the accounting of acreage to which water would no longer be delivered.

27. Regarding A&B’s enlargement rights—totaling 2,063.1 acres—the district court explained as follows: “The indirect result is that the enlargement rights are protected under the September 9, 1948, priority date and the subordination provision that applies to all enlargement rights is circumvented.” *Memorandum Decision* at 41. The Director concurs with this statement. To conclude otherwise would result in injury to water right holders who are junior to A&B’s 36-2080 right, but senior to its enlargement rights. Idaho Code § 42-1426; *Fremont-Madison Irr. Dist. and Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 460-61, 926 P.2d 1301, 1307-08 (1996).

28. In its 1994 Petition for Delivery Call, A&B stated its “diversions” under water right 36-2080 were 974 cfs. In its 2007 Motion to Proceed, A&B stated its “diversions” under the same right were 970 cfs. As stated in the Findings of Fact, the measurements provided by A&B in its Petition and Motion to Proceed are peak season low flow well capacity measurements. In its Motion to Proceed, A&B stated it “was able to deliver at least 0.75 miner’s inch prior to the major impacts caused by junior ground water pumping.”

29. The 2006 water supply of 970 cfs is the low flow capacity of A&B’s pumps

during the peak season, which equates to 0.77 miner's inches per acre for the 62,604.3-acre place of use for water right 36-2080. Adjusted for 3 percent conveyance loss, the on-farm delivery is 0.75 miner's inches per acre. However, because A&B does not limit irrigation to 62,604.3 acres, the on-farm delivery for 66,686.2 acres, adjusted for 3 percent conveyance loss, is 0.71 miner's inches per acre. The Director concludes that if A&B limited irrigation under 36-2080 to 62,604.3 acres, it would satisfy the criteria set forth in its Motion to Proceed.

30. In its Motion to Proceed, A&B stated that 0.75 miner's inches is "the minimum amount necessary to irrigate lands within A&B during the peek [sic] periods when irrigation water is most needed." R. at 836. At the hearing and in its expert report, A&B stated that 0.75 is a well rectification standard, not an irrigation requirement. In its expert report, A&B presented a theoretical analysis to support its position that 0.89 miner's inches per acre is its diversion requirement during the peak season. As will be explained below, A&B theoretical analysis ignores that its actual diversions during the peak season have never met its stated diversion requirement.

31. A&B is authorized to divert 1,100 cfs (0.88 miner's inches per acre) under water right 36-2080, and the record supports the fact that A&B is capable of diverting 1,100 cfs. The evidence in the record establishes that 1,100 cfs has not been available for diversion during the peak season when demand for water is at its greatest. Based on the Annual Report, Part 2, the Director concludes that the maximum low flow capacity of A&B production wells during the peak season, 1,087 cfs (0.87 miner's inches per acre), occurred in 1974. Adjusted for 8 percent conveyance loss, the amount of water available for on-farm delivery during the peak season is 1,000 cfs, Ex. 113 at 58 (A&B 609), or 0.80 miner's inches per acre. Therefore, the Director concludes that 0.88 miner's inches per acre has not been available for diversion during the peak season. CM Rule 42.01.c. *See also Order on Petition for Judicial Review, CV-2008-444, pp. 21-22 (Fifth Jud. Dist., June 19, 2009) (Director's consideration of a water right's seasonal variability is authorized by the CM Rules).*

32. Based on the WaterPumpedrevised.xls spreadsheet, which measures diversions at the wellhead, the Director concludes that the maximum amount of water actually diverted during the peak season was 0.76 miner's inches per acre in 1963 and 1967. CM Rule 42.01.c. In 1964, A&B actually diverted 0.75 miner's inches per acre. *Id.* In those years, water was diverted predominantly through unlined ditches and laterals and applied by gravity systems. These values are not adjusted for conveyance loss and irrigation efficiency.

33. In comparing peak season low flow well capacity from the Annual Report, Part 2 with actual diversions from the WaterPumpedrevised.xls spreadsheet, the Director concludes that A&B is not making full use of its diversion works during the peak season. CM Rule 42.01.a, d, e, h. For example, in 2006, the year A&B filed its Motion to Proceed, 970 cfs (0.77 miner's inches per acre) was available for diversion; however, A&B actually diverted 0.65 miner's inches per acre.

34. Converted to a monthly volume, the 2006 peak season low flow discharge of 970 cfs is 59,643 acre-feet. In 2006, A&B pumped 49,855.3 acre-feet. Therefore, A&B had the ability or capacity on a project-wide basis to pump nearly 10,000 acre-feet of additional water

during the peak demand period. Moreover, A&B accomplished its diversions in 2006 from 177 of 188 wells.

35. The Director concludes that, during the peak season, A&B could divert additional water for irrigation purposes. CM Rule 42.01.e. Further, if more water is needed, A&B has additional wells that could be put into production. CM Rule 42.01.g. Requiring curtailment when there are sufficient reasonable alternative means of diversion is contrary to the full economic development of the State's water resources. CM Rule 20.03; Idaho Code § 42-226.

36. The Director concludes that A&B has the capacity to pump more water if it in fact needs more water. For purposes of conjunctive administration, A&B may not seek curtailment of junior-priority ground water rights when it is not fully utilizing its capacity to divert water. CM Rule 20.03; Idaho Code § 42-226; *Clear Springs* at 90.

37. The Director concludes that ground water declines across the ESPA and within A&B's boundary have occurred because of conversion from application by gravity flood/furrow irrigation to sprinkler systems, a sequence of prolonged drought, and ground water diversions for irrigation and other consumptive purposes.

38. The record establishes that A&B has successfully implemented numerous measures that have reduced the amount of water required to irrigate the 62,604.3 acres under its calling water right, 36-2080. These measures include: 1) conversion of 1,447 acres, or 2.3 percent of 62,604.3 acres, from ground water irrigation to surface water irrigation; 2) reduction of conveyance losses from 8 percent to 3 percent; 3) conversion of 96 percent of the project from gravity to sprinkler irrigation (sprinkler irrigation was expected to reduce the per acre water requirement by 19.6 percent); and 4) near completion of a drain well elimination program, which provides for re-use of storm water and waste water for the irrigation of crops.

39. The Director concludes that the total average decrease in peak monthly well production of 4,206 acre-feet, between the periods 1963 through 1982 and 1994 through 2007 (7.7 percent), is attributable to measures discussed above and the fact that A&B added 4,081.9 acres of irrigation development (junior and subordinated enlargement acres) beyond the 62,604.3 acres licensed under its calling water right, 36-2080. CM Rule 42.d, e.

40. The Director concludes that had A&B limited its ground water use to irrigation of the 62,604.3 acres under water right 36-2080, or if it had not developed 4,081.9 additional acres of irrigation (junior and subordinated enlargement acres), mean annual ground water use between 1982 and 2007 would be lower than the mean annual use actually recorded for that period. CM Rule 42.d, e.

41. An analysis of 2006 ET data using METRIC and NDVI modeling showed that A&B acres had higher consumptive use and biomass than surrounding irrigated acres that were not alleged to be water short. In 2006, A&B did not pump to its full capacity and actual peak season diversions were 0.65 miner's inches per acre. The METRIC and NDVI models have been published, peer reviewed, and are scientifically reliable. The Director concludes that A&B lands alleged to be water short have higher consumptive use and biomass than lands not alleged to be

water short. Based on these analyses, it is reasonably certain that A&B lands are not water short.

42. While witnesses called by A&B testified that they could put more water to beneficial use, based on the testimony and crop yield records, the Director concludes with reasonable certainty that A&B's crop mix is grown to maturity on A&B lands with the current water supply.

43. The southwestern area of the A&B project has been noted for its lack of productivity. The Director does not question well construction or well placement. The question is whether A&B may curtail junior-priority ground water rights because of inherent hydrogeological facts that cannot be attributed to junior ground water pumping. The hydrogeology in the southwestern area of the project is inherently poor and was documented as such by numerous letters that were written during the late 1950s and early 1960s. The problems discussed in the USBR letters were not the result of junior ground water pumping by others. The Director concludes that the inherent hydrogeologic environment in the southwestern area of the project—not depletions caused by junior-priority ground water users—is the primary cause of A&B's reduced pumping yields and the need to convert 1,447 acres from ground water to surface water irrigation. Wells placed in a poor hydrogeologic environment do not constitute a reasonable means of diversion. CM Rule 42.01.g, h. To curtail junior-priority ground water rights because of a poor hydrogeologic environment would countenance unreasonableness of diversion and hinder full economic development of the State's water resources. CM Rule 20.03; Idaho Code § 42-226; *Clear Springs* at 90-91 (a senior appropriator's means of diversion must be reasonable to sustain a delivery call).

44. In its *Memorandum Decision*, the district court stated that the Director must conclude by clear and convincing evidence "that the quantity decreed to A&B's 36-2080 exceeds the quantity being put to beneficial use for purposes of determining material injury." *Memorandum Decision* at 49. "Conditions surrounding the use of water are not static. Post-adjudication circumstances can result where a senior may not require the full quantity decreed." *Id.* at 30. "Efficiencies, new technologies and improvements in delivery systems that reduce conveyance losses can result in a circumstance where the full decreed quantity may not be required to irrigate the total number of decreed acres. The subsequent lining or piping of a ditch or the conversion from gravity fed furrow irrigation to sprinkler irrigation can reduce the quantity of water needed to accomplish the purpose of use for which the right was decreed." *Id.* at 30.

45. In its November 2, 2010 *Memorandum Decision on Rehearing*, the district court went on to say, "In the delivery call, the senior's present water requirements are at issue. If it is determined that the senior's present use does not require the full decreed quantity, then the quantity called for in excess of the senior's present needs would not be put to beneficial use or put differently would be wasted." *Memorandum Decision on Rehearing* at 8. "[I]n order to give proper presumptive weight to a decree any finding by the Director that the quantity decreed exceeds that being put to beneficial use must be supported by clear and convincing evidence." *Memorandum Decision* at 38.

46. "Idaho law prohibits a senior from depriving a junior of water if the water called

for is not being put to beneficial use. Therefore a decree or license does not insulate a senior appropriator from an allegation of waste or the failure to put the decreed quantity to beneficial use.” *Id.* at 33. “[T]here are indeed circumstances where the senior making the call may not at the present time require the full decreed quantity and therefore is not entitled to administration based on the full decreed quantity.” *Memorandum Decision on Rehearing* at 7.

47. The Idaho Supreme Court recently stated: “The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.” *Clear Springs* at 89. “Economy must be required and demanded in the use and application of water.” *Id.*

48. The record establishes that A&B is authorized to divert up to 1,100 cfs for irrigation of 62,604.3 acres. The record establishes that A&B irrigates 4,081.9 acres more than are authorized under its calling water right. The record establishes that A&B’s water use has decreased as a result of converting its project from gravity to sprinkler irrigation and employing other efficiency measures. The record establishes that A&B has not had the capacity to divert its full water right during the peak season, and does not utilize the capacity it has during the peak season when water is most needed. While A&B is authorized to divert from 188 points of diversion, it only pumps from 177 wells. The record establishes that since 1992, when a majority of the project had been converted to sprinklers—and not taking into consideration the 1,447 acres that were converted from ground water to surface water in the southwestern area of the project, or the capacity that could be gained from putting the 11 unused wells into production—A&B’s actual diversions have averaged 0.65 miner’s inches per acre during the peak season.

49. Due to decreased conveyance loss and improved irrigation efficiencies, the Director concludes that A&B’s efficiencies have allowed it to increase available water to grow crops to maturity. The Director concludes that there is no discernible long-term trend in ET and that A&B’s efficiencies have not been “offset” by increased ET or different cropping patterns. This conclusion further supported by testimony at the hearing by farmers, crop yield records, and the Department’s METRIC and NDVI analyses. A&B may change to a more consumptive crop mix, which could require more water than is available under current circumstances; however, based on examination of historical and current crop mixes contained in this record, the Director concludes that A&B has sufficient water to raise crops to maturity.

50. The Director concludes that, despite reduced peak low flow diversions that are less than 1,100 cfs, A&B’s improved efficiencies, over time, have allowed it to provide more water for consumptive use by crops than was available at the time the right was licensed. A&B’s calculated maximum peak diversion rate requirement (1,107 cfs) is greater than the licensed maximum rate of diversion (1,100 cfs), and the greatest recorded peak season low flow (1,087 cfs). During its historical record, the Unit B well system has never been able to produce the licensed maximum rate during the peak demand period or been able to satisfy the maximum peak period consumptive use requirement asserted by A&B in its expert report (0.89 miner’s inches per acre).

51. Based on the record, the Director concludes by clear and convincing evidence that

A&B is not materially injured. The clear and convincing evidence in the record supports the Director's conclusion that the 1,100 cfs (0.88 miner's inches per acre) decreed to A&B under 36-2080 exceeds the quantity being put to beneficial use for purposes of determining material injury. *Memorandum Decision* at 49. The clear and convincing evidence in the record supports the Director's conclusion that the quantity available to A&B is sufficient for the purpose of irrigating crops. *Memorandum Decision on Rehearing* at 7. A&B is authorized to divert water within the limits of its decree and may revert to less efficient means of irrigation, which could require more water than is available under current conditions. See Idaho Code §§ 42-223(9) and 42-250.

52. Because A&B is not materially injured, it is not necessary to determine if A&B has exceeded its reasonable pumping levels. *Memorandum Decision* at 22-24; *January 2008 Final Order* at 5.

### ORDER

Based upon and consistent with the foregoing, the Director hereby orders as follows:

IT IS HEREBY ORDERED that the Director concludes by clear and convincing evidence that A&B Irrigation District is not materially injured and its delivery call is DENIED.

IT IS FURTHER ORDERED that prior to seeking curtailment of junior-priority ground water users, A&B must provide the Department with an accounting of junior and/or enlargement acres to which water will not be diverted. Prior to seeking curtailment of junior-priority ground water users, A&B must exercise all of its appurtenant points of diversion.

IT IS FURTHER ORDERED that pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order may appeal the final order to district court by filing a petition in the district court of the county in which a hearing was held, the final agency action was taken, the party seeking review of the order resides, or the real property or personal property that was the subject of the agency action is located. The appeal must be filed within twenty-eight (28) days: (a) of the service date of the final order; (b) of an order denying petition for reconsideration; or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See Idaho Code § 67-5273. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

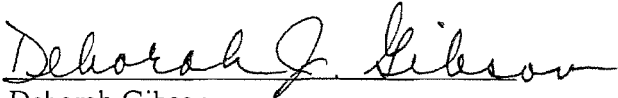
Dated this 30<sup>th</sup> day of June, 2011.

  
GARY SPACKMAN  
Interim Director

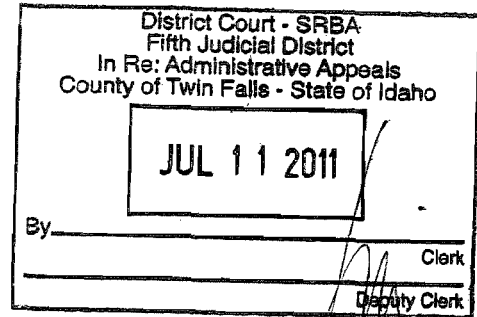
CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the following attached document on the persons listed below by mailing in the United States mail, first class with the correct postage affixed thereto, as well as by e-mail to those persons listed with e-mail addresses, on this 30<sup>th</sup> day of June, 2011.

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Deborah Gibson  
Idaho Department of Water Resources

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*Attorneys for Petitioner 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,

Petitioner,

vs.

THE IDAHO DEPARTMENT OF WATER  
 RESOURCES and GARY SPACKMAN in his  
 official capacity as Interim Director of the Idaho  
 Department of Water Resources,

Respondents.

CASE NO. CV 2011-512

**PETITIONER'S STATEMENT OF  
 INITIAL ISSUES**

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 *Statement of Initial Issues* for its *Petition for Judicial Review* previously filed with the Court on June 27, 2011.



## STATEMENT OF INITIAL ISSUES

1. The Petitioner intends to assert the following issues on judicial review:
  - a. Whether the Director erred by failing to provide for timely and lawful administration of junior priority ground water rights to satisfy A&B's decreed senior ground water right.
  - b. Whether the Director unconstitutionally applied the Department's Conjunctive Management Rules (IDAPA 37.03.11 *et seq.*) and erred in failing to recognize and honor A&B's decreed senior ground water right for purposes of administration.
  - c. Whether the Director erred in finding that A&B could not beneficially use the quantity of its decreed water right for irrigation purposes.
  - d. Whether the Director erred in not finding material injury to A&B's senior water right because A&B has 11 unused wells or points of diversion "that may be put into production at any time or the wells may be reconstructed at another location."
  - e. Whether the Director erred in finding that the "inherent hydrogeologic environment" for certain wells represents an unreasonable means of diversion.
  - f. Whether the Director erred in applying CM Rule 20.03, parts of which have been determined invalid by the Idaho Supreme Court in *Clear Springs Foods, Inc., et al. v. Spackman, et al.*, 150 Idaho 790 (2011).
  - g. Whether the Director erred in forcing A&B to curtail or regulate its 1994 enlargement water rights as a precondition to the administration of other junior water rights.
  - h. Whether the Director erred in using pre-decree information as a basis to disregard A&B's decreed quantity of 1,100 cfs (0.88 miner's inch per acre).

i. Whether the Director erred in concluding that A&B could divert additional water for irrigation purposes during the peak season.

j. Whether the Director erred in failing to apply CM Rules 20.03 and 40.05 for purposes of evaluating whether junior ground water right holders were “wasting” water.

k. Whether the Director erred in finding that A&B could not beneficially use 0.88 miner’s inch per acre even though the Director authorized surrounding water users with junior ground water rights to use 0.88 miner’s inch per acre of water, and more.

l. Whether the Director erred in using a “crop maturity” standard for purposes of water right administration.

m. Whether the Director erred by addressing issues that are beyond the scope of the Court’s remand order.

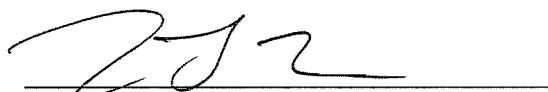
n. Whether the Director’s decision is supported by substantial evidence in the record.

o. Whether, if A&B’s senior water right is subject to the Ground Water Act, the Director erred in refusing to establish a “reasonable ground water pumping level” for purposes of administration pursuant to Idaho Code § 42-226.

2. Pursuant to I.R.C.P. 84(d)(5), the Petitioner reserves the right to assert additional issues and/or clarify or further specify the issues for judicial review stated herein which later become discovered.

**DATED** this 11<sup>th</sup> day of July 2011.

**BARKER ROSHOLT & SIMPSON LLP**



Travis L. Thompson

*Attorneys for Petitioner A&B Irrigation District*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 11<sup>th</sup> day of July, 2011, I served true and correct copies of the *Petitioner's Statement of Initial Issues* upon the following by the method indicated:

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

- U.S. Mail, Postage Prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
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 Chris Bromley  
 Deputy Attorneys General  
 Idaho Department of Water Resources  
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 Boise, Idaho 83720-0098  
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- Overnight Mail
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Jerry R. Rigby Rigby Andrus and Rigby 25 N 2 <sup>nd</sup> East Rexburg, ID 83440 <a href="mailto:jrigby@rex-law.com">jrigby@rex-law.com</a>	Randall C. Budge Candice M. McHugh Racine Olson P.O. Box 1391 201 E Center Street Pocatello, ID 83204-1391 <a href="mailto:rcb@racinelaw.net">rcb@racinelaw.net</a> <a href="mailto:cmm@racinelaw.net">cmm@racinelaw.net</a>	Sarah A. Klahn Mitra Pemberton White & Jankowski LLP 511 Sixteenth Street, Suite 500 Denver, CO 80202 <a href="mailto:sarahk@white-jankowski.com">sarahk@white-jankowski.com</a> <a href="mailto:mitrap@white-jankowski.com">mitrap@white-jankowski.com</a>
A. Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83201 <a href="mailto:dtranmer@pocatello.us">dtranmer@pocatello.us</a>		

  
 \_\_\_\_\_  
 Travis L. Thompson

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District Court - SRBA  
 Fifth Judicial District  
 In Re: Administrative Appeals  
 County of Twin Falls - State of Idaho

**JUL 21 2011**

By \_\_\_\_\_ Clerk  
 \_\_\_\_\_ Deputy Clerk

*Attorneys for Petitioner 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,  
 Petitioner,

vs.

THE IDAHO DEPARTMENT OF WATER  
 RESOURCES and GARY SPACKMAN in his  
 official capacity as Interim Director of the Idaho  
 Department of Water Resources,  
 Respondents.

)  
 ) CASE NO. CV-2011-512  
 )  
 )

)  
 ) **A&B'S RESPONSE TO IDWR'S**  
 ) **MOTION TO DISMISS**  
 )  
 )

\_\_\_\_\_  
 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 *Response to IDWR's Motion to Dismiss*.

## INTRODUCTION

IDWR has no authority to go beyond the plain language of a statute that requires the Department to dispose of A&B's petition for reconsideration within 21 days. Therefore, the Department's June 9, 2011 and June 30, 2011 orders are *ultra vires* and have no bearing on these proceedings. Accordingly, this Court should deny the Department's *Motion to Dismiss A&B's Notice of Appeal* and allow A&B to proceed on its appeal of the April 27, 2011 Order, assuming A&B's petition was not "granted" by the Director's *June 1 Order*. *Infra* n.1.

## BACKGROUND

On May 4, 2010, this Court issued its *Memorandum Decision and Order on Petition for Judicial Review* ("Memorandum Decision") in Case No. CV-2009-647, reversing and remanding the Director's finding of no material injury for application of the appropriate burden of proof and evidentiary standard. IGWA and Pocatello requested rehearing, challenging the Court's decision that the proper standard to apply in conjunctive administration is "clear and convincing." On November 2, 2010, the Court reaffirmed its previous holding regarding the appropriate standards and burden of proof.

On November 10, 2010, A&B requested confirmation that IDWR intended to "proceed with the remand as ordered by the District Court." *A&B November 10, 2010 Letter* (Ex. A to Petition). In the letter, A&B reminded the Department that "time is of the essence for water right administration decisions next year" and requested a timely response as to the Department's intentions. *Id.*

The Department refused to follow this Court's *Memorandum Order*. As such, A&B was forced to seek relief from this Court by filing a *Motion to Enforce the Remand Order*. This

Court again ordered the Director to analyze the A&B call under the correct standard of review. *Order Granting Motion to Enforce in Part and Denying Motion in Part* (February 15, 2011).

Over two months later, the Director finally complied with the *Remand Order* by issuing the *Final Order on Remand* (April 27, 2011). A&B filed a timely *Petition for Reconsideration of the Final Order on Remand* on May 11, 2011, pursuant to I.C. § 67-5246(4) and IDAPA 37.01.01.730.02(a).

Under the APA, the Department had 21 days to “issue a written order disposing of the petition.” I.C. § 67-5246(4) (emphasis added). Exactly 21 days later, on June 1, 2011, the Director issued an *Order Granting Petition for Reconsideration to Allow Time for Further Review* (“*June 1 Order*”). In the *June 1 Order*, the Director “granted” A&B’s petition but stated that he would not issue a decision on the merits until June 9, 2011.<sup>1</sup> The Director failed to comply with his order and did not issue a decision by June 9<sup>th</sup>. Instead, the Director issued a second order, the *Amended Order Granting Petition for Reconsideration to Allow for Further Review*, purporting to extend the date of his decision to June 30, 2011. Finally, on June 30, 2011, the Director issued an *Order Regarding Petition for Reconsideration and Amended Final Order on Remand Regarding the A&B Irrigation District Delivery Call*.

In the interim, A&B filed its *Notice of Appeal*, challenging the *April 27, 2011 Final Order* on June 24, 2011.

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<sup>1</sup> In the *June 1 Order*, the Director stated A&B’s petition was granted “for the sole purpose of allowing additional time for the Department to respond to the Petition” and that he would issue an order by June 9, 2011. It is A&B’s position that based upon the plain terms of the order, A&B’s petition has been granted and the Director is obligated to revise his Remand Order consistent with A&B’s requested relief. Consequently, the Director has a duty to immediately administer hydraulically connected junior water rights that are injuring A&B’s senior water right 36-2080 during the 2011 irrigation season. However, in order to preserve its legal rights, A&B filed its petition for judicial review with this Court. A&B has yet to receive confirmation that IDWR will administer hydraulically connected junior water that are injuring A&B’s senior water right. A&B reserves the right to seek further judicial relief in this matter.

## ARGUMENT

### **I. Since the Idaho APA Requires the Director to “dispose of” Petitions for Reconsideration within 21 days, the Director Had No Authority to Issue the June 9, 2011 or 30, 2011 Orders; Therefore, A&B Properly Appealed the April 27, 2011 Order.**

The Director asserts that A&B’s *Notice of Appeal* must be dismissed because the *June 30, 2011 Order* “supersedes” the *April 27, 2011 Order*. This assertion is made without citation to any legal authority justifying the Director’s actions. In truth, the Director had no authority to issue the June 9 or June 30 Orders since the plain language of the statute requires the Director to dispose of a petition for reconsideration within 21 days. As such, the June 9 and June 30 Orders are *ultra vires* and have no bearing on these proceedings.

The relevant statutory provision provides:

(4) Unless otherwise provided by statute or rule, any party may file a motion for reconsideration of any final order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.

(5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

Idaho Code § 67-5246(4) and (5) (emphasis added). IDWR regulations include nearly identical language. IDAPA 37.01.01.740.02(a) (“The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law.”) (Emphasis added).

This language is clear and provides no discretion in the Director's actions. Under Idaho law, where the statutory language is "unambiguous, the clearly expressed intent of the legislative body must be given effect..." *In re Idaho Dept. of Water Resources Amended Final Order Creating Water District 170*, 148 Idaho 200, 210, 220 P.3d 318, 328 (2009). A statute is ambiguous when:

[T]he meaning is so doubtful or obscure that reasonable minds might be uncertain or disagree as to its meaning. However, ambiguity is not established merely because different possible interpretations are presented to a court. If this were the case then all statutes that are the subject of litigation could be considered ambiguous....

*Canty v. Idaho State Tax Commission*, 138 Idaho 178, 182, 59 P.3d 983, 987 (2002) (internal citations and quotations omitted) (citing *Rim View Trout Co. v. Higginson*, 121 Idaho 819, 823, 828 P.2d 848, 852 (1992)). Importantly, "a statute is not ambiguous merely because an astute mind can devise more than one interpretation of it." *Canty*, 138 Idaho at 182, 59 P.3d at 987.

Based on the language of the statute, the filing of a petition for reconsideration commands one of two limited results from the agency: 1) the petition must be "disposed of" by action of the Director; or 2) the petition will be "disposed of" by operation of law.

Because the Director lacks any legal authority to issue an order on a petition for reconsideration after the 21 days, he certainly cannot "grant" a petition for the sole purpose of allowing indefinite time to rule on the merits. Nothing in the APA allows such a result. Yet that is exactly what the Director did in this case by extending the 21-day deadline "for the sole purpose of allowing additional time for the Department to respond to the Petition." *IDWR Motion to Dismiss*, at 2.

Applying the Supreme Court's guidance on statutory interpretation to Idaho Code section 67-5246, there is no question that the law requires the Director to "dispose of" the petition. The



statute prescribes a mandatory duty – that the Director “shall issue a written order”<sup>2</sup> – and limits that mandatory duty to a single action – “disposing of the petition.” Idaho Code §67-5246(4)(emphasis added).

There is no room for construction of a statute where the terms, though not defined, have a plain, obvious, and rational meaning. *Roeder Holdings, L.L.C. v. Bd. of Equalization of Ada County*, 136 Idaho 809, 814, 41 P.3d 237, 242 (2001). The term “dispose of” has a “plain, obvious, and rational meaning,” which is:

To alienate or direct the ownership of property, as disposition by will. Used also of the determination of suits. To exercise finally, in any manner, one’s power of control over; to pass into the control of someone else; to alienate, relinquish, part with, or get rid of; to put out of the way; to finish with; to bargain away. Often used in restricted sense of “sale” only, or so restricted by context.

*Black’s Law Dictionary*, 6<sup>th</sup> ed. (1991) (emphasis added).

Nonetheless, the Department argues that the plain terms of this unambiguous statute somehow provide it the power to grant the petition “for the sole purpose of allowing additional time for the Department to respond to the Petition.”<sup>3</sup> *IDWR Motion to Dismiss*, at 2. However, there is simply no basis for this position under Idaho law because a “statute is not ambiguous merely because an astute mind can devise more than one interpretation of it.” *Canty v. Idaho State Tax Commission*, 138 Idaho at 182, 59 P.3d at 987. IDWR’s attempt to redefine “dispose of” to “grant a petition for sole purpose of allowing additional time” must be rejected.

The Director is bound by law. Administrative agencies are “creatures of statute and, therefore, are limited to the power and authority granted them by the Legislature.” *Henderson v.*

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<sup>2</sup> Furthermore, the *June 1, 2011 Order* did not dispose of the issues raised by A&B in its Petition for Reconsideration *in writing*, as expressly required under I.C. § 67-5246. In fact, the June 1 Order did nothing towards disposing of the issues raised in the *Petition for Reconsideration*, which is a clear violation of the statute.

<sup>3</sup> In addition to IDWR’s complete lack of authority to undertake this action, IDWR fails to cite any law in support of its motion.

*Eclipse Traffic Control & Flagging, Inc.*, 147 Idaho 628, 632, 213 P.3d 718, 722 (2009) (internal quotations omitted). It is therefore “axiomatic, under the principles of administrative law, that an agency cannot act *ultra vires*; that is, it cannot assume more power than the legislature delegated to it.” *Burnside v. Gate City Steel Corp.*, 112 Idaho 1040, 1047, 739 P.2d 339, 346 (1987).

Idaho courts have observed that “Where the legislature enacted a statute requiring that an administrative agency carry out specific functions, that agency cannot validly subvert the legislation by promulgating contradictory rules.” *Roeder Holdings, L.L.C. v. Bd. of Equalization of Ada County*, 136 Idaho 809, 814, 41 P.3d 237, 242 (2001) (abrogated by *Ada County Bd. of Equalization v. Highlands, Inc.*, 141 Idaho 202, 108 P.3d 349 (2005) on other grounds). The Idaho Supreme Court advises that the “goal of statutory interpretation is to discover the intention of the legislature in drafting a statute, and to apply the statute accordingly, examining not only the literal words of the statute, but also the reasonableness of proposed constructions, the public policy behind the statute, and its legislative history.” *In re Idaho Dept. of Water Resources Amended Final Order Creating Water District 170*, 148 Idaho 200, 210, 220 P.3d 318, 328 (2009) (internal quotations omitted). Because the Director did not have the authority to issue the June 9 and June 30 Orders, they are products of *ultra vires* action and are therefore void as a matter of law and should be stricken.

In addition to being *ultra vires*, the Director’s actions have failed to provide A&B timely relief prior to the 2011 irrigation season. In *Am. Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Res.*, the Idaho Supreme Court explained:

... the [CM] Rules clearly have incorporated the provisions of the Idaho Constitution, statutes and case law. We agree with the district court's exhaustive analysis of Idaho's Constitutional Convention and the court's conclusion that the drafters intended that there be no unnecessary delays in the delivery of water

pursuant to a valid water right. Clearly, a timely response is required when a delivery call is made and water is necessary to respond to that call.

*Am. Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Res.*, 143 Idaho 862, 874, 154 P.3d 433, 445 (2007).

By first delaying a response on the Court's ordered remand, without any legal basis, and now delaying action on A&B's petition until the middle of the irrigation season, the Department has "run out the clock" on A&B's call for this year. An untimely response to A&B's call is the very issue A&B warned the Director about in November, 2010. *See* Ex. A to Petition. This unwarranted delay is inexcusable under the law and unfairly prejudices A&B's landowners. The lack of agency action in the area of water right administration should not be tolerated.

Finally, A&B directs this Court's attention to a recent Idaho Supreme Court decision that utilized a strict reading of the APA. In *City of Eagle v. Idaho Department of Water Resources* IDWR failed to properly serve an order on reconsideration on the City of Eagle. It then reissued the order and postponed the City's deadline for filing an appeal because of the improper service – in effect tolling the City's deadline for appeal from the proper service date. The district court rejected the City's appeal as untimely and the Supreme Court affirmed, stating:

I.C. § 67–5273 “requires that if reconsideration of the final order is sought, the petition for judicial review must be filed within twenty-eight days after the decision on the reconsideration.” This Court dismissed the appeal and held that the twenty-eight-day appeal period began on the day that the agency issued the order on reconsideration, which was the day the order on reconsideration was signed and dated, not the day on which it was served.

\*\*

We find that IDWR's actions on July 16, 2008, constitute nothing more than serving the original Order on Reconsideration issued July 3, 2008, and thus, Eagle's appeal is untimely under Erickson....IDWR's statement in the letter concerning the appeal period appears to be nothing more than the result of IDWR's erroneous belief that the appeal period begins when an order is served. IDWR made the same error—stating that the appeal period began when the Order on Reconsideration was served—in the Order on Reconsideration itself.

*City of Eagle v. Idaho Dept. of Water Resources*, 150 Idaho 449, 247 P.3d 1037, 1039-1040 (2011).

The plain language of the APA requires a decision on a petition for reconsideration within 21 days or it is deemed denied by operation of law. *See* I.C. § 67-5246(4) and (5). The law is clear and must be followed. *City of Eagle, supra*. Accordingly, A&B's *Notice of Appeal*, which was filed following the *June 1, 2011 Order*, is timely and the Director's *Motion to Dismiss* should be denied.

**II. Alternatively, if the Court Determines the June 30, 2011 Order is Authorized by Law, A&B should be Permitted to Amend its Petition for Judicial Review.**

If the Court determines that the Director did not exceed his authority in issuing the *June 30, 2011 Order*, then A&B should be permitted to amend its petition for judicial review. *See* I.R.C.P. 84(r); I.A.R. 17(m). As stated above, the plain language of the APA and IDWR regulations provide that a petition for reconsideration must be "disposed of" within 21 days. *Supra*. The APA further provides that notices of appeal must be filed within 28 days following the date that the petition for reconsideration is "disposed of." I.C. § 67-5273. A&B takes these provisions to mean that a petition for judicial review was due no later than 28 days following the *June 1, 2011 Order*.

If the Court determines that A&B's petition was premature, then the Court should permit A&B to amend its petition to include the June 9 and June 30 orders in light of the plain language of the APA. *See* I.A.R. 17(m).

///


///

**CONCLUSION**

For the above stated reasons, A&B requests this Court to deny IDWR's *Motion to Dismiss A&B's Notice of Appeal*.

**DATED** this 21<sup>st</sup> day of July 2011.

**BARKER ROSHOLT & SIMPSON LLP**

  
\_\_\_\_\_  
Sarah W. Jiger

*Attorneys for Petitioner A&B Irrigation District*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21<sup>st</sup> day of July, 2011, I served true and correct copies of A&B's Response to IDWR's Motion to Dismiss upon the following by U.S. Mail, postage prepaid:

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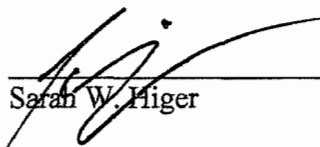
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District Court - SRBA  
 Fifth Judicial District  
 In Re: Administrative Appeals  
 County of Twin Falls - State of Idaho

JUL 21 2011

By \_\_\_\_\_ Clerk  
 \_\_\_\_\_ Deputy Clerk

*Attorneys for Petitioner 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,  
 Petitioner,

vs.

THE IDAHO DEPARTMENT OF WATER  
 RESOURCES and GARY SPACKMAN in his  
 official capacity as Interim Director of the Idaho  
 Department of Water Resources,  
 Respondents.

CASE NO. CV-2011-512

**A&B'S MOTION TO STRIKE  
 AFFIDAVIT OF CHRIS M.  
 BROMLEY IN SUPPORT OF  
 IDWR'S MOTION TO DISMISS**

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 Affidavit of Chris M. Bromley in Support of IDWR's Motion to Dismiss*.

A&B's Motion to Strike Affidavit of Chris M. Bromley

A&B files this motion pursuant to Idaho Rules of Civil Procedure 84(o) and 12(f). Rule 12(f) 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.

I.R.C.P. 12(f).

A&B submits that the *Affidavit of Chris M. Bromley* is immaterial to this proceeding and therefore should be stricken. As explained in *A&B's Response to IDWR's Motion to Dismiss*, filed concurrently herewith, the Director was required to dispose of A&B's petition for reconsideration within 21 days of its submittal, in this case June 1, 2011.

On June 1, 2011, the Director issued an order "granting" A&B's petition and allegedly extending his time to respond to the petition. As explained in the *Response*, this action was *ultra vires* and thus void. Under the plain language of the controlling statutes, the Director had until June 1, 2011 to issue an order disposing of the petition. Accordingly, his subsequent orders on June 9, 2011 and June 30, 2011 were the products of *ultra vires* actions and are therefore void as a matter of law.

The *Affidavit of Chris M. Bromley in Support of IDWR's Motion to Dismiss* was merely a conduit to admit these *ultra vires* Orders. It has no other relevance to these proceedings and should also be stricken.

For the above stated reasons, the *Affidavit of Chris M. Bromley in Support of IDWR's Motion to Dismiss*, with its attachments, should be stricken from the record. A&B respectfully



requests that this *Motion to Strike* be heard at the currently scheduled August 4, 2011 Hearing on IDWR's *Motion to Dismiss*, set for 1:30 P.M.

**DATED** this 21<sup>st</sup> day of July 2011.

**BARKER ROSHOLT & SIMPSON LLP**



---

Sarah W. Higer

*Attorneys for Petitioner A&B Irrigation District*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21<sup>st</sup> day of July, 2011, I served true and correct copies of A&B's Motion to Strike the Affidavit of Chris M. Bromley in Support of IDWR's Motion to Dismiss upon the following by U.S. Mail, postage prepaid:

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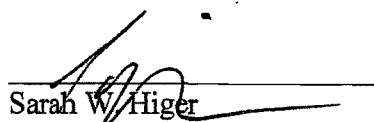
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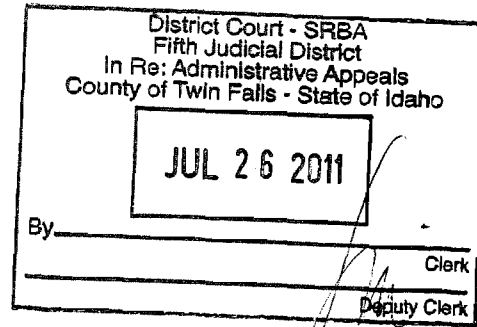
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Attorneys for Respondents

**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,  
Petitioner,

vs.

THE IDAHO DEPARTMENT OF WATER  
RESOURCES and GARY SPACKMAN in his  
official capacity as Interim Director of the  
Idaho Department of Water Resources,  
Respondent.

)  
) Case No. CV-2011-512  
)  
)  
)  
)

**IDWR RESPONSE TO A&B'S  
MOTION TO STRIKE AFFIDAVIT  
OF CHRIS M. BROMLEY**

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

COME NOW the Idaho Department of Water Resources and Gary Spackman, Interim  
Director (collectively referred to herein as "IDWR") and respond to A&B's *Motion to Strike  
Affidavit of Chris M. Bromley in Support of IDWR's Motion to Dismiss* ("Motion to Strike").

## BACKGROUND

On June 24, 2011, the A&B Irrigation District (“A&B”) filed a *Notice of Appeal and Petition for Judicial Review of Agency Action* (“Petition for Judicial Review”). In that document, A&B’s sought review of IDWR’s April 27, 2011 *Final Order on Remand Regarding the A&B Irrigation District Delivery Call* (“April 27 Final Order on Remand”). On July 6, 2011, the Idaho Department of Water Resources (“IDWR”) filed a *Motion and Memorandum in Support of Dismissal of A&B Irrigation District's June 24, 2011 Notice of Appeal and Petition for Judicial Review of Agency Action* (“Motion to Dismiss”). The Motion was accompanied by the *Affidavit of Chris M. Bromley*. The basis of the Motion to Dismiss was that IDWR, on June 30, 2011, issued an *Amended Final Order on Remand Regarding the A&B Irrigation District Delivery Call* (“June 30 Amended Final Order”) that superseded the April 27 Final Order on Remand. See, Exhibit A at 1, *Affidavit of Chris M. Bromley*.

On July 22, 2011, A&B filed a *Response to IDWR's Motion to Dismiss*, along with its Motion to Strike. In its Motion to Strike, A&B “submits that the *Affidavit of Chris M. Bromley* is immaterial to this proceeding and therefore should be stricken [because] the Director was required to dispose of A&B’s petition for reconsideration within 21 days of its submittal, in this case June 1, 2011.” *Motion* at 2.


## ARGUMENT

The purpose of the *Affidavit of Chris M. Bromley* was to bring two documents to the Court’s attention that are dispositive in this case: (1) the June 30, 2011 *Order Regarding Petition for Reconsideration* (“Order on Reconsideration”); and (2) the June 30 Amended Final Order on Remand. Neither document is “*ultra vires*” as argued by A&B in its Motion to Strike.

By its own volition, A&B sought reconsideration of the April 27 Final Order on Remand. In accordance with Idaho Code § 67-5246, IDWR “disposed of” A&B’s May 11, 2011 *Petition for Reconsideration* of the April 27 Final Order on Remand by granting A&B’s *Petition for Reconsideration* “for the sole purpose of allowing additional time for the Department to respond to the *Petition*.” *Affidavit of Chris M. Bromley*, Exhibits A & B. IDWR stated that it would issue an order on reconsideration and amended final order no later than June 30, 2011. *Id.* at Exhibit B. On June 30, IDWR issued its Order on Reconsideration and Amended Final Order on Remand. Both documents expressly state that the April 27 Final Order on Remand was superseded by the June 30 Amended Final Order on Remand. *Id.* at Exhibits A & B.

Because the April 27 Final Order was superseded by the June 30 Amended Final Order, IDWR respectfully requests the Court grant IDWR’s Motion to Dismiss and deny A&B’s Motion to Strike. The only final agency action that A&B may seek judicial review from is the June 30 Amended Final Order.

DATED this 26<sup>th</sup> day of July 2011.

  
CHRIS M. BROMLEY  
Deputy Attorney General  
Idaho Department of Water Resources


### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the State of Idaho, employed by the Attorney General of the State of Idaho and residing in Boise, Idaho; and that I served one (1) true and correct copy of the following described document on the persons listed below by email and mailing in the United States mail, first class, with the correct postage affixed thereto on this 26<sup>th</sup> day of July 2011.

Document(s) served: **IDWR RESPONSE TO A&B'S MOTION TO STRIKE AFFIDAVIT OF CHRIS M. BROMLEY**

Person(s) served:

John K. Simpson Travis L. Thompson Barker Rosholt & Simpson 113 Main Ave W., Ste. 303 P.O. Box 485 Twin Falls, ID 83303-0485 <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a> <a href="mailto:tlt@idahowaters.com">tlt@idahowaters.com</a>	Randall C. Budge Candice M. McHugh Racine Olson Nye Budge & Bailey P.O. Box 1391 201 E. Center St. Pocatello, ID 83204-1391 <a href="mailto:rcb@racinelaw.net">rcb@racinelaw.net</a> <a href="mailto:cmm@racinelaw.net">cmm@racinelaw.net</a>	Sarah A. Klahn Mitra Pemberton White & Jankowski LLP 511 Sixteenth St., Ste. 500 Denver, CO 80202 <a href="mailto:sarahk@white-jankowski.com">sarahk@white-jankowski.com</a> <a href="mailto:mitrap@white-jankowski.com">mitrap@white-jankowski.com</a>
Jerry Rigby Rigby Andrus 25 North Second East P.O. Box 250 Rexburg, ID 83440 <a href="mailto:jrigby@rex-law.com">jrigby@rex-law.com</a>	A. Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83201 <a href="mailto:dtranmer@pocatello.us">dtranmer@pocatello.us</a>	

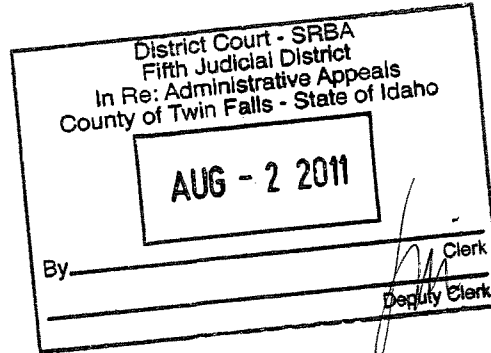

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**CHRIS M. BROMLEY**  
 Deputy Attorney General  
 Idaho Department of Water Resources

LAWRENCE G. WASDEN  
ATTORNEY GENERAL

CLIVE J. STRONG  
Deputy Attorney General  
Chief, Natural Resources Division

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Attorneys for Respondents

**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,  
Petitioner,

vs.

THE IDAHO DEPARTMENT OF WATER  
RESOURCES and GARY SPACKMAN in his  
official capacity as Interim Director of the  
Idaho Department of Water Resources,  
Respondent.

Case No. CV-2011-512

**IDWR REPLY IN SUPPORT OF  
ITS MOTION TO DISMISS**

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

On July 6, 2011, the Idaho Department of Water Resources ("IDWR") filed a *Motion and Memorandum in Support of Dismissal of A&B Irrigation District's June 24, 2011 Notice of Appeal and Petition for Judicial Review of Agency Action* ("Motion"). On July 22, 2011, the

A&B Irrigation District (“A&B”) filed a *Response to IDWR’s Motion to Dismiss* (“Response”). IDWR hereby files this Reply and *Second Affidavit of Chris M. Bromley* in support of its Motion.

### ARGUMENT

Based on A&B’s Response, the only issue is whether Idaho Code § 67-5246(5) allowed IDWR to timely grant A&B’s May 11, 2011 *Petition for Reconsideration* (“Petition”) “for the sole purpose of allowing additional time for the Department to respond to the Petition[,]”<sup>1</sup> *see Second Affidavit of Chris M. Bromley*, Exhibits 1 & 2, then subsequently issue its June 30, 2011 *Amended Final Order on Remand Regarding the A&B Irrigation District Delivery Call*. Central to resolution of this dispute is what the phrase “disposed of” means.

Idaho Code § 67-5246(5) states in full:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

Emphasis added.

A&B argues the phrase “disposed of” means that IDWR must issue an order on the merits within twenty-one days. A&B says the plain meaning of the statute supports its

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<sup>1</sup> In footnote 1 to its Response, A&B argues that the Director’s decision to grant its Petition on June 1 and again on June 9, 2011 evidences that “the Director has a duty to immediately administer hydraulically connected junior water rights that are injuring A&B’s senior water right 36-2080 during the 2011 irrigation season.” *Response* at 3, fn. 1. As can be seen from the plain language of Exhibits 1 and 2, the basis for granting A&B’s Petition was “for the sole purpose of allowing additional time for the Department to respond to the Petition.” Emphasis added. IDWR’s decision to grant the Petition cannot be interpreted as posited by A&B. IDWR has not found material injury to A&B.



construction. Ironically, IDWR also believes that the plain meaning of the statute supports its position that A&B's action for judicial review should be dismissed.

As cited by A&B, Black's Law Dictionary supports IDWR's position. According to Black's, the phrase "dispose of" means:

To alienate or direct the ownership of property, as disposition by will. Used also in the determination of suits. Called a word of large extent. *Koerner v. Wilkinson*, 96 Mo. App. 510, 70 S.W. 509; *Love v. Pamplin* (C.C.), 21 F. 760; *U.S. v. Hacker* (D.C.) 73 F. 294; *Benz v. Fabian*, 54 N.J. Eq. 615, 35 A. 760; *Elston v. Schilling*, 42 N.Y. 79; *Beard v. Knox*, 5 Cal. 256, 63 Am. Dec. 125. To exercise finally, in any manner, one's power of control over; to pass into the control of someone else; to alienate, relinquish, part with, or get rid of.

Black's Law Dictionary, 3<sup>rd</sup> Ed. (1933) (emphasis added). *Koerner v. Wilkinson*, 70 S.W. 509, 511 (Mo. App. 1902) ("Disposal' is a word of broad significance . . . . The word being so varied in its meaning . . .").

The use of the terms "large extent" and "broad significance" to define the phrase support a broad interpretation, not the narrow interpretation suggested by A&B. This broad interpretation is also supported by the University of Idaho's seminal law review article on Idaho's Administrative Procedure Act. Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273 (1993). There, the authors specifically discussed Idaho Code § 67-5246 and the meaning ascribed to disposal of a petition for reconsideration:

A petition for reconsideration that is not acted upon within twenty-one days is presumed denied.<sup>296</sup> It is not necessary, however, that the officer decide the issues presented by the petition within twenty-one days; it is only necessary that the petition be accepted, which can be accomplished through notification of the parties that the officer will reconsider the order.<sup>297</sup>

*Id.* at 329 (emphasis in original).

In footnote 297, the authors provide the following citation:

*See* Comments to the Attorney General's Rules 710 through 789 ("Reconsideration can be granted by issuing an order that says, 'The petition for

reconsideration is granted,' then proceeding to schedule further hearings, briefing, etc., on reconsideration.”).

*Id.*

A&B’s “one size fits all” interpretation of Idaho Code § 67-5246 cannot be reconciled. As this Court is aware, petitions for reconsideration vary widely in their content, form, and substance. Some petitions for reconsideration are easily addressed, while others are not. Of course, this cannot be known until the petition for reconsideration is filed and reviewed by the agency. In the case of a complex petition for reconsideration, A&B’s “one size fits all” approach would prevent an agency, for lack of time, from requesting additional hearings, briefing, oral argument, or taking the necessary amount of time to properly respond. 30 Idaho L. Rev. at 329. This is precisely why Idaho Code § 67-5246(5) uses such a varied phrase as “disposed of” in its construction. The phrase provides agencies with the necessary flexibility to properly analyze and respond to the myriad petitions for reconsideration they face. Given the burden of presumption that attaches to final agency orders, Idaho Code § 67-5279(3), it makes sense that the legislature would provide the agency with the flexibility to examine each petition for reconsideration based on its particular circumstances before issuance of a reviewable order.

Here, A&B’s Petition “raised numerous technical issues with the *Final Order on Remand* that deserved the Department’s full attention and thorough analysis. This required a detailed investigation of facts from the large and complex administrative record.” *Second Affidavit of Chris M. Bromley*, Exhibit 3 at 1.<sup>2</sup> “When it became evident that the Department’s technical review and written response to the *Petition for Reconsideration* could not be issued [within 21 days], [the Director] extended the deadline to June 30, 2011.” *Id.* The parties were timely

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<sup>2</sup> Exhibit 3 is a written response from Interim Director Gary Spackman to Travis L. Thompson, counsel for A&B. Exhibit 4 to the *Second Affidavit of Chris M. Bromley* is Mr. Thompson’s initial letter to Interim Director Spackman.

notified on June 1, and then again on June 9, 2011, of IDWR's decision to grant the Petition in order to take the necessary time to properly review and respond.<sup>3</sup> *Id.* at Exhibits 1 & 2. On June 30, 2011, IDWR issued its *Order Regarding Petition for Reconsideration* ("Order on Reconsideration") and *Amended Final Order on Remand Regarding the A&B Irrigation District Delivery Call* ("Amended Final Order on Remand"). *Affidavit of Chris M. Bromley* at Exhibits A & B (July 6, 2011).

Given the complexity of A&B's Petition and the administrative record, it was reasonable for IDWR to take 30 additional days to issue its Order on Reconsideration and Amended Final Order on Remand. Yet A&B asserts that IDWR's delay "failed to provide A&B timely relief prior to the 2011 irrigation season." *Response* at 7. This argument is unclear. IDWR's April 27, 2011 *Final Order on Remand Regarding the A&B Irrigation District Delivery Call*, upon which A&B currently seeks judicial review, was issued well after the start of the 2011 irrigation season. That order found, by clear and convincing evidence, that A&B was not materially injured. A&B specifically sought reconsideration of the April 27, 2011 order, and IDWR acted on A&B's request. A&B cannot explain how IDWR's decision to issue its Order on Reconsideration and Amended Final Order on Remand on June 30, 2011, rather than June 1, 2011, results in prejudice.

In an attempt to explain prejudice, A&B directs the Court's attention to *American Falls Reservoir District No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2007) to prove that the Director acted untimely. While the Court in *American Falls* was certainly concerned about the timeliness of responding to delivery calls, "neither the Constitution nor the statutes place any specific timeframes on this process, despite ample opportunity to do so." *Id.* at

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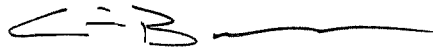
<sup>3</sup> If IDWR had not issued its June 1 order, A&B's *Petition for Reconsideration* ("Petition") it would have been denied because the agency failed to "dispose of the petition within twenty-one (21) days." Idaho Code §67-5246(5).

875, 154 P.3d at 446. “Given the complexity of the factual determinations that must be made in determining material injury . . . [i]t is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts.” *Id.* (emphasis added).

The Court’s reasoning in *American Falls* is consistent with the legislature’s use of the phrase “disposed of” in Idaho Code § 67-5246. As explained by Director Spackman in his letter to Mr. Thompson, it was important that IDWR properly analyze A&B’s Petition and provide a thorough, well-reasoned response. *Second Affidavit of Chris M. Bromley* at Exhibit 3. It was reasonable, given the Petition’s technical complexity and the directive from the Supreme Court that IDWR get its decisions right, for IDWR to take 30 additional days to issue its Order on Reconsideration and Amended Final Order on Remand.

Based on the foregoing, A&B’s “one size fits all” approach is inconsistent with the legislature’s use of the phrase “disposed of” in Idaho Code § 67-5246. Therefore, IDWR respectfully moves the Court to dismiss A&B’s June 24, 2011 *Notice of Appeal and Petition for Judicial Review of Agency Action*. The only final agency action that A&B may seek judicial review from is the June 30 Amended Final Order. I.R.C.P. 84(b); Idaho Code § 67-5246.

DATED this 1<sup>st</sup> day of August 2011.



---

CHRIS M. BROMLEY  
Deputy Attorney General  
Idaho Department of Water Resources

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am a duly licensed attorney in the State of Idaho, employed by the Attorney General of the State of Idaho and residing in Boise, Idaho; and that I served one (1) true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 15<sup>th</sup> day of August 2011.

Document(s) served: **IDWR REPLY IN SUPPORT OF ITS MOTION TO DISMISS**

Person(s) served:

John K. Simpson Travis L. Thompson Barker Rosholt & Simpson 113 Main Ave W., Ste. 303 P.O. Box 485 Twin Falls, ID 83303-0485	Randall C. Budge Candice M. McHugh Racine Olson Nye Budge & Bailey P.O. Box 1391 201 E. Center St. Pocatello, ID 83204-1391	Sarah A. Klahn Mitra Pemberton White & Jankowski LLP 511 Sixteenth St., Ste. 500 Denver, CO 80202
Jerry Rigby Rigby Andrus 25 North Second East P.O. Box 250 Rexburg, ID 83440	A. Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83201	



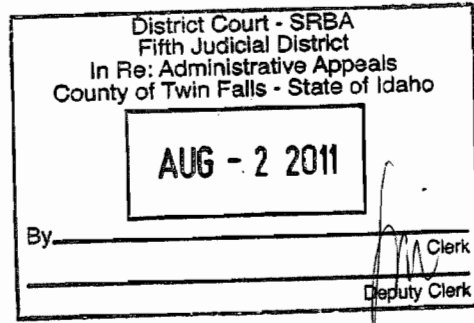
CHRIS M. BROMLEY  
Deputy Attorney General  
Idaho Department of Water Resources

LAWRENCE G. WASDEN  
ATTORNEY GENERAL

CLIVE J. STRONG  
Deputy Attorney General  
Chief, Natural Resources Division

GARRICK L. BAXTER, ISB No. 6301  
CHRIS M. BROMLEY, ISB No. 6530  
Deputy Attorneys General  
P.O. Box 83720  
Boise, ID 83720-0098  
Telephone: (208) 287-4800  
Facsimile: (208) 287-6700

Attorneys for Respondents



**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, )  
 )  
 ) Petitioner, )  
 )  
 )  
 ) vs. )  
 )  
 ) THE IDAHO DEPARTMENT OF WATER )  
 ) RESOURCES and GARY SPACKMAN in his )  
 ) official capacity as Interim Director of the )  
 ) Idaho Department of Water Resources, )  
 )  
 ) Respondent. )

Case No. CV-2011-512

**SECOND AFFIDAVIT  
OF CHRIS M. BROMLEY**

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 )

STATE OF IDAHO )  
 ) ss. )  
County of Ada )

CHRIS M. BROMLEY, being first duly sworn upon oath, deposes and says:

1. I am one of the Deputy Attorneys General of record for the Respondents, Idaho Department of Water Resources and Gary Spackman, Interim Director. I am over the age of 18 and state the following based upon my own personal knowledge.

2. Attached hereto as **Exhibit 1** is a true and correct copy of the June 1, 2011 *Order Granting Petition for Reconsideration to Allow Time for Further Review*.

3. Attached hereto as **Exhibit 2** is a true and correct copy of the June 9, 2011 *Amended Order Granting Petition for Reconsideration to Allow Time for Further Review*.

4. Attached hereto as **Exhibit 3** is a true and correct copy of the July 5, 2011 letter from Gary Spackman, Interim Director, to Travis L. Thompson, counsel for the A&B Irrigation District.

5. Attached hereto as **Exhibit 4** is a true and correct copy of July 1, 2011 letter from Mr. Thompson to Interim Director Spackman.

Further your Affiant sayeth naught.

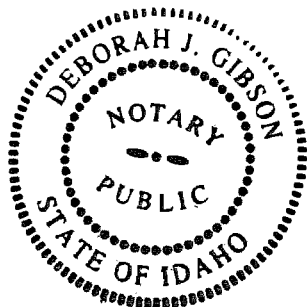
DATED this 15<sup>th</sup> day of August 2011.




CHRIS M. BROMLEY  
Deputy Attorney General  
Idaho Department of Water Resources

SUBSCRIBED AND SWORN TO BEFORE ME this 15<sup>th</sup> day of August 2011.

(seal)



  
NOTARY PUBLIC for Idaho  
Residing at: Parma, Idaho  
My Commission Expires: 8/10/2015

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am a duly licensed attorney in the State of Idaho, employed by the Attorney General of the State of Idaho and residing in Boise, Idaho; and that I served one (1) true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 15<sup>th</sup> day of August 2011.

Document(s) served: AFFIDAVIT OF CHRIS M. BROMLEY

Person(s) served:

John K. Simpson Travis L. Thompson Barker Rosholt & Simpson 113 Main Ave W., Ste. 303 P.O. Box 485 Twin Falls, ID 83303-0485	Randall C. Budge Candice M. McHugh Racine Olson Nye Budge & Bailey P.O. Box 1391 201 E. Center St. Pocatello, ID 83204-1391	Sarah A. Klahn Mitra Pemberton White & Jankowski LLP 511 Sixteenth St., Ste. 500 Denver, CO 80202
Jerry Rigby Rigby Andrus 25 North Second East P.O. Box 250 Rexburg, ID 83440	A. Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83201	



CHRIS M. BROMLEY  
Deputy Attorney General  
Idaho Department of Water Resources



# EXHIBIT 1

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF THE PETITION FOR )  
DELIVERY CALL OF A&B IRRIGATION ) CM-DC-2011-001  
DISTRICT FOR THE DELIVERY OF GROUND )  
WATER AND FOR THE CREATION OF A ) **ORDER GRANTING PETITION**  
GROUND WATER MANAGEMENT AREA ) **FOR RECONSIDERATION TO**  
 ) **ALLOW TIME FOR FURTHER**  
 ) **REVIEW**  
 )

---

On April 27, 2011, the Director of the Idaho Department of Water Resources (“Director” or “Department”) issued a *Final Order on Remand Regarding A&B Irrigation District’s Delivery Call* (“Final Order on Remand”). The Final Order on Remand was served on April 27, 2011.

On May 11, 2011, A&B Irrigation District (“A&B”) filed a timely *Petition for Reconsideration of Interim Director’s April 27, 2011 Final Order on Remand/Request for Hearing* (“Petition”).

Department Rule of Procedure 740.02.a provides that any party may file a petition for reconsideration within fourteen days of the service date of a final order. IDAPA 37.01.01.740.02.a. *See also* Idaho Code § 67-5246(4). The rule further provides, “The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law.” *Id.*

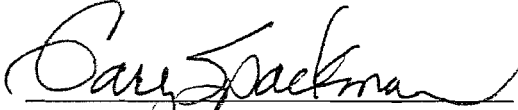
A&B filed its Petition on May 11, 2011, and it will be deemed denied by operation of law if not acted upon by the Department by June 1, 2011. Because the Department requires additional time to review the merits of the Petition, the Director shall grant A&B’s Petition for the sole purpose of allowing additional time for the Department to respond to the Petition. An order responding to the merits of the Petition will issue no later than June 9, 2011.

**ORDER**

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Petition is GRANTED for the sole purpose of allowing additional time for the Department to

respond to the Petition. An order responding to the merits of the Petition shall issue no later than June 9, 2011.

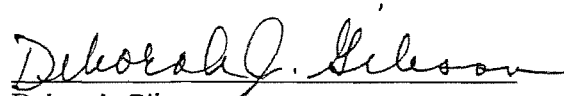
Dated this 1<sup>st</sup> day of June, 2011.

  
GARY SPACKMAN  
Interim Director

**CERTIFICATE OF SERVICE**

I hereby certify that I served a true and correct copy of the following attached document on the persons listed below by mailing in the United States mail, first class with the correct postage affixed thereto, as well as by e-mail to those persons listed with e-mail addresses, on this 15<sup>th</sup> day of June, 2011.

John K. Simpson Travis L. Thompson Barker Rosholt & Simpson 113 Main Ave W., Ste. 303 P.O. Box 485 Twin Falls, ID 83303-0485 <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a> <a href="mailto:tlr@idahowaters.com">tlr@idahowaters.com</a>	Randall C. Budge Candice M. McHugh Racine Olson Nye Budge & Bailey P.O. Box 1391 201 E. Center St. Pocatello, ID 83204-1391 <a href="mailto:rcb@racinelaw.net">rcb@racinelaw.net</a> <a href="mailto:cmm@racinelaw.net">cmm@racinelaw.net</a>	Sarah A. Klahn Mitra Pemberton White & Jankowski LLP 511 Sixteenth St., Ste. 500 Denver, CO 80202 <a href="mailto:sarahk@white-jankowski.com">sarahk@white-jankowski.com</a> <a href="mailto:mitrap@white-jankowski.com">mitrap@white-jankowski.com</a>
Jerry Rigby Rigby Andrus 25 North Second East P.O. Box 250 Rexburg, ID 83440 <a href="mailto:jrigby@rex-law.com">jrigby@rex-law.com</a>	A. Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83201 <a href="mailto:dtranmer@pocatello.us">dtranmer@pocatello.us</a>	

  
Deborah Gibson  
Idaho Department of Water Resources

# **EXHIBIT 2**

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF THE PETITION FOR )  
DELIVERY CALL OF A&B IRRIGATION ) CM-DC-2011-001  
DISTRICT FOR THE DELIVERY OF GROUND )  
WATER AND FOR THE CREATION OF A ) **AMENDED ORDER**  
GROUND WATER MANAGEMENT AREA ) **GRANTING PETITION**  
) **FOR RECONSIDERATION**  
) **TO ALLOW TIME**  
) **FOR FURTHER REVIEW**  
\_\_\_\_\_)

On April 27, 2011, the Director of the Idaho Department of Water Resources (“Director” or “Department”) issued a *Final Order on Remand Regarding A&B Irrigation District’s Delivery Call* (“Final Order on Remand”). The Final Order on Remand was served on April 27, 2011.

On May 11, 2011, A&B Irrigation District (“A&B”) filed a timely *Petition for Reconsideration of Interim Director’s April 27, 2011 Final Order on Remand/Request for Hearing* (“Petition”).

Department Rule of Procedure 740.02.a provides that any party may file a petition for reconsideration within fourteen days of the service date of a final order. IDAPA 37.01.01.740.02.a. *See also* Idaho Code § 67-5246(4). The rule further provides, “The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law.” *Id.*


A&B filed its Petition on May 11, 2011, and it will be deemed denied by operation of law if not acted upon by the Department by June 1, 2011. Because the Department requires additional time to review the merits of the Petition, the Director shall grant A&B’s Petition for the sole purpose of allowing additional time for the Department to respond to the Petition. An order responding to the merits of the Petition will issue no later than June 30, 2011.

**ORDER**

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Petition is GRANTED for the sole purpose of allowing additional time for the Department to

respond to the Petition. An order responding to the merits of the Petition shall issue no later than June 30, 2011.

Dated this 9<sup>th</sup> day of June, 2011.

  
GARY SPACKMAN  
Interim Director

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the following attached document on the persons listed below by mailing in the United States mail, first class with the correct postage affixed thereto, as well as by e-mail to those persons listed with e-mail addresses, on this 9th day of June, 2011.

John K. Simpson Travis L. Thompson Barker Rosholt & Simpson 113 Main Ave W., Ste. 303 P.O. Box 485 Twin Falls, ID 83303-0485 <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a> <a href="mailto:tlt@idahowaters.com">tlt@idahowaters.com</a>	Randall C. Budge Candice M. McHugh Racine Olson Nye Budge & Bailey P.O. Box 1391 201 E. Center St. Pocatello, ID 83204-1391 <a href="mailto:rcb@racinelaw.net">rcb@racinelaw.net</a> <a href="mailto:cmm@racinelaw.net">cmm@racinelaw.net</a>	Sarah A. Klahn Mitra Pemberton White & Jankowski LLP 511 Sixteenth St., Ste. 500 Denver, CO 80202 <a href="mailto:sarahk@white-jankowski.com">sarahk@white-jankowski.com</a> <a href="mailto:mitrap@white-jankowski.com">mitrap@white-jankowski.com</a>
Jerry Rigby Rigby Andrus 25 North Second East P.O. Box 250 Rexburg, ID 83440 <a href="mailto:jrigby@rex-law.com">jrigby@rex-law.com</a>	A. Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83201 <a href="mailto:dtranmer@pocatello.us">dtranmer@pocatello.us</a>	



Deborah Gibson  
Idaho Department of Water Resources



# EXHIBIT 3



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web Site: [www.idwr.idaho.gov](http://www.idwr.idaho.gov)

July 5, 2011

C. L. "BUTCH" OTTER  
Governor

GARY SPACKMAN  
Interim Director

Travis L. Thompson  
Barker Rosholt & Simpson  
233 2nd St N Ste D  
PO Box 485  
Twin Falls, Idaho 83303-0485

Dear Mr. Thompson:

I recently received your July 1, 2011 letter regarding *In the Matter of the Petition for Delivery Call of A&B*.

As you are aware, your client's *Petition for Reconsideration* raised numerous technical issues with the *Final Order on Remand* that deserved the Department's full attention and thorough analysis. This required a detailed investigation of facts from the large and complex administrative record.

When it became evident that the technically complex issues raised by your client could not be addressed in twenty-one days, I issued an order granting the *Petition for Reconsideration* "for the sole purpose of allowing additional time for the Department to respond to the Petition. An order responding to the merits of the Petition shall issue no later than June 9, 2011."

When it became evident that the Department's technical review and written response to the *Petition for Reconsideration* could not be issued by June 9, 2011, I extended the deadline to June 30, 2011. On June 30, 2011, the Department issued an *Order Regarding Petition for Reconsideration and Amended Final Order on Remand*. The *Amended Final Order on Remand* incorporated the findings and conclusions from the *Order Regarding Petition for Reconsideration* and superseded the *Final Order on Remand*.

Mr. Thompson  
July 5, 2011  
Page 2 of 2

As the finder of fact, I believed your client deserved the Department's full attention and detailed investigation of the issues raised in its *Petition for Reconsideration*, and hope your client will appreciate that the Department acted as expeditiously as possible.

Sincerely,

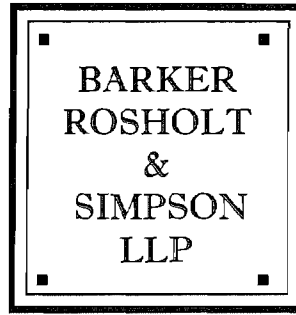
A handwritten signature in black ink, appearing to read "Gary Spackman". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Gary Spackman  
Interim Director

cc: Counsel of Record

# **EXHIBIT 4**

John A. Rosholt  
Albert P. Barker  
John K. Simpson  
Travis L. Thompson  
Shelley M. Davis  
Paul L. Arrington  
Scott A. Magnuson  
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July 1, 2011

VIA U.S. MAIL & EMAIL: [gary.spackman@idwr.idaho.gov](mailto:gary.spackman@idwr.idaho.gov)

Interim Director Gary Spackman  
Idaho Department of Water Resources  
322 E. Front St.  
P.O. Box 83720  
Boise, Idaho 83720-0098

**Re: *In the Matter of the Petition for Delivery Call of A&B etc.***

Dear Gary:

I am writing on behalf of our client A&B Irrigation District (“A&B”) with respect to the above-referenced matter. Last November A&B requested confirmation that IDWR would proceed with the remand as ordered by Judge Wildman in his *Memorandum Decision and Order on Petitions for Rehearing (A&B v. IDWR, Minidoka County Dist. Ct., Fifth Jud. Dist., Case No. CV-000647)*. Unfortunately, without any legal basis, you refused to follow the Court’s order and A&B was forced to request further relief before the District Court. *See Order Granting Motion to Enforce in Part and Denying Motion in Part* (February 15, 2011).

After the Court ordered compliance with the remand order it took over 60 days for you to issue the *Final Order on Remand* (April 27, 2011). A&B filed a petition for reconsideration on May 11, 2011. On June 1, 2011 you granted A&B’s petition. *See Order Granting Petition for Reconsideration to Allow Time for Further Review*. On June 9, 2011, you issued an *Amended Order* attempting to delay further action on A&B’s petition. Yesterday, you issued two additional orders, attempting to deny A&B’s requested relief on reconsideration.

Pursuant to the plain terms of your June 1<sup>st</sup> order, A&B’s petition was “granted”. Accordingly, you have a mandatory duty to immediately administer junior priority ground water rights that injure A&B’s senior water right 36-2080. I.C. § 42-607; CM Rule 40. A&B expects you to revise your *Remand Order* promptly in compliance with Idaho law.

0148

In order to protect its legal rights, A&B appealed the *Remand Order* to the Minidoka County District Court on June 27, 2011. It is A&B's position that this appeal is unnecessary since A&B's petition for reconsideration was "granted" by your June 1<sup>st</sup> order. Once A&B receives confirmation that you have revised your *Remand Order* and are proceeding with administration of junior priority water rights, A&B will withdraw its petition for judicial review.

If you disagree that A&B's petition for reconsideration was "granted," and the District Court confirms this position, then A&B's petition has been denied by operation of law. See I.C. § 67-5246(4), (5). Idaho's APA required you to "dispose" of A&B's petition within 21 days. There is nothing in the APA or IDWR's Rules of Procedure that would allow the agency to "grant" a petition for reconsideration for the sole purpose to allow an indefinite time for further review. Therefore any orders you attempted to issue after June 1<sup>st</sup> are void under Idaho's APA.

On a practical note IDWR has been required to comply with the Court's order on remand for over a year, since May 2010. Once the Court denied the petitions for rehearing, A&B requested confirmation that you would proceed on remand by letter of November 10, 2010. See **Ex. A**. In that letter, A&B emphasized the need for timely relief prior to the 2011 irrigation season. As Interim Director you are certainly aware of the need for timely action in water right administration matters. Unfortunately, you refused to follow the Court's order without any legal basis.

The failure to act has now delayed any administration into the middle of the 2011 irrigation season. The recent failure to follow Idaho's APA in responding to A&B's petition for reconsideration is evidence of further inexcusable delay. In short, this type of water right administration violates Idaho law. As Judge Wood accurately observed in a prior case, "an untimely decision effectively becomes the decision; i.e. 'no decision is the decision.'" See *Order on Plaintiffs' Motion for Summary Judgment* at 97, *AFRD #2 v. IDWR et al.* (Gooding County Dist. Ct., Fifth Jud. Dist., Case No. CV 2005-000600).

A&B is clearly disappointed in IDWR's repeated failure to properly respond to the District's request for administration in this matter.<sup>1</sup> We expect a timely response to this letter.

Sincerely,

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson

---

<sup>1</sup> The prior Director also refused to perform any administration when A&B requested action on March 16, 2007. The District Court issued a writ of mandate ordering the Director to respond to A&B's request on October 23, 2007. See *A&B Irr. Dist. v. Tuthill et al.*, (Minidoka County Dist. Ct., Fifth Jud. Dist., Case No. 2007-000665)

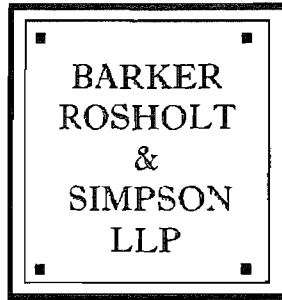
Interim Director Spackman  
July 1, 2011  
Page - 3

cc: Dan Temple (A&B)  
David Hensley  
Garrick Baxter  
Chris Bromley  
Randy Budge  
Sarah Klahn  
Dean Tranmer  
Jerry Rigby

# Exhibit A



John A. Rosholt  
Albert P. Barker  
John K. Simpson  
Travis L. Thompson  
Shelley M. Davis  
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November 10, 2010

VIA U.S. MAIL & EMAIL: [gary.spackman@idwr.idaho.gov](mailto:gary.spackman@idwr.idaho.gov)

Interim Director Gary Spackman  
Idaho Department of Water Resources  
322 E. Front St.  
P.O. Box 83720  
Boise, Idaho 83720-0098

**Re: *A&B Irr. Dist. v. IDWR (Case No. 2009-647) In the Matter of the Petition for Delivery Call of A&B etc.***

Dear Gary:

I am writing on behalf of our client A&B Irrigation District ("A&B") with respect to the above-referenced matter. Judge Wildman issued his *Memorandum Decision and Order on Petitions for Rehearing* last week on November 2, 2010. Judge Wildman denied the petitions for rehearing and affirmed his prior ruling issued on May 20, 2010 ("*Order*").

In his *Order*, Judge Wildman remanded the case to IDWR in order to apply the appropriate evidentiary standard to the existing record in responding to A&B's delivery call. Although the case was pending on rehearing for several months, we have not received any notice that IDWR is preparing a new administrative order on remand. A&B seeks confirmation that IDWR intends to proceed with the remand as ordered by the District Court.

In addition, on the issue of interconnection within the A&B project, Judge Wildman stated:

The Director concluded that A&B must make reasonable efforts to maximize interconnection of the system and placed the burden on A&B to demonstrate where interconnection is not physically or financially practical. The Director did not abuse discretion in imposing such a requirement.

*Order* at 39.

0152

In his recommended order, Hearing Officer Schroeder stated:

A&B has not undertaken an engineering analysis or other study to determine the feasibility of moving water from a long system to a short system. In light of the manner in which the water right was defined in the license and partial decree it should do so. IDWR should lend whatever expertise it has to that effort.

*Opinion at 19.*<sup>1</sup>

Although the Director did not initially request A&B to provide an interconnection feasibility study back in 2007,<sup>2</sup> A&B is preparing to undertake the study and requests IDWR to lend its expertise as recommended by Hearing Officer Schroeder. A&B understands the scope of the study to be as follows:

- 1) Identify water short areas within the project
- 2) Identify areas where additional water can be diverted and delivered to serve water short areas
- 3) Determine whether obtaining additional water will interfere with existing wells and water supplies
- 4) Identify infrastructure improvements and water conveyance facility needs to move water to water short areas (wells, pumps, pipelines, regulating reservoirs, easements)
- 5) Provide cost estimates and determine feasibility

A&B seeks confirmation that IDWR will assist in the above-referenced study to ensure a complete and adequate record for the Director to make a new injury determination. Please provide any comments on the tasks to be undertaken and information about how IDWR can provide assistance. A&B would be prepared to submit the study by the end of January 2011.

Since time is of the essence for water right administration decisions next year, please advise us as to your intentions regarding the above requests as soon as possible.

Sincerely,

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson

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<sup>1</sup> Former Director Tuthill adopted this recommended finding. See *Final Order* at 5.

<sup>2</sup> See *Order Requesting Information* (November 16, 2007).

Interim Director Spackman  
November 10, 2010  
Page - 3

cc: Dan Temple (A&B)  
Garrick Baxter  
Chris Bromley  
Randy Budge  
Sarah Klahn  
Dean Tranmer  
Jerry Rigby

District Court - SRBA  
Fifth Judicial District  
In Re: Administrative Appeals  
County of Twin Falls - State of Idaho

**AUG 11 2011**

By \_\_\_\_\_ Clerk

\_\_\_\_\_ Deputy Clerk

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  
Petitioner,

vs.

THE IDAHO DEPARTMENT OF WATER  
RESOURCES and GARY SPACKMAN in his  
official capacity as Interim Director of the  
Idaho Department of Water Resources,  
Respondents.

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

) Case No. CV 2011-512  
)  
) **ORDER ON MOTION TO**  
) **DISMISS AND MOTION TO**  
) **STRIKE**

I.

**FACTUAL AND PROCEDURAL BACKGROUND**

- 1. On April 27, 2011, Gary Spackman, the Interim Director of the Idaho Department of Water Resources ("Department" or "IDWR"), issued his *Final Order on Remand Regarding the A&B Irrigation District Delivery Call* ("*Final Order*") in IDWR Docket No. CM-DC-2011-001.
- 2. On May 11, 2011, the A&B Irrigation District ("A&B") filed a *Petition for Reconsideration* in the administrative proceeding, asking the Department to reconsider certain findings and conclusions set forth in the *Final Order*.

3. On June 1, 2011, the Director entered an *Order Granting Petition for Reconsideration to Allow Time for Further Review* in the administrative proceeding, wherein he ordered that A&B's *Petition for Reconsideration* be granted "for the sole purposes of allowing additional time for the Department to respond to the Petition." *Second Bromley Aff.*, Ex.1. The *Order* further provided that "an order responding to the merits of the Petition shall issue no later than June 9, 2011." *Id.*

4. On June 9, 2011, the Director entered an *Amended Order Granting Petition for Reconsideration to Allow Time for Further Review* in the administrative proceeding, wherein he again granted A&B's *Petition for Reconsideration* "for the sole purpose of allowing additional time for the Department to respond to the Petition." *Second Bromley Aff.*, Ex.2. The *Amended Order* further provided that "an order responding to the merits of the Petition shall issue no later than June 30, 2011." *Id.*

5. On June 27, 2011, Petitioner A&B Irrigation District ("A&B") filed a *Petition for Judicial Review* in the above-entitled district court seeking judicial review of the *Final Order*. The case was reassigned by the clerk of the court to this Court on June 27, 2011.

6. On June 30, 2011, the Director entered an *Order Regarding Petition for Reconsideration* as well as an *Amended Final Order on Remand Regarding the A&B Irrigation District Delivery Call* ("*Amended Final Order*") in the administrative proceeding. By its terms the *Amended Final Order* purported to supersede the *Final Order*.

7. On July 7, 2011, IDWR filed a *Motion to Dismiss* in the above-captioned action, requesting that this Court dismiss A&B's *Petition for Judicial Review*. The basis of IDWR's *Motion* is that the *Final Order* from which judicial review was taken by A&B has been superseded by the *Amended Final Order* and therefore is not ripe for review. In support of its *Motion to Dismiss*, IDWR filed the *Affidavit of Chris M. Bromley*.

8. On July 21, 2011, A&B filed its *Response* to IDWR's *Motion to Dismiss* as well as a *Motion to Strike*. A&B's *Response* asserts that the *Final Order* is a final order from which judicial review may be sought, and that the Director lacked the authority to issue, among other things, the *Amended Final Order*. A&B's *Motion to Strike* requests that this Court strike the *Affidavit of Chris M. Bromley* on the grounds that it is immaterial to this proceeding.

9. IDWR filed its *Response to A&B's Motion to Strike* on July 26, 2011, and its *Reply* in support of its *Motion to Dismiss* on August 2, 2011. With its *Reply*, IDWR filed the *Second Affidavit of Chris M. Bromley*.

10. Oral argument on the *Motion to Dismiss* and the *Motion to Strike* was held before this Court on August 4, 2011.

## II. ANALYSIS

### A. Motion to Dismiss.

The Department argues that A&B's *Petition for Judicial Review* should be dismissed as a matter of law because the Director's *Final Order*, which A&B seeks judicial review of, has been superseded by the Director's *Amended Final Order* and is no longer ripe for review. A&B argues in response that the Director's *Final Order* is the only order from which judicial review may be taken in this case. A&B asserts that the Director's subsequent *Amended Final Order* is *ultra vires* and void due to the Director's failure to comply with the timeframes set forth in Idaho Code § 67-5246.

The case involves the interpretation of Idaho Code § 67-5246. When interpreting a statute, a court's primary objective is to derive the Legislature's intent in enacting the statute. *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 307, 312, 109 P.3d 161, 166 (2005). Therefore, statutory interpretation begins with the literal language of the statute. *Id.* If the statutory language is unambiguous, this Court need not engage in statutory construction and should apply the statute's plain meaning. *Id.* In other words, "[a]n unambiguous statute must be given its plain, usual, and ordinary meaning." *Paolini v. Albertson's, Inc.*, 143 Idaho 547, 549, 149 P.3d 822, 824 (2006). On the other hand, if the statutory language is ambiguous, a court must examine the proffered interpretations "and consider the context in which [the] language is used, the evils to be remedied and the objects in view." *Callies v. O'Neal*, 147 Idaho 841, 847, 216 P.3d 130, 136 (2009). A statute will be regarded as ambiguous if the language of the statute is capable of more than one reasonable construction. *State v. Yzaguirre*, 144 Idaho 471, 475, 163 P.3d 1183, 1187 (2007). Statutory provisions should not be read in isolation but instead are interpreted in the context of the entire document. *Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 310, 208 P.3d 289, 292 (2009). All sections of applicable statutes must be construed

together so as to determine the legislature's intent. *In re Idaho Dept. of Water Resources Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 211, 220 P.3d 318, 329 (2008).

Idaho Code § 67-5246 governs final orders and the effectiveness of final orders issued by administrative agencies under Idaho's Administrative Procedure Act, I.C. § 67-5201, *et al.* ("IDAPA"). It provides in pertinent part as follows:

(4) Unless otherwise provided by statute or rule, any party may file a motion for reconsideration of any final order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.

(5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

(a) The petition for reconsideration is disposed of; or

(b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

I.C. §§ 67-5246(4) & (5) (emphasis added). IDWR regulations include similar language. IDAPA 37.01.01.740.02(a) ("The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law.") (emphasis added).

A&B and the Department propose differing interpretations of the term "disposed of" as used in I.C. §§ 67-5246(4) & (5). A&B interprets the term as requiring that the agency head decide the merits of a petition for reconsideration of a final order via the issuance of a written order within 21 days of its filing. It is A&B's position that if the merits are not decided within that timeframe, operation of law works to deny the petition under I.C. § 67-5246. Consistent with its position, A&B argues that in this case its *Petition for Reconsideration* was denied via operation of law on June 1, 2011 (i.e., 21 days following its filing) when the Director failed to issue a written opinion deciding the merits of the *Petition* on that date. A&B further contends that the Director's *Amended Final Order* is void and *ultra vires* as it was entered after (1) its *Petition for Reconsideration* was deemed denied via operation of law; and (2) its *Petition for*

*Judicial Review* was timely filed with the district court seeking review of the Director's *Final Order*. A&B contends the Director lacked authority to issue his *Amended Final Order* subsequent to the statutory denial of the *Petition for Reconsideration* and its filing of a timely *Petition for Judicial Review* of the *Final Order* with the district court.

The Department contends that A&B interprets the term "disposed of" too narrowly. It argues the term does not require an agency head to decide the merits of a petition for reconsideration within 21 days. Rather, that it simply requires the agency head to accept or deny the petition within that timeframe. It is the Department's position that when an agency head accepts a petition for reconsideration within 21 days of its filing via the issuance of a written order, the agency head can then take further actions beyond the prescribed 21 day timeframe, such as enter orders regarding briefing schedules, oral argument dates, and/or set other proceedings on the petition as necessary. In this case the Department asserts that the Director timely "disposed of" A&B's *Petition for Reconsideration* on June 1, 2011 when it entered its *Order* granting the *Petition* "for the sole purposes of allowing additional time for the Department respond to the *Petition*."

This Court finds the term "disposed of" as used in I.C. § 67-5246 and IDAPA 37.01.01.740.02(a) to be ambiguous. The term is not a defined term under IDAPA and the Court finds that reasonable minds might differ as to its interpretation, making it subject to conflicting interpretations. Where a statute governing an administrative agency is ambiguous, the level of deference that should be granted the agency interpretation is determined under the four prong test announced by the Idaho Supreme Court in *J.R. Simplot Co. v. Idaho State Tax Comm'n*:

[1] The court must first determine if the agency has been entrusted with the responsibility to administer the statute at issue. Only if the agency has received this authority will it be "impliedly clothed with power to construe" the law.

[2] The second prong of the test is that the agency's statutory construction must be reasonable....

[3] The third prong for allowing agency deference is that a court must determine that the statutory language at issue does not expressly treat the precise question at issue....

[4] If an agency, with authority to administer a statutory area of the law, has made a reasonable construction of a statute on a question without a precise statutory answer then, under the fourth prong of the test, a court must ask whether any of the rationales underlying the rule of deference are present.



*J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991).

The first prong of the test is met in this case as the Department is entrusted to administer Idaho Code § 67-5246 with respect to petitions for reconsideration filed in the administrative actions before it. The second prong is met since as the Department's interpretation is reasonable. The Department points out, and this Court agrees, that the substance and content of petitions for reconsideration can vary significantly. Some are simple and some are complex. Most that deal with the administration of groundwater pursuant to a delivery call fall under the latter category. With respect to those petitions that raise complex issues, this Court does not read I.C. § 67-5246 as prohibiting the agency head from issuing a briefing schedule, and scheduling an oral argument, which may extend past 21 days of the filing of the petition so long as the agency head acts upon the petition within the 21 day period by issuing a written order granting the petition. A&B's interpretation is unreasonable and would lead to absurd results in this respect in that if there is a scheduling conflict wherein the agency head cannot, for whatever reason, have briefing, oral argument, and a written opinion completed within the 21 day period, the agency head would simply be forced to issue a written opinion addressing the merits without the benefit of briefing and/or oral argument. An important principle of administrative law is that the agency should be given the first opportunity to correct its possible errors. *Dale D. Goble, Michael S. Gilmore, The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 328 (1993). The Department's interpretation is reasonable in that it allows the agency the time to take the steps necessary to adequately consider and respond to a complex motion for reconsideration should the agency head decide to accept it.

Since the term "disposed of" is undefined, and subject to conflicting interpretations, the third prong of the test is met. Last, the fourth prong of the test is met in this case. One of the rationales underlying deference is that the agency interpretation is "practical." *Canty v. Idaho State Tax Commission*, 138 Idaho 178, 184, 59 P.3d 983, 989 (2002). The Idaho Supreme Court has instructed that this rationale "refers to the fact that statutory language is often of necessity general and therefore cannot address all of the details necessary for its effective implementation." *Id.* As a practical matter the Department's interpretation makes sense in that it is not always possible or practical for an agency head to have to rule on the merits of a petition for reconsideration with 21 days of filing, especially where the agency head desires further

briefing to be submitted and oral argument on the issues raised. The alternative result would undermine any meaningful opportunity to have the agency head consider the merits of a petition for reconsideration. Therefore the Department's interpretation is a practical interpretation of the statute. Another rationale asks whether the agency has expertise. In this case, the Department has expertise in the field of water law and delivery calls, which is the subject matter of the *Petition for Reconsideration* in this case. Therefore, several rationales underlying deference are present in this case and application of the *Simplot Test* weights in favor of deference to the agency interpretation.

The Department's interpretation is also consistent with one of the leading commentaries on Idaho's Administrative Procedure Act, which provides as follows:

An important principle of administrative law is that the agency should be given the first opportunity to correct its possible errors. The APA's provisions for contested cases incorporate this principle by explicitly authorizing petitions for reconsideration. Regardless of the kind of order, the presiding officer has authority to entertain petitions for reconsideration of the order if the petition is filed within fourteen days of the issuance of the order. While the filing of a petition for reconsideration is not a prerequisite to administrative or judicial review of the order, the officer who issued the order will have greater familiarity with the factual and legal issues than will other potential decision makers. It is therefore far more efficient for all parties to have that officer reconsider the order, particularly when minor or technical problems arise.

A petition for reconsideration that is not acted upon within twenty-one days is presumed denied. *It is not necessary, however, that the officer decide the issues presented by the petition within twenty-one days; it is only necessary that the petition be accepted, which can be accomplished through notification of the parties that the officer will reconsider the order.*

*Dale D. Goble, Michael S. Gilmore, The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 328–29 (1993) (emphasis added).

The Department's interpretation is further consistent with the written explanatory comments that accompany the Idaho Rules of Administrative Procedure of the Attorney General:

In Rules 720, 730 and 740, the presiding officer has twenty-one days to act on a petition for reconsideration. But granting reconsideration is not the same as issuing the final decision following reconsideration. Reconsideration can be granted by issuing an order that says, "The petition for reconsideration is granted," then proceeding to schedule further hearings, briefing, etc., on reconsideration.

*Idaho Administrative Procedure Act with Comments and Idaho Attorney General's Model Rules of Practice and Procedure*, Written Comments to Rules 710 through 789 (effective July 1, 1993). A copy of the pertinent Written Comments is attached hereto as Exhibit A.

Therefore, for the reasons set forth herein, this Court finds that A&B urges this Court to accept too narrow a reading of the term "disposed of" as used in I.C. § 67-5246 and IDAPA 37.01.01.740.02(a). The Court holds that the "disposed of" language of I.C. § 67-5246 does not require that an agency head issue a written decision deciding the merits of a petition for reconsideration within 21 days.

**B. Motion to Strike.**

A&B's *Motion to Strike* requests that this Court strike the *Affidavit of Chris M. Bromley* on the grounds that it is immaterial to this proceeding.<sup>1</sup> The decision to grant or deny a motion to strike is left to the sound discretion of the district court. *See e.g., Mallonee v. State*, 139 Idaho 615, 623, 84 P.3d 551, 559 (2004) ("whether the district court erred when it granted the motion to strike is reviewed on appeal under an abuse of discretion standard").

In this case, the entirety of the *Affidavit of Chris M. Bromley* consists of two attachments. Attached as Exhibit A to the *Affidavit* is a copy of the Director's June 30, 2011 *Order Regarding Petition for Reconsideration*. Attached as Exhibit B to the *Affidavit* is a copy of the Director's June 30, 2011 *Amended Final Order*. 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*. Namely, that the Director lacked the authority to issue the *Orders* attached as Exhibit A and B to the *Affidavit of Chris M. Bromley*. Since A&B's arguments in this respect have been rejected by the Court for the reasons stated above, the basis for its *Motion to Strike* must likewise be rejected. Therefore, this Court finds A&B's *Motion to Strike* to be unavailing.

**C. A&B may amend its *Petition for Judicial Review* to seek judicial review of the Director's *Amended Final Order*.**

A&B asserts that if the Court determines to grant the Department's *Motion to Dismiss*, then it should be permitted to amend its *Petition for Judicial Review* to seek judicial review of

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<sup>1</sup> The Court notes that A&B did not move to strike the *Second Affidavit of Chris M. Bromley* filed on August 2, 2011 in the above-captioned matter.

the Director's *Amended Final Order*. This Court agrees. Since Idaho Rule of Civil Procedure 84 does not address the amendment of *Petitions for Judicial Review*, this Court looks to the Idaho Appellate Rules for further guidance. I.R.C.P. 84(r). Idaho Appellate Rule 17(m) provides as follows:

In the event the original notice of appeal erroneously states any of the information and requirements of this rule or additional facts arise after the filing of the initial notice of appeal, the appellant may thereafter file an amended notice of appeal correctly setting forth the facts and information. The amended notice of appeal shall indicate changes from the original notice of appeal by means of strikethroughs and underlining. An amended notice of appeal shall be filed with the clerk of the district court in the same manner as the original notice of appeal but no filing fee shall be required. If the original notice of appeal was timely filed from an appealable judgment, order or decree, the amended notice of appeal will relate back to the date of filing of the original notice of appeal. If the amended notice of appeal includes a request for preparation of additional transcripts, the notice must include an estimate of the number of additional pages requested and a certification that the amended notice has been served on each reporter of whom a request for additional transcript is made.

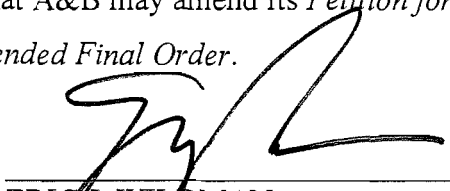
This Court holds that A&B may amend its *Petition for Judicial Review* to seek judicial review of the Director's *Amended Final Order* pursuant to I.A.R. 17(m). The *Amended Petition for Judicial Review* will relate back to the to the date of filing of the original *Petition for Judicial Review* and will be treated as a premature filing of a *Petition for Judicial Review* that became valid upon the Director's issuance of the *Amended Final Order*. I.A.R. 17(c)(2).

### III.

#### ORDER

1. Based on the forgoing, it is hereby ordered that the Department's *Motion to Dismiss* is **granted**.
2. It is hereby further ordered that A&B's *Motion to Strike* is **denied**.
3. It is hereby further ordered that A&B may amend its *Petition for Judicial Review* to seek judicial review of the Director's *Amended Final Order*.

Dated August 11, 2011.

  
ERIC J. WILDMAN  
District Judge

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715  
1193

IDAHO ADMINISTRATIVE PROCEDURE ACT  
WITH COMMENTS

AND

IDAHO ATTORNEY GENERAL'S  
MODEL RULES OF PRACTICE AND PROCEDURE

*Effective July 1, 1993*



**Larry EchoHawk**  
Attorney General

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Caldwell, Idaho

ORDER ON MOTION TO DISMISS AND MOTION TO STRIKE

(Subcase No.) <b>EXHIBIT</b> <b>A</b>
Date: _____

0164

731. -- 739. (RESERVED).

740. FINAL ORDERS (Rule 740). (7-1-93)

01. **Definition.** Final orders are preliminary orders that have become final under Rule 730 pursuant to section 67-5245, Idaho Code, or orders issued by the agency head pursuant to section 67-5246, Idaho Code. Emergency orders issued under section 67-5247, Idaho Code, shall be designated as final orders if the agency will not issue further orders or conduct further proceedings in the matter. (7-1-93)

02. **Content.** Every final order issued by the agency head must contain or be accompanied by a document containing the following paragraphs or substantially similar paragraphs: (7-1-93)

- a. This is a final order of the agency. Any party may file a motion for reconsideration of this final order within fourteen (14) days of the service date of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code. (7-1-93)
- b. Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by this final order or orders previously issued in this case may appeal this final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:
  - i. A hearing was held, (7-1-93)
  - ii. The final agency action was taken, (7-1-93)
  - iii. The party seeking review of the order resides, or (7-1-93)
  - iv. The real property or personal property that was the subject of the agency action is located. (7-1-93)
- c. An appeal must be filed within twenty-eight (28) days (a) of the service date of this final order, (b) of an order denying petition for reconsideration, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal. (7-1-93)

741. -- 749. (RESERVED).

750. **ORDER NOT DESIGNATED (Rule 750).** If an order is not designated as recommended, preliminary or final at its release, but is designated as recommended, preliminary or final after its release, its effective date for purposes of reconsideration or appeal is the date of the order of designation. If a party believes that an order not designated as a recommended order, preliminary order or final order according to the terms of these rules should be designated as a recommended order, preliminary order or final order, the party may move to designate the order as recommended, preliminary or final, as appropriate. (7-1-93)

751. -- 759. (RESERVED).

760. **MODIFICATION OF ORDER ON PRESIDING OFFICER'S OWN MOTION (Rule 760).** A hearing officer issuing a recommended or preliminary order may modify the recommended or preliminary order on the hearing officer's own motion within fourteen (14) days after issuance of the recommended or preliminary order by withdrawing the recommended or preliminary order and issuing a substitute recommended or preliminary order. The agency head may modify or amend a final order of the agency (be it a preliminary order that became final because no party challenged it or a final order issued by the agency head itself) at any time before notice of appeal to district court has been filed or the expiration of the time for appeal to district court, whichever is earlier, by withdrawing the earlier final order and substituting a new final order for it. (7-1-93)

761. -- 769. (RESERVED).

770. **CLARIFICATION OF ORDERS (Rule 770).** Any party or person affected by an order may petition to clarify any order, whether interlocutory, recommended, preliminary or final. Petitions for clarification from final orders do not suspend or toll the time to petition for reconsideration or to appeal the order. A petition for clarification may be combined with a petition for reconsideration or stated in the alternative as a petition for clarification and/or reconsideration. (7-1-93)

771. -- 779. (RESERVED).

780. **STAY OF ORDERS (Rule 780).** Any party or person affected by an order may petition the agency to stay any order, whether interlocutory or final. Interlocutory or final orders may be stayed by the judiciary according to statute. The agency may stay any interlocutory or final order on its own motion. (7-1-93)

781. -- 789. (RESERVED).

#### *Comments to Rules 710 through 789.*

Rule 710 recognizes the existence of interlocutory orders and gives several examples of interlocutory orders.

Rule 711 sets forth the rules for reviewing interlocutory orders.

Rule 720 implements section 67-5244, Idaho Code, on recommended orders of hearing officers. Recommended orders do not become final orders until reviewed and adopted, modified, etc., by the agency head.

Rule 730 implements section 67-5245, Idaho Code, on preliminary orders of hearing officers. Preliminary orders become final orders unless a party petitions the agency head to review them.

Rule 740 implements section 67-5246, Idaho Code, on final orders. Emergency orders in cases in which no further orders will be issued are included in the categories of orders that are final orders.

Rule 750 provides a mechanism for correcting

the failure to designate an order as recommended, preliminary or final.

In Rules 720, 730 and 740, the presiding officer has twenty-one days to act on petition for reconsideration. This means the officer must grant or deny reconsideration. But granting reconsideration is not the same as issuing the final decision following reconsideration. Reconsideration can be granted by issuing an order that says, "The petition for reconsideration is granted," then proceeding to schedule further hearings, briefing, etc., on reconsideration.

Rule 760 provides a mechanism for the agency to correct mistakes in recommended, preliminary or final orders before the orders become final.

Rules 770 and 780 set forth the rules for staying and clarifying orders and reviewing interlocutory orders.

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON MOTION TO DISMISS AND MOTION TO STRIKE was mailed on August 11, 2011, with sufficient first-class postage to the following:

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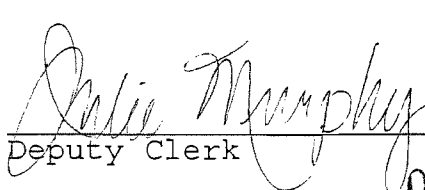
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ORDER

Page 1 8/11/11

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Deputy Clerk

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3. On June 1, 2011, the Director entered an *Order Granting Petition for Reconsideration to Allow Time for Further Review* in the administrative proceeding, wherein he ordered that A&B's *Petition for Reconsideration* be granted "for the sole purposes of allowing additional time for the Department to respond to the Petition." *Second Bromley Aff.*, Ex.1. The *Order* further provided that "an order responding to the merits of the Petition shall issue no later than June 9, 2011." *Id.*

4. On June 9, 2011, the Director entered an *Amended Order Granting Petition for Reconsideration to Allow Time for Further Review* in the administrative proceeding, wherein he again granted A&B's *Petition for Reconsideration* "for the sole purpose of allowing additional time for the Department to respond to the Petition." *Second Bromley Aff.*, Ex.2. The *Amended Order* further provided that "an order responding to the merits of the Petition shall issue no later than June 30, 2011." *Id.*

5. On June 27, 2011, Petitioner A&B Irrigation District ("A&B") filed a *Petition for Judicial Review* in the above-entitled district court seeking judicial review of the *Final Order*. The case was reassigned by the clerk of the court to this Court on June 27, 2011.

6. On June 30, 2011, the Director entered an *Order Regarding Petition for Reconsideration* as well as an *Amended Final Order on Remand Regarding the A&B Irrigation District Delivery Call* ("*Amended Final Order*") in the administrative proceeding. By its terms the *Amended Final Order* purported to supersede the *Final Order*.

7. On July 7, 2011, IDWR filed a *Motion to Dismiss* in the above-captioned action, requesting that this Court dismiss A&B's *Petition for Judicial Review*. The basis of IDWR's *Motion* is that the *Final Order* from which judicial review was taken by A&B has been superseded by the *Amended Final Order* and therefore is not ripe for review. In support of its *Motion to Dismiss*, IDWR filed the *Affidavit of Chris M. Bromley*.

8. On July 21, 2011, A&B filed its *Response* to IDWR's *Motion to Dismiss* as well as a *Motion to Strike*. A&B's *Response* asserts that the *Final Order* is a final order from which judicial review may be sought, and that the Director lacked the authority to issue, among other things, the *Amended Final Order*. A&B's *Motion to Strike* requests that this Court strike the *Affidavit of Chris M. Bromley* on the grounds that it is immaterial to this proceeding.

9. IDWR filed its *Response* to A&B's *Motion to Strike* on July 26, 2011, and its *Reply* in support of its *Motion to Dismiss* on August 2, 2011. With its *Reply*, IDWR filed the *Second Affidavit of Chris M. Bromley*.

10. Oral argument on the *Motion to Dismiss* and the *Motion to Strike* was held before this Court on August 4, 2011.

## II. ANALYSIS

### A. Motion to Dismiss.

The Department argues that A&B's *Petition for Judicial Review* should be dismissed as a matter of law because the Director's *Final Order*, which A&B seeks judicial review of, has been superseded by the Director's *Amended Final Order* and is no longer ripe for review. A&B argues in response that the Director's *Final Order* is the only order from which judicial review may be taken in this case. A&B asserts that the Director's subsequent *Amended Final Order* is *ultra vires* and void due to the Director's failure to comply with the timeframes set forth in Idaho Code § 67-5246.

The case involves the interpretation of Idaho Code § 67-5246. When interpreting a statute, a court's primary objective is to derive the Legislature's intent in enacting the statute. *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 307, 312, 109 P.3d 161, 166 (2005). Therefore, statutory interpretation begins with the literal language of the statute. *Id.* If the statutory language is unambiguous, this Court need not engage in statutory construction and should apply the statute's plain meaning. *Id.* In other words, "[a]n unambiguous statute must be given its plain, usual, and ordinary meaning." *Paolini v. Albertson's, Inc.*, 143 Idaho 547, 549, 149 P.3d 822, 824 (2006). On the other hand, if the statutory language is ambiguous, a court must examine the proffered interpretations "and consider the context in which [the] language is used, the evils to be remedied and the objects in view." *Callies v. O'Neal*, 147 Idaho 841, 847, 216 P.3d 130, 136 (2009). A statute will be regarded as ambiguous if the language of the statute is capable of more than one reasonable construction. *State v. Yzaguirre*, 144 Idaho 471, 475, 163 P.3d 1183, 1187 (2007). Statutory provisions should not be read in isolation but instead are interpreted in the context of the entire document. *Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 310, 208 P.3d 289, 292 (2009). All sections of applicable statutes must be construed

together so as to determine the legislature's intent. *In re Idaho Dept. of Water Resources Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 211, 220 P.3d 318, 329 (2008).

Idaho Code § 67-5246 governs final orders and the effectiveness of final orders issued by administrative agencies under Idaho's Administrative Procedure Act, I.C. § 67-5201, *et al.* ("IDAPA"). It provides in pertinent part as follows:

(4) Unless otherwise provided by statute or rule, any party may file a motion for reconsideration of any final order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.

(5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

(a) The petition for reconsideration is disposed of; or

(b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

I.C. §§ 67-5246(4) & (5) (emphasis added). IDWR regulations include similar language. IDAPA 37.01.01.740.02(a) ("The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law.") (emphasis added).

A&B and the Department propose differing interpretations of the term "disposed of" as used in I.C. §§ 67-5246(4) & (5). A&B interprets the term as requiring that the agency head decide the merits of a petition for reconsideration of a final order via the issuance of a written order within 21 days of its filing. It is A&B's position that if the merits are not decided within that timeframe, operation of law works to deny the petition under I.C. § 67-5246. Consistent with its position, A&B argues that in this case its *Petition for Reconsideration* was denied via operation of law on June 1, 2011 (i.e., 21 days following its filing) when the Director failed to issue a written opinion deciding the merits of the *Petition* on that date. A&B further contends that the Director's *Amended Final Order* is void and *ultra vires* as it was entered after (1) its *Petition for Reconsideration* was deemed denied via operation of law; and (2) its *Petition for*

*Judicial Review* was timely filed with the district court seeking review of the Director's *Final Order*. A&B contends the Director lacked authority to issue his *Amended Final Order* subsequent to the statutory denial of the *Petition for Reconsideration* and its filing of a timely *Petition for Judicial Review* of the *Final Order* with the district court.

The Department contends that A&B interprets the term "disposed of" too narrowly. It argues the term does not require an agency head to decide the merits of a petition for reconsideration within 21 days. Rather, that it simply requires the agency head to accept or deny the petition within that timeframe. It is the Department's position that when an agency head accepts a petition for reconsideration within 21 days of its filing via the issuance of a written order, the agency head can then take further actions beyond the prescribed 21 day timeframe, such as enter orders regarding briefing schedules, oral argument dates, and/or set other proceedings on the petition as necessary. In this case the Department asserts that the Director timely "disposed of" A&B's *Petition for Reconsideration* on June 1, 2011 when it entered its *Order* granting the *Petition* "for the sole purposes of allowing additional time for the Department respond to the *Petition*."

This Court finds the term "disposed of" as used in I.C. § 67-5246 and IDAPA 37.01.01.740.02(a) to be ambiguous. The term is not a defined term under IDAPA and the Court finds that reasonable minds might differ as to its interpretation, making it subject to conflicting interpretations. Where a statute governing an administrative agency is ambiguous, the level of deference that should be granted the agency interpretation is determined under the four prong test announced by the Idaho Supreme Court in *J.R. Simplot Co. v. Idaho State Tax Comm'n*:

[1] The court must first determine if the agency has been entrusted with the responsibility to administer the statute at issue. Only if the agency has received this authority will it be "impliedly clothed with power to construe" the law.

[2] The second prong of the test is that the agency's statutory construction must be reasonable....

[3] The third prong for allowing agency deference is that a court must determine that the statutory language at issue does not expressly treat the precise question at issue....

[4] If an agency, with authority to administer a statutory area of the law, has made a reasonable construction of a statute on a question without a precise statutory answer then, under the fourth prong of the test, a court must ask whether any of the rationales underlying the rule of deference are present.

*J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991).

The first prong of the test is met in this case as the Department is entrusted to administer Idaho Code § 67-5246 with respect to petitions for reconsideration filed in the administrative actions before it. The second prong is met since as the Department's interpretation is reasonable. The Department points out, and this Court agrees, that the substance and content of petitions for reconsideration can vary significantly. Some are simple and some are complex. Most that deal with the administration of groundwater pursuant to a delivery call fall under the latter category. With respect to those petitions that raise complex issues, this Court does not read I.C. § 67-5246 as prohibiting the agency head from issuing a briefing schedule, and scheduling an oral argument, which may extend past 21 days of the filing of the petition so long as the agency head acts upon the petition within the 21 day period by issuing a written order granting the petition. A&B's interpretation is unreasonable and would lead to absurd results in this respect in that if there is a scheduling conflict wherein the agency head cannot, for whatever reason, have briefing, oral argument, and a written opinion completed within the 21 day period, the agency head would simply be forced to issue a written opinion addressing the merits without the benefit of briefing and/or oral argument. An important principle of administrative law is that the agency should be given the first opportunity to correct its possible errors. *Dale D. Goble, Michael S. Gilmore, The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 328 (1993). The Department's interpretation is reasonable in that it allows the agency the time to take the steps necessary to adequately consider and respond to a complex motion for reconsideration should the agency head decide to accept it.

Since the term "disposed of" is undefined, and subject to conflicting interpretations, the third prong of the test is met. Last, the fourth prong of the test is met in this case. One of the rationales underlying deference is that the agency interpretation is "practical." *Canty v. Idaho State Tax Commission*, 138 Idaho 178, 184, 59 P.3d 983, 989 (2002). The Idaho Supreme Court has instructed that this rationale "refers to the fact that statutory language is often of necessity general and therefore cannot address all of the details necessary for its effective implementation." *Id.* As a practical matter the Department's interpretation makes sense in that it is not always possible or practical for an agency head to have to rule on the merits of a petition for reconsideration with 21 days of filing, especially where the agency head desires further

briefing to be submitted and oral argument on the issues raised. The alternative result would undermine any meaningful opportunity to have the agency head consider the merits of a petition for reconsideration. Therefore the Department's interpretation is a practical interpretation of the statute. Another rationale asks whether the agency has expertise. In this case, the Department has expertise in the field of water law and delivery calls, which is the subject matter of the *Petition for Reconsideration* in this case. Therefore, several rationales underlying deference are present in this case and application of the *Simplot Test* weights in favor of deference to the agency interpretation.

The Department's interpretation is also consistent with one of the leading commentaries on Idaho's Administrative Procedure Act, which provides as follows:

An important principle of administrative law is that the agency should be given the first opportunity to correct its possible errors. The APA's provisions for contested cases incorporate this principle by explicitly authorizing petitions for reconsideration. Regardless of the kind of order, the presiding officer has authority to entertain petitions for reconsideration of the order if the petition is filed within fourteen days of the issuance of the order. While the filing of a petition for reconsideration is not a prerequisite to administrative or judicial review of the order, the officer who issued the order will have greater familiarity with the factual and legal issues than will other potential decision makers. It is therefore far more efficient for all parties to have that officer reconsider the order, particularly when minor or technical problems arise.

A petition for reconsideration that is not acted upon within twenty-one days is presumed denied. *It is not necessary, however, that the officer decide the issues presented by the petition within twenty-one days; it is only necessary that the petition be accepted, which can be accomplished through notification of the parties that the officer will reconsider the order.*

*Dale D. Goble, Michael S. Gilmore, The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 328–29 (1993) (emphasis added).

The Department's interpretation is further consistent with the written explanatory comments that accompany the Idaho Rules of Administrative Procedure of the Attorney General:

In Rules 720, 730 and 740, the presiding officer has twenty-one days to act on a petition for reconsideration. But granting reconsideration is not the same as issuing the final decision following reconsideration. Reconsideration can be granted by issuing an order that says, "The petition for reconsideration is granted," then proceeding to schedule further hearings, briefing, etc., on reconsideration.

*Idaho Administrative Procedure Act with Comments and Idaho Attorney General's Model Rules of Practice and Procedure*, Written Comments to Rules 710 through 789 (effective July 1, 1993). A copy of the pertinent Written Comments is attached hereto as Exhibit A.

Therefore, for the reasons set forth herein, this Court finds that A&B urges this Court to accept too narrow a reading of the term "disposed of" as used in I.C. § 67-5246 and IDAPA 37.01.01.740.02(a). The Court holds that the "disposed of" language of I.C. § 67-5246 does not require that an agency head issue a written decision deciding the merits of a petition for reconsideration within 21 days.

**B. Motion to Strike.**

A&B's *Motion to Strike* requests that this Court strike the *Affidavit of Chris M. Bromley* on the grounds that it is immaterial to this proceeding.<sup>1</sup> The decision to grant or deny a motion to strike is left to the sound discretion of the district court. *See e.g., Mallonee v. State*, 139 Idaho 615, 623, 84 P.3d 551, 559 (2004) ("whether the district court erred when it granted the motion to strike is reviewed on appeal under an abuse of discretion standard").

In this case, the entirety of the *Affidavit of Chris M. Bromley* consists of two attachments. Attached as Exhibit A to the *Affidavit* is a copy of the Director's June 30, 2011 *Order Regarding Petition for Reconsideration*. Attached as Exhibit B to the *Affidavit* is a copy of the Director's June 30, 2011 *Amended Final Order*. 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*. Namely, that the Director lacked the authority to issue the *Orders* attached as Exhibit A and B to the *Affidavit of Chris M. Bromley*. Since A&B's arguments in this respect have been rejected by the Court for the reasons stated above, the basis for its *Motion to Strike* must likewise be rejected. Therefore, this Court finds A&B's *Motion to Strike* to be unavailing.

**C. A&B may amend its *Petition for Judicial Review* to seek judicial review of the Director's *Amended Final Order*.**

A&B asserts that if the Court determines to grant the Department's *Motion to Dismiss*, then it should be permitted to amend its *Petition for Judicial Review* to seek judicial review of

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<sup>1</sup> The Court notes that A&B did not move to strike the *Second Affidavit of Chris M. Bromley* filed on August 2, 2011 in the above-captioned matter.

the Director's *Amended Final Order*. This Court agrees. Since Idaho Rule of Civil Procedure 84 does not address the amendment of *Petitions for Judicial Review*, this Court looks to the Idaho Appellate Rules for further guidance. I.R.C.P. 84(r). Idaho Appellate Rule 17(m) provides as follows:

In the event the original notice of appeal erroneously states any of the information and requirements of this rule or additional facts arise after the filing of the initial notice of appeal, the appellant may thereafter file an amended notice of appeal correctly setting forth the facts and information. The amended notice of appeal shall indicate changes from the original notice of appeal by means of strikethroughs and underlining. An amended notice of appeal shall be filed with the clerk of the district court in the same manner as the original notice of appeal but no filing fee shall be required. If the original notice of appeal was timely filed from an appealable judgment, order or decree, the amended notice of appeal will relate back to the date of filing of the original notice of appeal. If the amended notice of appeal includes a request for preparation of additional transcripts, the notice must include an estimate of the number of additional pages requested and a certification that the amended notice has been served on each reporter of whom a request for additional transcript is made.

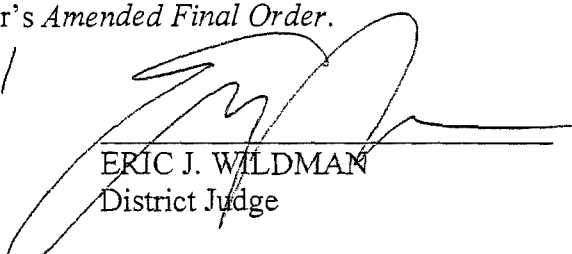
This Court holds that A&B may amend its *Petition for Judicial Review* to seek judicial review of the Director's *Amended Final Order* pursuant to I.A.R. 17(m). The *Amended Petition for Judicial Review* will relate back to the to the date of filing of the original *Petition for Judicial Review* and will be treated as a premature filing of a *Petition for Judicial Review* that became valid upon the Director's issuance of the *Amended Final Order*. I.A.R. 17(c)(2).

### III.

#### ORDER

1. Based on the forgoing, it is hereby ordered that the Department's *Motion to Dismiss is granted*.
2. It is hereby further ordered that A&B's *Motion to Strike is denied*.
3. It is hereby further ordered that A&B may amend its *Petition for Judicial Review* to seek judicial review of the Director's *Amended Final Order*.

Dated August 29, 2011

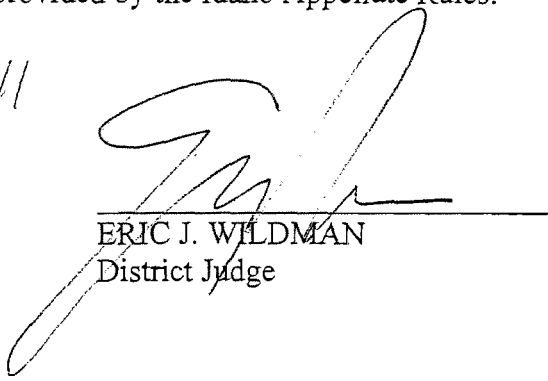
  
ERIC J. WILDMAN  
District Judge



**RULE 54(b) CERTIFICATE**

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Dated August 29, 2011



ERIC J. WILDMAN  
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the AMENDED ORDER ON MOTION TO DISMISS AND MOTION TO STRIKE (WITH RULE 54(B) CERTIFIC. was mailed on August 29, 2011, with sufficient first-class postage to the following:

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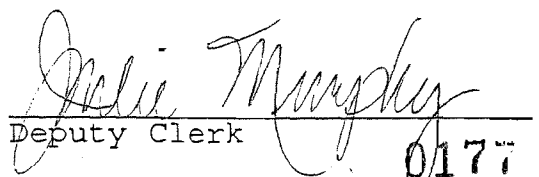
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Phone: 208-733-0700

DIRECTOR OF IDWR  
PO BOX 83720  
BOISE, ID 83720-0098

  
0177



TO: THE ABOVE NAMED RESPONDENTS, INTERIM DIRECTOR GARY SPACKMAN AND THE IDAHO DEPARTMENT OF WATER RESOURCES, AND THE PARTIES' COUNSEL OF RECORD IDENTIFIED ON THE CERTIFICATE OF SERVICE; AND THE CLERK OF THE ABOVE ENTITLED DISTRICT COURT

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellant, A&B IRRIGATION DISTRICT ("Appellant") appeals against the above named respondents to the Idaho Supreme Court from the district court's *Amended Order on Motion to Dismiss and Motion to Strike*, entered in the above entitled action on August 29, 2011, the Honorable Eric J. Wildman presiding. Judge Wildman entered a Rule 54(b) certificate of final judgment on August 29, 2011.

2. The above named Appellant has a right to appeal to the Idaho Supreme Court, and the order described in paragraph 1 is an appealable order pursuant to Rule 11(a)(3), I.A.R.

3. The Appellant's preliminary statement of issues it intends to assert on appeal, which under I.A.R. 17, does not prevent the Appellant from asserting other issues, is as follows:

a. Whether the District Court erred by ignoring the plain meaning of the Idaho APA in concluding that the Director of the Idaho Department of Water Resources did not have to dispose of A&B's petition for reconsideration within twenty-one (21) days as required by Idaho Code § 67-5246 and IDAPA 37.01.740.02.a? Whether the petition for reconsideration was denied as a matter of law when the Director failed to dispose of the petition within 21 days as required by law?

b. Whether the District Court erred in dismissing A&B's petition for judicial review of the Interim Director's April 27, 2011 *Final Order on Remand Regarding A&B Irrigation District Delivery Call*?

c. Whether the District Court erred in denying A&B's motion to strike the *Affidavit of Chris M. Bromley*?

4. No order has been entered sealing any portion of the record.

5. (a) Is a reporter's transcript requested? **NO**

6. The Appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.:

*Interim Director's Final Order on Remand Regarding A&B Irrigation District Delivery Call* (April 27, 2011)

*IDWR Motion and Memorandum in Support of Dismissal of A&B Irrigation District's June 24, 2011 Notice of Appeal and Petition for Judicial Review of Agency Action* (July 7, 2011)

*Affidavit of Chris M. Bromley* (July 7, 2011)

*Petitioner's Statement of Initial Issues* (July 11, 2011)

*A&B's Response to IDWR's Motion to Dismiss* (July 21, 2011)

*A&B's Motion to Strike Affidavit of Chris M. Bromley in Support of IDWR's Motion to Dismiss* (July 21, 2011)

*IDWR Response to A&B's Motion to Strike Affidavit of Chris M. Bromley* (July 26, 2011)

*IDWR Reply in Support of its Motion to Dismiss* (August 2, 2011)

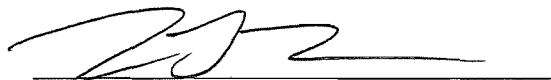
*Second Affidavit of Chris M. Bromley* (August 2, 2011)

7. I certify:

- a. That the estimated fee for preparation of the clerk's record has been paid.
- b. That the appellant filing fee has been paid.
- c. That service has been made upon all parties to be served pursuant to Rule 20.

**DATED** this 15<sup>th</sup> day of September, 2011.

**BARKER ROSHOLT & SIMPSON LLP**



Travis L. Thompson

*Attorneys for Petitioner A&B Irrigation District*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 15<sup>th</sup> day of September, 2011, I served true and correct copies of the *Notice of Appeal* upon the following by the method indicated:

SRBA District Court  
253 3<sup>rd</sup> Ave. North  
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](mailto:garrick.baxter@idwr.idaho.gov)  
[chris.bromley@idwr.idaho.gov](mailto:chris.bromley@idwr.idaho.gov)

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

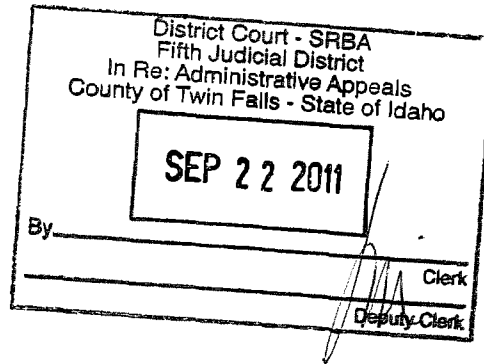
<p>Jerry R. Rigby Rigby Andrus &amp; Rigby Chtd. 25 N 2<sup>nd</sup> East Rexburg, Idaho 83440 <a href="mailto:jrigby@rex-law.com">jrigby@rex-law.com</a></p>	<p>Randall C. Budge Candice M. McHugh Racine Olson P.O. Box 1391 201 E. Center Street Pocatello, Idaho 83204-1391 <a href="mailto:rcb@racinelaw.net">rcb@racinelaw.net</a> <a href="mailto:cmm@racinelaw.net">cmm@racinelaw.net</a></p>	<p>Sarah A. Klahn Mitra Pemberton White &amp; Jankowski LLP 511 Sixteenth Street, Suite 500 Denver, Colorado 80202 <a href="mailto:sarahk@white-jankowski.com">sarahk@white-jankowski.com</a> <a href="mailto:mitrap@white-jankowski.com">mitrap@white-jankowski.com</a></p>
<p>A. Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, Idaho 83201 <a href="mailto:dtranmer@pocatello.us">dtranmer@pocatello.us</a></p>		

  
 Travis L. Thompson

**LAWRENCE G. WASDEN**  
ATTORNEY GENERAL

**CLIVE J. STRONG**  
Deputy Attorney General  
Chief, Natural Resources Division

**GARRICK L. BAXTER, ISB #6301**  
**CHRIS M. BROMLEY, ISB #6530**  
Deputy Attorneys General  
Idaho Department of Water Resources  
P. O. Box 83720  
Boise, Idaho 83720-0098  
Telephone: (208) 287-4800  
Facsimile: (208) 287-6700



**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, )  
)  
Petitioner, )  
)  
vs. )  
)  
THE IDAHO DEPARTMENT OF WATER )  
RESOURCES and GARY SPACKMAN in his )  
official capacity as Interim Director of the Idaho )  
Department of Water Resources, )  
)  
)  
Respondents. )

Case No. CV 2011-512  
**REQUEST FOR  
TRANSCRIPTS**

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 )  
)

TO: THE ABOVE NAMED PETITIONER AND THE PARTY'S ATTORNEY AND THE COURT REPORTER OF THE SRBA DISTRICT COURT


NOTICE IS HEREBY GIVEN THAT, the Respondents in the above entitled proceeding hereby requests pursuant to Rule 19, I.A.R., the inclusion of the hard copy version of the transcript resulting from the hearing held on August 4, 2011 in respect to Petitioner's Motion to Strike and Respondent's Motion to Dismiss.

I certify that a copy of this request for transcript has been served on the court reporter of whom the transcript is requested as named below at the addresses set out below in the attached Certificate of Mailing.

I further certify that this request for transcript has been served upon the clerk of the district court and upon all parties required to be served pursuant to Rule 20, I.A.R.

DATED this 20<sup>th</sup> day of September, 2011.

LAWRENCE G. WASDEN  
Attorney General  
CLIVE J. STRONG  
Chief, Natural Resources Division

  
\_\_\_\_\_  
CHRIS M. BROMLEY  
Deputy Attorney General  
Idaho Department of Water Resources



## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 20<sup>th</sup> day of September 2011.

Document Served: **REQUEST FOR TRANSCRIPTS**

SRBA District Court 253 3 <sup>rd</sup> Ave. North P.O. Box 2707 Twin Falls, Idaho 83303-2707	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
Linda Leadbetter, SRBA Court Reporter 570 Rim View Drive Twin Falls ID 83301	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
John K. Simpson Travis Thompson Paul L. Arrington Sarah W. Higer BARKER ROSHOLT & SIMPSON LLP 113 Main Avenue West, Suite 303 P.O. Box 485 Twin Falls, ID 83303-0485 <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a> <a href="mailto:tlt@idahowaters.com">tlt@idahowaters.com</a> <a href="mailto:pla@idahowaters.com">pla@idahowaters.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Randy C. Budge Candice M. McHugh RACINE OLSON NYE BUDGE BAILEY P.O. Box 1391 Pocatello, ID 83201 <a href="mailto:rcb@racinelaw.net">rcb@racinelaw.net</a> <a href="mailto:cmm@racinelaw.net">cmm@racinelaw.net</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
A. Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83201 <a href="mailto:dtranmer@pocatello.us">dtranmer@pocatello.us</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

<p>Sarah A. Klahn  Mitra M. Pemberton  WHITE &amp; JANKOWSKI LLP  511 Sixteenth Street, Suite 500  Denver, CO 80202  <a href="mailto:sarahk@white-jankowski.com">sarahk@white-jankowski.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input type="checkbox"/> Hand Delivery  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> Email</p>
<p>Jerry R. Rigby  Rigby Andrus and Moeller  25 N 2<sup>nd</sup> East  Rexburg, ID 83440  <a href="mailto:jrigby@rex-law.com">jrigby@rex-law.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input type="checkbox"/> Hand Delivery  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> Email</p>




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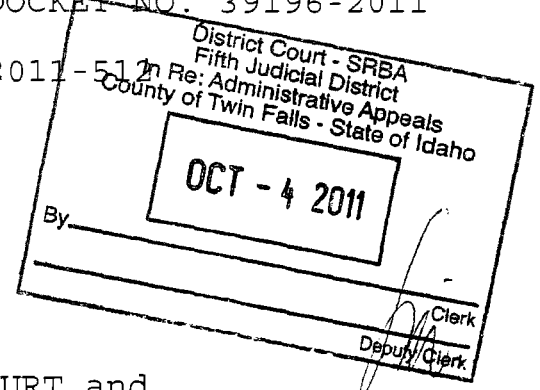
Chris M. Bromley

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, )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
IDWR, )  
 )  
Respondent. )  
\_\_\_\_\_ )

SC DOCKET NO. 39196-2011

CV-2011-512



To: THE CLERK OF THE IDAHO SUPREME COURT and  
THE CLERK OF THE SNAKE RIVER BASIN ADJUDICATION COURT:

NOTICE OF TRANSCRIPT LODGED

NOTICE IS HEREBY GIVEN that on October 4, 2011, I  
lodged with the clerk of the Snake River Basin Adjudication  
Court a reporter's transcript of all assigned appellate  
transcripts, 21 pages in length, consisting of:  
8-4-11 Motions to Dismiss and Strike.

A PDF copy has been emailed to sctfilings@idcourts.net;  
Mr. Chris Bromley, chris.bromley@idwr.idaho.gov;  
Mr. Travis Thompson, tlt@idahowaters.com.

\_\_\_\_\_  
Linda Ledbetter  
Official Court Reporter

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT  
OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA**

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 capacity as Interim )  
 Director of the Idaho Department of )  
 Water Resources, )

Respondents, )

and )

THE CITY OF POCA TELLO and )  
 IDAHO GROUND WATER )  
 APPROPRIATORS, INC., )

Intervenors. )

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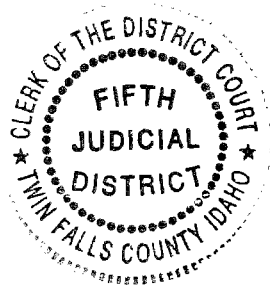
**Supreme Court  
Docket No. 39196-2011**

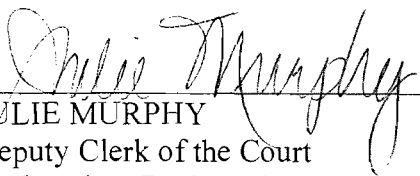
**Snake River Basin Adjudication  
Docket No. 2011-512**

**CLERK'S CERTIFICATE**

I, Julie Murphy, Deputy Clerk of the Court, Snake River Basin Adjudication District Court of the Fifth Judicial District, State of Idaho, in and for the County of Twin Falls, hereby certify that the foregoing *Clerk's Record on Appeal* was compiled and bound under my direction and is a true, correct and complete record of the pleadings and documents required by Idaho Appellate Rule 28, and documents requested in the A&B Irrigation District's *Notice of Appeal* filed on September 15, 2011.

Signed and sealed this 10th day of October, 2011.



  
\_\_\_\_\_  
JULIE MURPHY  
Deputy Clerk of the Court  
Snake River Basin Adjudication

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT  
OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA**

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 capacity as Interim )  
 Director of the Idaho Department of )  
 Water Resources, )

Respondents, )

and )

THE CITY OF POCATELLO and )  
 IDAHO GROUND WATER )  
 APPROPRIATORS, INC., )

Intervenors. )

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**Supreme Court  
Docket No. 39196-2011**

**Snake River Basin Adjudication  
Docket No. 2011-512**

**CLERK'S CERTIFICATE  
OF SERVICE**

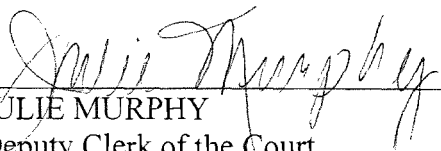
I, Julie Murphy, Deputy Clerk of the Court, Snake River Basin Adjudication District Court of the Fifth Judicial District, State of Idaho, in and for the County of Twin Falls, hereby certify that a true and correct copy of the *Clerk's Record on Appeal* was served this day on the following parties:

John K. Simpson, Travis L. Thompson,  
Paul L. Arrington, Sarah W. Higer  
BARKER ROSHOLT & SIMPSON, LLP  
PO Box 485  
Twin Falls, Idaho 83303-0485  
(Attorneys for Petitioner-Appellant)

Garrick L. Baxter  
Chris M. Bromley  
Deputy Attorneys General  
State of Idaho  
PO Box 83720  
Boise, ID 83720-0098  
(Attorneys for Respondents)

Signed and sealed this 6<sup>th</sup> day of October, 2011.



  
\_\_\_\_\_  
JULIE MURPHY  
Deputy Clerk of the Court  
Snake River Basin Adjudication