1-17-2012

A & B Irr. Dist. V. IDWR Respondent's Brief Dckt. 39196

Supreme Court Docket No. 39196-2011

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF THE PETITION FOR DELIVERY CALL OF A&B IRRIGATION DISTRICT FOR THE DELIVERY OF GROUND WATER AND FOR THE CREATION OF A GROUND WATER MANAGEMENT AREA.

A&B IRRIGATION DISTRICT,

Petitioner-Appellant,

v.

IDAHO DEPARTMENT OF WATER RESOURCES, and GARY SPACKMAN, in his official capacity as Interim Director of the IDAHO DEPARTMENT OF WATER RESOURCES,

Respondents,

and

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

Intervenors-Respondents.

IDWR RESPONDENTS' BRIEF

On Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Minidoka, Docket No. 2011-512

Honorable Eric J. Wildman, District Judge, Presiding

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STATEMENT OF CASE

I. NATURE OF THE CASE

This case presents the question of whether Idaho Code § 67-5246(4) requires an agency head to issue a final order on the merits in a contested administrative case within twenty-one days of receiving a petition for reconsideration. The district court held that the term "disposing of" as used in Idaho Code § 67-5246(4) does not mean that an agency head is required to decide the merits of a petition for reconsideration within twenty-one days and therefore dismissed A&B Irrigation District's ("A&B") petition for judicial review as not ripe for judicial review. A&B now appeals the district court's dismissal. Respondents Gary Spackman, the Interim Director of the Idaho Department of Water Resources ("Director"), and the Idaho Department of Water Resources (collectively referred to as "the Department") ask this Court to affirm the district court's dismissal of A&B's petition for judicial review.

II. COURSE OF PROCEEDINGS AND STATEMENT OF FACTS[1]

On April 27, 2011, the Director issued his *Final Order on Remand Regarding the A&B Irrigation District Delivery Call ("Final Order").* (R. Vol. I, pp. 3-24.) The 22-page *Final Order* addressed certain legal and factual issues surrounding A&B's ongoing water delivery call.[2]

On May 11, 2011, A&B filed a timely *Petition for Reconsideration* ("*Petition*") in the administrative proceeding, asking the Director to reconsider numerous findings and conclusions set forth in the *Final Order.* (Supp. R. Vol. I, pp. 4-17.) Specifically, A&B's detailed *Petition*

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[1] Because the course of proceedings and the facts of this case are closely intertwined, these two sections are combined in this brief.

[2] Other issues related to A&B's water delivery call are currently pending before this Court in *A&B Irr. Dist. v. IDWR*, S.Ct. Doc. No. 38403-2011.

raised issues of fact and law, several of which were matters of first impression: A&B challenged the Director's analysis of presumptions afforded to decreed rights, questioned whether the Director's actions were within the scope of the district court remand, and disputed the Director's analysis of A&B's water delivery system, his hydrogeological evaluation of A&B's place of use, his evaluation of A&B's enlargement acres, and his determinations related to A&B's rates of diversion. (Supp. R. Vol. I, pp. 2-12.) A&B also challenged the Director's application of the Conjunctive Management Rules, his response to A&B's request to establish a reasonable pumping level in the A&B pumping area, and his factual characterizations of testimony. (Supp. R. Vol. I, pp. 12-13.)

Idaho Code § 67-5246 of the Idaho Administrative Procedure Act ("APA") governs the disposition of motions for reconsideration. Idaho Code § 67-5246 provides in pertinent part:

> (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.

Idaho Code § 67-5246(4) (emphasis added). The Department's administrative rules of procedure include similar language. "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." IDAPA 37.01.01.740.02(a).

The Director reviewed A&B's petition for reconsideration, stating in a letter to counsel for A&B that the *Petition* raised "numerous technical issues with the *Final Order on Remand* that deserved the Department's full attention and thorough analysis." (R. Vol. I, p. 145.) The Director further determined that "a detailed investigation of facts from the large and complex administrative record" was necessary to properly respond to the issues raised by A&B. *Id.* The

Director concluded that it would take more than twenty-one days for him to properly respond to the numerous issues raised in the petition. *Id.* Accordingly, on June 1, 2011, within the twenty-one day time period within which to respond, 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* be granted "for the sole purpose of allowing additional time for the Department to respond to the Petition." (R. Vol. I, pp. 137-138.) The order further provided that "an order responding to the merits of the Petition shall issue no later than June 9, 2011." (R. Vol. I, p. 138.) June 9, 2011, was not a legal deadline, but a self-imposed deadline for expeditious resolution of the *Petition.*[3]

The Director was not able to complete his review by the self-imposed June 9th deadline, so on June 9, 2011, the Director entered an *Amended Order Granting Petition for Reconsideration to Allow Time for Further Review* extending the deadline to June 30, 2011. (R. Vol. I, p. 142.)

On June 27, 2011, before the Director issued his amended order, A&B filed a *Notice of Appeal and Petition for Judicial Review of Agency Action* ("*Petition for Judicial Review*") in Minidoka County seeking judicial review of the *Final Order.* (R. Vol. I, pp. 26-30.) The case was reassigned to the presiding judge of the Snake River Basin Adjudication on June 27, 2011. (R. Vol. I, p. 1.)

Three days later, on June 30, 2011, the Director entered a 35-page *Amended Final Order on Remand Regarding the A&B Irrigation District Delivery Call ("Amended Final Order")* in

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[3] The APA does not set a deadline for completing work on a Petition for Reconsideration. This is evidenced by contrasting Idaho Code § 67-5246 with Idaho Code § 61-626(2) (the Public Utilities Commission, upon granting a petition for reconsideration, must rehear the matter within thirteen weeks and must issue a decision within 28 days after the matter is finally submitted for reconsideration).

the administrative proceeding as well as a 17-page *Order Regarding Petition for Reconsideration*. (R. Vol. I, pp. 48-101.) In the *Amended Final Order* and the *Order Regarding Petition for Reconsideration*, the Director analyzed each of the issues raised by A&B's *Petition*. The Director agreed to a factual change in the order requested by A&B. (R. Vol. I, p. 64.) While the ultimate conclusion on other issues was not changed, the Director modified his analysis of some issues based upon A&B's *Petition*. (R. Vol. I, pp. 50-61, 63.) By its terms the *Amended Final Order* superseded the *Final Order*. (R. Vol. I. p. 67.)

On July 7, 2011, the Department filed a *Motion to Dismiss* A&B's *Petition for Judicial Review*. (R. Vol. I, pp. 40-42.) The Department asserted that the *Final Order* from which judicial review was taken by A&B was superseded by the *Amended Final Order* and therefore was not ripe for review. In support of its *Motion to Dismiss,* the Department filed the *Affidavit of Chris M. Bromley*. (R. Vol. I, pp. 44-102.) The Bromley affidavit consisted of two documents: a copy of the Director's June 30, 2011 *Amended Final Order* and a copy of the Director's June 30, 2011 *Order Regarding Petition for Reconsideration.*

On July 21, 2011, A&B filed its *Response to IDWR's Motion to Dismiss* ("*Response*") as well as a *Motion to Strike*. (R. Vol. I, pp. 107-121.) A&B's *Response* asserted 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*. (R. Vol. I, p. 108.) A&B's *Motion to Strike* requested that the district court strike the *Affidavit of Chris M. Bromley* on the grounds that it is immaterial to this proceeding. (R. Vol. I, p. 119.)

The Department 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. (R. Vol. I, pp. 122-131.) With its *Reply,* the Department filed the *Second Affidavit of Chris M. Bromley*. (R. Vol. I, pp. 133-154.)

The district court heard oral argument on the *Motion to Dismiss* and the *Motion to Strike* on August 4, 2011. (Tr. p. 1.)

On August 11, 2011, the district court issued its order dismissing A&B's appeal. (R. Vol. I, pp. 155-166.) While the district court concluded that the term "disposed of" as used in Idaho Code § 67-5246 is ambiguous, it nonetheless held that the term does not require an agency head to decide the merits and issue a final order in the matter within twenty-one days of receipt of a petition for reconsideration based upon the agency deference test announced by this Court in *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 820 P.2d 1206 (1991). (R. Vol. I, pp. 171, 172, 174.)

A&B did not file a notice of appeal but instead filed *A&B Irrigation District's Unopposed Motion for I.R.C.P. 54(b) Certificate of Final Judgment* on August 26, 2011, seeking entry of a final judgment under I.R.C.P. 54(b). On August 29, 2011, the district court issued an order granting A&B's motion for an I.R.C.P. 54(b) certificate of final judgment. *Order Granting Motion for I.R.C.P. 54(b) Certificate* at 1.[4] On the same day, the district court issued an amended order. (R. Vol. I, pp. 167-177.) The only change in the amended order was the addition of an I.R.C.P. 54(b) certification. *Order Granting Motion for I.R.C.P. 54(b) Certificate* at 3 ("The *Amended Order on Motion to Dismiss* will be identical to the Court's *Order on Motion to Dismiss*, save the insertion of a Rule 54(b) Certificate immediately following the Court's signature."). On September 15, 2011, A&B filed its *Notice of Appeal.* (R. Vol. I, pp. 178-180.)

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[4] Along with this brief, the Department is filing a *Motion to Augment* which seeks to augment the record with the district court's *Order Granting Motion for I.R.C.P. 54(b) Certificate.*

ISSUES PRESENTED ON APPEAL

A&B frames the first issue in this case as "whether the district court erred in concluding that IDWR *did not* have to dispose of A&B's petition for reconsideration within twenty-one (21) days ... ." *Opening Brief* at 3 (emphasis added). This misstates the district court's holding. The district court held that the term "disposed of" was ambiguous and concluded that Idaho Code § 67-5246 does not require an agency head to decide the merits and issue a final order in the matter within twenty-one days of receipt of a petition for reconsideration. (R. Vol. I, pp. 171, 172, 174; *Opening Brief* at 3.) Thus, contrary to A&B's statement, the district court concluded that the Director *did* "dispose of" the petition for reconsideration as required by Idaho Code § 67-5246 by granting the petition for reconsideration. Accordingly, the issues on appeal are more properly stated as follows:

1. Whether the district court correctly held that Idaho Code § 67-5246 allows an agency head to "dispose of" a petition for reconsideration by issuing a written order granting the petition within twenty-one days of receipt of the petition and then subsequently issuing an order on reconsideration resolving the merits of the matter?

2. Whether the district court correctly dismissed as premature A&B's petition for judicial review of the Director's April 27, 2011 *Final Order*?

3. Whether the district court reasonably exercised its discretion in denying A&B's motion to strike the *Affidavit of Chris M. Bromley*?

STANDARD OF REVIEW

1. Review of the District Court. "When reviewing a decision of the district court acting in its appellate capacity, the Supreme Court directly reviews the district court's decision." *Laughy v. Idaho Dept. of Transp.*, 149 Idaho 867, 868, 243 P.3d 1055, 1056 (2010) (quoting *Reisenauer v. State*, 145 Idaho 948, 949, 188 P.3d 890, 891 (2008)).

2. Statutory Interpretation. The interpretation of a statute is ordinarily a question of law over which this Court exercises free review. *Idaho Power Co. v. Idaho Dept. of Water Resources*, 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011).

3. APA Standard of Review. Judicial review of a final decision by the Department is governed by the Idaho Administrative Procedure Act, title 67, chapter 52 of the Idaho Code. Idaho Code § 42-1701A(4). The agency's action may be set aside if the agency's findings, conclusions, or decisions (a) violate constitutional or statutory provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record; or (e) are arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279(3). In addition to proving one of the enumerated statutory grounds for overturning an agency action, the challenging party must also show prejudice to a substantial right. Idaho Code § 67-5279(4); *Laughy*, 149 Idaho at 868, 243 P.3d at 1056.

4. Exercise of Discretion. The decision to grant or deny a motion to strike is reviewed under an abuse of discretion standard. *Sprinkler Irr. Company v. John Deere Ins. Company, Inc.*, 139 Idaho 691, 696, 85 P.3d 667, 672 (2004).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT IDAHO CODE § 67-5246 ALLOWS AN AGENCY HEAD TO "DISPOSE OF" A PETITION FOR RECONSIDERATION BY ISSUING A WRITTEN ORDER GRANTING THE PETITION WITHIN TWENTY-ONE DAYS OF RECEIPT AND THEN ISSUING A SUBSEQUENT ORDER ON RECONSIDERATION RESOLVING THE MERITS OF THE MATTER.

A. A&B's Petition For Judicial Review Was Properly Dismissed As Premature Because The Director Issued A "Written Order Disposing Of" A&B's Petition For Reconsideration Within Twenty-One Days.

The central focus of this case is the meaning of the term "disposing of" as used in section 67-5246(4) of the APA. The district court found the term to be ambiguous and, through the application of the *Simplot* agency deference test, concluded that Idaho Code § 67-5246 does not require the Director to issue a final decision within twenty-one days of the filing of a petition for reconsideration. (R. Vol. I, pp. 171, 172, 174.) While the Department agrees with the district court's conclusion that Idaho Code § 67-5246(4) does not require the Director to issue a final decision within twenty-one days of the filing of a petition for reconsideration, the Department contends that the plain reading of the statute supports this holding, without need to apply the *Simplot* agency deference test.

1. Under The Plain Language Of The APA, The Director Issued A "Written Order Disposing Of" A&B's Petition For Reconsideration When He Issued His June 1, 2011 *Order Granting Petition For Reconsideration*.

Idaho Code § 67-5246 governs final orders issued by administrative agencies under the APA. Subsection (4) addresses petitions for reconsideration from final orders:

> (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.

Idaho Code § 67-5246(4) (emphasis added).

When interpreting a statute, a court is guided by general principles of statutory construction and a common sense appraisal of what the legislature intended. *State v. Paciorek*, 137 Idaho 629, 632, 51 P.3d 443, 446 (Ct. App. 2002). Statutory interpretation begins with the literal language of the statute. *Idaho Power Co.*, 151 Idaho at 272, 255 P.3d at 1158. If the statutory language is unambiguous, a court need not engage in statutory construction and should apply the statute's plain meaning. *Id.*

The Director issued his *Final Order* on April 27, 2011. (R. Vol. I, pp. 3-24.) A&B filed its petition for reconsideration on May 11, 2011. (Supp. R. Vol. I, pp. 4-17.) On June 1, 2011, the twenty-first day after the filing of the petition, the Director issued a written order granting the petition. (R. Vol. I, pp. 137-138.) The order granting the petition expressly stated that the Director was granting the petition for reconsideration and that a later order on the merits would subsequently be issued by the Department. (R. Vol. I, p. 137.)

Under a plain reading of Idaho Code § 67-5246(4), the Director's June 1, 2011 order satisfies the criteria of this statute, as the Director issued "a written order disposing of" the petition for reconsideration. In general, the definition of terms within a statute or act control the meaning of the term. *State v. Yzaguirre*, 144 Idaho 471, 478, 163 P.3d 1183, 1190 (2007). But in this case, the APA has not defined the term "disposing of." Where the legislature has not provided a definition in the statute, terms in the statute are given their common, everyday meanings. *Id.* The dictionary definition of the phrase "dispose of" is:

1. *To attend to; settle*: disposed of the problem quickly.
2. To transfer or part with, as by giving or selling.
3. To get rid of; throw out.
4. To kill or destroy: a despot who disposed of all his enemies, real or imagined.

American Heritage Dictionary of the English Language, 4th Ed. (2000) (emphasis added).

In this case, the Director exercised his authority as provided for in the statute and issued a written order within the twenty-one day period granting the petition. Through his order, the Director "attended to" and "settled" the petition for reconsideration by granting the petition and agreeing to reconsider the issues of fact and law A&B requested he reconsider. The Director clearly signaled to A&B that the effectiveness of the first order was withdrawn by stating that a subsequent order would issue.

A&B argues that the Department's interpretation is incorrect. A&B interprets the term "disposing of" narrowly as requiring the agency head to decide the merits of a petition for reconsideration and issue a final order in the case within twenty-one days of the filing of the petition for reconsideration. *Opening Brief* at 4-5. A&B argues that because the merits were not decided within twenty-one days, the Department's decision was final on June 2, 2011 by operation of law. *Id.* A&B's interpretation, however, cannot be reconciled with the language of the statute. The statute only requires the Director to issue a "written order disposing of" the petition within twenty-one days. The Director complied with the statute by issuing a written order granting reconsideration, which was the specific procedural relief that A&B requested. Idaho Code § 67-5246(4) does not require the agency head issue a final decision on the merits, thus wrapping up the entire matter, within the twenty-one day time period as suggested by A&B. A&B attempts to read more into the statute than is actually there.

The Department's plain reading is in accord with the leading commentary on Idaho's Administrative Procedure Act, *The Idaho Administrative Procedure Act: A Primer for the*

Practitioner, 30 Idaho L. Rev. 273 (1993), written by Michael S. Gilmore & Dale D. Goble.[5] In their law review article, Gilmore and Goble specifically discussed Idaho Code § 67-5246 and the meaning ascribed to disposal of a petition for reconsideration. The authors state that an agency head is not required to make a final determination on the merits within twenty-one days:

> 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.

Id. at 329 (emphasis in original) (footnotes omitted).

This definition is also consistent with the written explanatory comments that accompany the Idaho Attorney General's Model Rules of Administrative Procedure:

> 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 the 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 (1993) (R. Vol. I, pp. 164-165).

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[5] Professor Dale Goble of the University of Idaho College of Law and Deputy Attorney General Michael Gilmore are recognized authorities on the APA. They were both intimately involved in the substantial overhaul of the APA that took place in 1993. Professor Goble was the primary drafter of the APA and was the one that provided explanatory comments explaining how the APA would function. Larry Echohawk, *Introduction to Administrative Procedure Act Issue*, 30 Idaho L. Rev. 261 (1993). Mr. Gilmore participated in the drafting of the APA and also drafted the model rules of practice for the Idaho Attorney General's office. *Id.*

The principles behind this interpretation are clear. Administrative agencies should be provided the opportunity correct alleged errors in its orders. As articulated by Gilmore and Goble:

> 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 decisionmakers. It is therefore far more efficient for all parties to have that officer reconsider the order, particularly when minor or technical problems arise.

30 Idaho L. Rev. at 328-29.

A&B's interpretation would frustrate the purpose for encouraging an agency to reconsider its decision. Having time to properly evaluate and address issues raised by a party in a petition for reconsideration is important. As recognized by the district court, petitions for reconsideration vary widely in their content, form, and substance. (R. Vol. I, p. 172.) Some petitions for reconsideration are easily addressed, while others, like the broad reaching petition in this case, are not. *Id.* 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 short twenty-one day "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. A&B's interpretation would foster litigation and interfere with judicial economy as agencies would not have time to correct errors in complex proceeding.

The fact that Idaho Code § 67-5246(4) uses the term "written order disposing of" in its construction and did not say that the Director must issue a final decision on the merits within the twenty-one day period is important. *Contrast* Idaho Code § 67-5246(4) with Idaho Code § 61-626(2) (the Public Utilities Commission, upon granting a petition for reconsideration, must rehear the matter within thirteen weeks and must issue a decision within 28 days after the matter is finally submitted for reconsideration). The phrase "written order disposing of" provides agencies with the necessary flexibility to properly analyze and respond to the myriad petitions for reconsideration they face.

The practical effect of this is evident in this case. 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." (R. Vol. I, p. 145.) The result was a thorough evaluation of the "errors" alleged by A&B in its petition for reconsideration and resulted in the Director adding significant additional analysis into his June 30, 2011 *Amended Final Order*, evidenced by the fact that the new analysis added 13 pages to the *Amended Final Order*, bringing it to a total length of 35 pages. (R. Vol. I, pp. 48-101.) This considered evaluation of the original order was the appropriate response to A&B's petition.

A&B's interpretation would have forced the Director to issue a partially considered decision. Instead of allowing the Director to address the alleged errors in the first instance, A&B's approach would lead to a potential remand to do exactly what the Director did in this

proceeding – issued a thoroughly considered opinion. A&B's interpretation only serves to limit informed decision making and foster additional litigation.[6]

A&B attempts to create ambiguity where none exists in the statute based upon by citation to cases where the phrase "dispose of" or some variation of the phrase appears. An examination of the cited cases, however, shows that they are not interpreting the term in the context of the APA and that they are therefore distinguishable. For example, *Evans State Bank v. Skeen*, 30 Idaho 703, 167 P. 1165 (1917) examined the statutory definition of the term "final judgment" not the term "dispose of" in an entirely different statutory setting. Skeen appealed a district court order appointing a receiver of mortgaged personal property, an order overruling a motion to vacate the receivership, and an order directing the sale of the property. Evans State Bank moved to dismiss on the grounds that the orders were not final judgments. The Court explained that the right to appeal was statutory and reviewed the statutory definition, concluding that "[a]n examination of [the applicable statute] discloses that no appeal has been provided for from an order appointing a receiver" or the other orders. *Evans State Bank,* 30 Idaho at 705, 167 P. at 1166. While the Court did use the term "disposes of" and discussed a final determination by the district court, the Court did not define the words. The reference to a final determination of litigation had more to do with the fact that the Court was evaluating *final* orders. The question presented in *Evan State Bank* was which district court orders were appealable pursuant to statute.

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[6] A&B's argument that the district court's interpretation would cause petitions for reconsideration to "all but cease to exist" does not hold up. *Opening Brief* at 11. If a party is aware of an error in an agency's decision, the party should want to resolve it on reconsideration before the agency because if the matter is appealed to district court and the district court agrees that an error did occur, the matter would likely be remanded back to the agency to correct. A petition for reconsideration encourages judicial economy by allowing the agency the opportunity to correct the alleged error in the first instance, thereby saving the time it takes to appeal to district court.

Applying *Evans State Bank* in this case is an attempt to create a definition using a different factual scenario that did not scrutinize or analyze the term, much less scrutinize or analyze the term in the context of the APA. Put simply, the question presented in this case is not the question answered in *Evans State Bank* or the other cases cited by A&B.

2. The District Court's Interpretation Does Not Render The Twenty-One Day Time Period Irrelevant or Prevent Timely Judicial Review.

A&B argues that the failure to adopt its interpretation would render the twenty-one day period in Idaho Code § 67-5246(4) irrelevant because the other interpretations "clearly do[] not follow the statue's mandate requiring the agency to finally act within 21 days." *Opening Brief* at 10. This argument is circular and assumes as a given the very question at issue.

A&B also argues that if its interpretation is not adopted, that an "agency could prevent timely judicial review for an indefinite period of time." *Id.* By suggesting that an agency will prevent timely judicial review, A&B is asking this Court to assume that an agency will not act within a reasonable time frame. As is evidenced by the actions of the Department in this case, it is not reasonable to assume that an agency will not act in a timely manner.[7] Moreover, Idaho Code § 67-5201(3)(b) defines agency action to include "the failure to issue a rule or order," so that a party who believes that an agency has failed to timely act upon a granted petition for reconsideration may petition for judicial review from the agency action of failure to issue an order. As Gilmore and Goble explained:

> Perhaps the most common situation in which finality issues arise is when an agency refuses or fails to act. When an agency is sued on the grounds that a statute requires it to do something, the most common response is that it has not as

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[7] The Director's response time in this case was reasonable. The Director issued his *Amended Final Order* only 29 days after granting the petition for reconsideration. This timeframe is reasonable given the number and complexity of the issues raised by A&B in its petition and the Director's detailed response in his *Amended Final Order.*

> yet completed consideration of the matter and that there is, therefore, no final agency action to review. The obvious dilemma is that inaction at some point effectively becomes a decision to deny. If there is to be meaningful judicial review of agency decisions, finality defenses must be set aside at some point. The APA recognizes this problem by specifically defining "agency action" to include "the failure to issue a rule or order ... or failure to perform, any duty placed on the agency by law."

30 Idaho L. Rev. at 349 (footnotes omitted).

Alternatively, as this Court recently pointed out in *Idaho Power Co. v. Idaho Dept. of Water Resources*, if an agency unreasonably delays performance of its duties, the complaining party has remedy under Idaho Code § 7-302 and can seek a writ of mandamus to compel action by the agency. *Idaho Power Co.*, 151 Idaho at 273, 255 P.3d at 1163.

3. The District Court's Interpretation Does Not Result In Uncertainty In When An Order On Reconsideration Is Subject To Judicial Review Or When An Order On Reconsideration Becomes Effective.

A&B suggests that the district court's interpretation results in uncertainty in when an order is subject to judicial review and when it becomes effective. *Opening Brief* at 10. This is not true. A careful reading of the APA shows that there is a well defined process for determining when an order is subject to judicial review and becomes effective.

Assume, as in this case, an agency head issues a final order and then a petition for reconsideration is filed. If the agency disposes of the petition by granting the petition within twenty-one days and the agency subsequently issues an amended final order, the amended final order is considered an order on reconsideration. *See Erickson v. Idaho Bd. of Registration of Professional Engineers and Professional Land Surveyors*, 146 Idaho 852, 855-856, 203 P.3d 1251, 1254-1255 (2009) (a final order denying a petition for reconsideration is an order on

reconsideration).[8] Once an order on reconsideration is issued, it is subject to judicial review under Idaho Code § 67-5273(2). *Erickson*, 146 Idaho at 854, 203 P.3d at 1253 ("[Idaho Code § 67-5273(2)] 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 reconsideration."; *City of Eagle v. Idaho Dept. of Water Resources*, 150 Idaho 449, 452, 247 P.3d 1037, 1040 (2011). This is because Idaho Code § 67-5273(2) requires that if reconsideration of the original final order is sought, the petition for judicial review must be filed within twenty-eight days after "the decision thereon." Idaho Code § 67-5273(2). It is significant that Idaho Code § 67-5273(2) does not say that a petition for judicial review must be filed within twenty- eight days of the petition being "disposed of" but uses the different standard of "decision thereon." *Evans v. Teton County*, 139 Idaho 71, 78, 73 P.3d 84, 91 (2003) (statutes should be construed so that effect is given to their provisions). The fact Idaho Code §§ 67-5246(4) and 67-5273(2) use different language supports the district court's interpretation that the Department can dispose of a petition for reconsideration by granting the petition and then issue a later decision on the merits. Because the Director's *Amended Final Order* was clearly "the decision thereon," A&B's argument that the district court's interpretation would result in confusion about when to file a petition for judicial review is not convincing.

A&B also argues that the district court's interpretation of subsection (4) of Idaho Code § 67-5246 cannot be reconciled with subsection (5) and would result in confusion about the

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[8] While the administrative agency in *Erickson* issued an order denying a petition for reconsideration and, in this case, the Director granted the petition for reconsideration and subsequently issued his amended final order, it does not change the analysis here. The amended final order was still a decision on reconsideration and subject to judicial review under 67-5273(2) under the Court's reasoning in *Erickson*.

effective date of an order on reconsideration.[9] *Opening Brief* at 9. Contrary to A&B's argument, there is no conflict between subsections (4) and (5) under the district court's interpretation, and there is no confusion about the effective date of an order on reconsideration.

Idaho Code § 67-5246(5) addresses the effective date of a final order. This subsection provides, in relevant part, that "[u]nless 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."

In this case, the Director issued his *Amended Final Order* on June 30, 2011. As discussed above, the *Amended Final Order* is an order on reconsideration and a petition for judicial review must be filed within twenty-eight days of its service. *Erickson*, 146 Idaho at 854, 203 P.3d at 1253. The APA does not provide for a petition for reconsideration of an order on reconsideration, instead making it subject to a petition for judicial review within twenty-eight days of its service. *Id.* Because there can be no petition for reconsideration filed against an order on reconsideration, an order on reconsideration is effective fourteen days after its service. Idaho Code § 67-5246(5). A careful analysis of Idaho Code §§ 67-5246 and 67-5273 shows that there is an orderly and defined path for when an order on reconsideration becomes effective and is subject to a petition for judicial review. In this case, the Director's *Amended Final Order* became effective fourteen days after its service.

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[9] Effectiveness and appealability (i.e. being subject to judicial review) are distinct concepts.

4. The District Court's Interpretation Is Consistent With The Department's Rules Of Procedure.

A&B argues that the district court's interpretation is inconsistent with the Department's rules of procedures. *Opening Brief* at 3. This is not correct.

The Department's rules of procedure for contested cases are found at IDAPA 37.01.01. *et seq.* IDAPA 37.01.01.740 outlines the information that must accompany a final order issued by the Department and sets forth the Department's understanding of the time frame for a party to appeal a final order of the Department. This rule provides that an appeal must be filed within twenty-eight days:

> (a) of the service date of this final order, (b) of an order denying petition for reconsideration, or (c) [of] [sic] the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later.

IDAPA 37.01.01.740.02.d. This language confirms the Department's interpretation of how the petition for reconsideration process and the judicial review process works and is consistent with the Department's interpretation of Idaho Code § 67-5246. If a final order is issued, there are three different deadlines to file an appeal. Under subsection (a) of IDAPA 37.01.01.740.02.d., an appeal is due within 28 days of the service date of the final order if no petition for reconsideration is filed. Under subsection (b), an appeal is due twenty-eight days after an order denying petition for reconsideration. Under subsection (c), an appeal is due within twenty-eight days of the failure of the Department to "grant or deny" a petition for reconsideration with twenty-one days of service of the petition.

It is this last subsection (c) that is significant. The rule does not use the term "disposed of" but focuses on the "failure" to "grant or deny" the petition for reconsideration. It recognizes that if the Department grants a petition for reconsideration, it is not ripe for judicial review because an appeal is due only if the Department fails to "grant or deny" the petition. This

evidences that the district court's and the Department's interpretation is consistent with the Department's own rules and also evidences that this has been the Department's longtime interpretation of subsection (4).[10]

A&B's argument rests on the premise that an agency head can only revise an order within twenty-one days once a petition for reconsideration is filed. A&B's argument leads to the illogical conclusion that the agency's hands are tied and cannot ask for additional briefing on an issue, schedule more hearings, or ask for oral argument. An interpretation of a statute must be in accord with common sense and reason. *Smith v. Smith*, 131 Idaho 800, 802, 964 P.2d 667, 669 (1998); *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 735, 947 P.2d 400, 407 (1997). The district court's conclusion is the correct one: "A&B's interpretation is unreasonable and would lead to absurd results... ." (R. Vol. I, p. 172.) And while the district court ultimately reached this conclusion only after finding the statutory term ambiguous, this Court should affirm the district court's dismissal on the ground that the Director acted consistent with the plain language of the statute.

B. The District Court Correctly Held That The Department's Interpretation Of Idaho Code § 67-5246 Is Entitled To Deference Under the *Simplot* Agency Deference Test.

While the Department contends that the plain language of the APA supports the district court's decision, if this Court finds the phrase "disposing of" to be ambiguous, this Court should affirm the district court's decision under the *Simplot* deference test.

The district court found that the term "disposed of" is not defined under IDAPA and "that reasonable minds might differ as to its interpretation, making it subject to conflicting

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[10] This language appeared in the original rules as drafted in 1993. In 2000, the rule was given a new subheading, but the text of the rule itself did not change. Idaho Administrative Bulletin, October 6, 1999, pp. 553-34.

interpretation." (R. Vol. I, p. 171.) Once the district court found that the term was ambiguous, the district court then evaluated the Department's definition under the deference test announced by this Court in *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 820 P.2d 1206 (1991). The four-prong deference test of *Simplot* is as follows:

> (1) the court must determine whether the agency has been entrusted with the responsibility to administer the statute at issue, (2) the agency's statutory construction must be reasonable, (3) the court must determine that the statutory language at issue does not treat the precise issue, and (4) a court must ask whether any of the rationales underlying the rule of deference are present.

Pearl v. Board of Professional Discipline of Idaho State Bd. of Medicine, 137 Idaho 107, 113, 44 P.3d 1162, 1168 (2002) (citing *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 820 P.2d 1206 (1991)). If this test is met, the court will give "considerable weight" to the agency's interpretation. *Id.* As shown below, the four prongs of the *Simplot* test are present in this case.

1. The Department Is Entrusted With Interpreting The APA.

The first prong of the *Simplot* test is met in this case as the Department "has been entrusted with the responsibility to administer the statute at issue." *Simplot* at 849, 862, 820 P.2d at 1219. In this case, the Idaho Legislature has statutorily declared that the Director must comply with and shall conduct all administrative proceedings in accordance with the APA. Idaho Code § 42-1701A. As the district court correctly found, with the statutory proclamation of Idaho Code § 42-1701A, "the Department is entrusted to administer Idaho Code § 67-5246 with respect to petitions for reconsideration filed in the administrative actions before it." (R. Vol. I, p. 172.) As further evidence of the Director's responsibility to administer the statute, the Director has been given authority to and has in fact promulgated rules related to administrative proceedings. Idaho

Code § 42-1701A(1); IDAPA 37.01.01 *et seq.* These rules set forth the rules of procedure that govern contested case proceeding before the Department. IDAPA 37.01.01.001.02.

Citing the Idaho Supreme Court case *Westway Construction, Inc. v. Idaho Department of Transportation*, 139 Idaho 107, 116, 73 P.3d, 721, 730 (2003), A&B suggests that because other agencies are also charged with authority to administer the APA, the Department's interpretation is not entitled to deference. *Opening Brief* at 16. *Westway* is distinguishable, however, as the Idaho Legislature has expressly directed the Department to apply and interpret the APA and to promulgate its own rules for that purpose. Idaho Code § 42-1701A; *see Stafford v. Idaho Dept. of Health & Welfare*, 145 Idaho 530, 538, 181 P.3d 456, 464 (2008) (appropriate authority found where an agency has been empowered to carry out actions consistent with statute and to promulgate its own rules for that purpose). Furthermore, it is significant that the Department's interpretation is consistent with the explanation by the recognized authorities on the APA, Gilmore and Goble, in their frequently cited and often relied-upon law review article that serves as a reference for interpreting the APA.[11] Likewise, the Department's interpretation is consistent with the comments for the Attorney General's model rules. Because both of these authorities are undoubtedly relied upon by other agencies and the Attorney General's office, which provides

[11] The following is a list of some of the cases and secondary authorities that have cited to Gilmore and Goble's law review article *The Idaho Administrative Procedure Act: A Primer for the Practitioner*: *Laughy v. Idaho Dept. of Transp.*, 149 Idaho 867, 871, 243 P.3d 1055, 1059 (2010); *Westway Const., Inc. v. Idaho Transp. Dept.*, 139 Idaho 107, 114, 73 P.3d 721, 728 (2003); *Petersen v. Franklin County*, 130 Idaho 176, 182, 938 P.2d 1214, 1220 (1997); *Northern Frontiers, Inc. v. State ex. rel. Cade*, 129 Idaho 437, 440, 926 P.2d 213, 216 (Idaho Ct. App. 1996); Idaho Op. Atty. Gen. No. 01-3 (2001); *Land Use And The Lost Promise Of Cooper: What Happened To The "Judicial" In Quasi-Judicial Proceedings?*, 44 Idaho L. Rev. 735, 768 (2008); *Determining The Appropriate Level Of Judicial Deference To Public School Board Determinations Of Cause In Wrongful Termination Cases*, 38 Idaho L. Rev. 781, 813 (2002); *State Administrative Agency Action Under The Revised Idaho Administrative Procedure Act: A Question Of Judicial Deference*, 32 Idaho L. Rev. 139, 153 (1995).

legal representation for state agencies, there is little concern for conflicting interpretations by other agencies as suggested by A&B in its brief. *Opening Brief* at 16.

2. The Department's Interpretation Of Idaho Code § 67-5246 Is Reasonable.

The second prong of the *Simplot* test is also met as the district court correctly found that the Department's interpretation is reasonable. (R. Vol. I, p. 172.) In this prong, a court can evaluate reasonableness by examining the policy reasons supporting the interpretation. *See Canty v. Idaho State Tax Comm'n*, 138 Idaho 178, 183, 59 P.3d 983, 988 (2002) (the agency interpretation is consistent with policy of construing tax credits in favor of the state and guards against a double taxation). The district court found strong policy considerations supporting the Department's interpretation. The district court acknowledged that the substance and content of petitions for reconsideration can vary significantly. Some are simple and some are complex. The district court, with its extensive experience gained from its handling of the water delivery cases, recognized that the issues presented in water delivery call cases are complex and that most petitions for reconsideration in a delivery call case would also be complex in nature. (R. Vol. I, p. 172.)

Likewise, this Court is familiar with the complex nature of water administration cases. *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2007); *Clear Spring Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011); *A&B Irr. Dist. v. IDWR*, S.Ct. Doc. No. 38403-2011 (A&B's delivery call); *A&B Irr. Dist. v. IDWR*, S.Ct. Doc. No. 38191-2010 (Surface Water Coalition delivery call). Issues involving legal question of first impression, complex questions of ground water modeling, presumptions and burdens associated with evidence, conjunctive management rules, complex geological

connectivity issues over vast swaths of the Eastern Snake Plain Aquifer, are just a subset of the issues that have been presented in these water call delivery cases.

In this specific case, A&B's petition for reconsideration challenged the Director's analysis of presumptions afforded to decreed rights, whether the Director's actions were within the scope of the district court remand, the Director's analysis of A&B's water delivery system, the Director's hydrogeological evaluation of A&B place of use, the Director's evaluation of A&B's enlargement acres, and the Director's determinations related to A&B's rates of diversion. (Supp. R. Vol. I, pp. 4-17.) A&B also challenged the application of the Conjunctive Management Rules, the Director's response to A&B's request to establish a reasonable pumping level in the A&B pumping area, and the Director's factual characterizations of testimony. *Id.* The Director determined that some of the points raised by A&B were worthy of additional consideration and response, so he undertook "a detailed investigation of facts from the large and complex administrative record." (R. Vol. I, p. 145.) The result was the Director's Amended Final Order issued on June 30, 2011.

A&B's narrow interpretation of Idaho Code § 67-5246 requires a final decision on the merits within twenty-one days of the filing of the petition for reconsideration. As the district court correctly found, this is unreasonable for such complex cases and would lead to absurd results. (R. Vol. I, p. 172.) The district court correctly concluded that Idaho Code § 67-5246 does not prohibit an agency head from issuing a written order granting the petition for reconsideration and then taking additional steps to ultimately issue a revised final order past the twenty-one day time period. *Id.* at 174. As the district court stated:

> [I]f 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.

Id. at 172.[12] Or, in another situation that the district court did not discuss, the agency head would be required to deny a petition without examining its merits because of the inability to intelligently address the merits.

An important principle of administrative law is that the agency should be given the first opportunity to correct its possible errors. 30 Idaho L. Rev. at 328. The district court found the Department's interpretation to be consistent with this policy as it "allows the agency the time to take the steps necessary to adequately consider and respond to a complex motion for reconsideration... ." (R. Vol. I, p. 172.) Because the Department's interpretation is reasonable and is supported by sound policy, the second prong of the *Simplot* test is met here.

3. The District Court Found That The Term "Disposed Of" Is Ambiguous.

The district court found the term "disposed of" is undefined, and subject to conflicting interpretations, and therefore the term is ambiguous. Thus, the third prong of the *Simplot* test is satisfied.

4. The Rationales For Deference To The Department's Interpretation Are Present.

The forth prong requires a court look for the rationales underlying deference. The rationales to be considered include:

> (1) the rationale requiring that a practical interpretation of the statute exists, (2) the rationale requiring the presumption of legislative acquiescence, (3) the rationale requiring agency expertise, (4) the rationale of repose, and (5) the rationale requiring contemporaneous agency interpretation.

Canty v. Idaho State Tax Comm'n, 138 Idaho 178, 184, 59 P.3d 983, 989 (2002).

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[12] A&B complains that the Department did not take any of these steps. *Opening Brief* at 17, n.13. While IDWR did not set a briefing schedule or take these other steps, the court was rightfully highlighting the steps that might be required by an agency head to properly address a petition for reconsideration. Adopting A&B's interpretation would bar administrative agencies from ever taking such actions, a result that concerned the district court.

The first rationale underlying deference is that the agency interpretation is "practical." The district court found that:

> 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 [sic] 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.

(R. Vol. I, pp. 172-173.)

The second rationale examines legislative acquiescence. This Court has found that "[b]y not altering the statutory text the legislature is presumed to have sanctioned the agency interpretation." *Canty*, at 184, 59 P.3d 989 (citations omitted). In this case, the legislature has acquiesced in the Department's interpretation of subsection (4) of Idaho Code § 67-5246. In 2010, this section was amended. However, the legislature did not amend or change the phrase "disposing of." The legislature has also acquiesced in the interpretation though the adoption of the Department's rules of procedure. As described above, IDAPA 37.01.01.740 mirrors the Department's interpretation of Idaho Code § 67-5246. This rule was promulgated under the APA's rulemaking processes and was submitted for review by the Idaho Legislature and became effective after conclusion of the regular session. Idaho Code § 67-5224(5)(a), Idaho Administrative Bulletin, October 6, 1999, pp. 553-34.

The third rationale looks to agency expertise. The district court found that this rationale was also met, as 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." (R. Vol. I, p. 173.) Furthermore, the Department has gained agency experience in the APA as it has been interpreting and applying it since its passage.

The forth rationale looks to the rationale of repose. A&B has presented no evidence that the agency has ever interpreted § 67-5246(4) in a different manner. On the contrary, as pointed out by the district court, the Department has historically interpreted the statute this way. At the oral argument on the motion to dismiss, Judge Wildman stated that he had gone back and reviewed previous administrative appeals and found that the Department had issued decisions on reconsideration after the twenty-one day time period. (Tr. p. 14, lns 4-13.)

Furthermore, as discussed above, the Department's interpretation is consistent with its own rules, the long standing interpretation in Gilmore and Goble's law review article and the comments to the Idaho Rules of Administrative Procedure prepared by the Attorney General's Office in 1993. As stated in the comments to the Idaho Rules of Administrative Procedure:

> In Rules 720, 730, and 740 [of the Idaho Rules of Administrative Procedure, IDAPA 04.11.01.720, -.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.

Idaho Administrative Procedure Act with Comments and Idaho Attorney General's Model Rules of Practice and Procedure (1993), p. 93. The rationale of repose is met here as this interpretation has been in place since the very implementation of the APA.

The fifth rationale looks to whether the agency interpretation is consistent with any contemporaneous interpretations. Here, we have a contemporaneous interpretation of the statue offered by Gilmore and Goble, the acknowledged drafters of the APA, which is consistent with the interpretation offered by the Department through IDAPA 37.01.01.740, which became effective July of 1993, soon after the passage of the APA. Also, as noted above, the

Department's interpretation of the reconsideration provision is consistent with the Attorney General's 1993 interpretation.

It is not required that all the rationales be present for an agency interpretation to be entitled to deference. "If one or more of the rationales underlying the rule are present, and no 'cogent reason' exists for denying the agency some deference, the court should afford 'considerable weight' to the agency's statutory interpretation." *Simplot*, 120 Idaho at 862, 820 P.2d at 1219. Here, all the rationales underlying the rule of deference are present and there is no "cogent reason" why this court should not afford deference to the Department's statutory interpretation. Therefore, this Court should defer to the agency's interpretation and affirm the district court's order.

II. BECAUSE THE DISTRICT COURT CONCLUDED THAT THE DIRECTOR ACTED WITHIN HIS AUTHORITY IN ISSUING THE AMENDED FINAL ORDER, THE DISTRICT COURT CORRECTLY DISMISSED THE APPEAL OF THE DIRECTOR'S APRIL 27, 2011 ORDER.

The district court correctly dismissed A&B's petition for judicial review of the Director's April 27, 2011 order as premature. The Director "disposed of" the petition and effectively withdrew the April 27, 2011 order by grating the petition for reconsideration and stating that a later order would subsequently be issued by the Department. Because there was not a final order when A&B filed its first notice of appeal, there was nothing for A&B to appeal and the district court lacked jurisdiction over the matter. *See Laughy*, at 875, 243 P.3d at 1063 ("Not only must the person seeking judicial review be a party, but there must be a final order."). Because the appeal was not yet ripe, this Court should affirm the district court's dismissal. [13]

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[13] In its *Amended Order on Motion to Dismiss*, the district court authorized A&B to amend its petition for judicial review to seek review of the Director's June 30, 2011 *Amended Final Order* pursuant to I.A.R. 17(m). A&B filed an amended notice of appeal on August 25,

III. THE DISTRICT COURT CORRECTLY DENIED A&B'S MOTION TO STRIKE THE AFFIDAVIT OF CHRIS M. BROMLEY.

A&B's *Motion to Strike* requested that the *Affidavit of Chris M. Bromley* be stricken on the grounds that it is immaterial to the proceeding.[14] (R. Vol. I, p. 119.) The *Affidavit of Chris M. Bromley* consists of two attachments: Exhibit A, a copy of the Director's June 30, 2011 *Order Regarding Petition for Reconsideration* and Exhibit B, the Director's June 30, 2011 *Amended Final Order*. The district court denied the *Motion to Strike* because the affidavit was relevant to A&B's argument that the Director lacked authority to issue the orders. (R. Vol. I, p. 174.)

The district court's denial of the *Motion to Strike* should be affirmed. The decision to grant or deny a motion to strike is left to the sound discretion of the district court and is reviewed under an abuse of discretion standard. *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"). Because the Motion to Strike rests on the faulty premise that the Director lacked authority to issue the two orders, the district court did not abuse its discretion and this Court should affirm the district court's denial of A&B's *Motion to Strike*.

2011, appealing the *Amended Final Order*. Along with this brief, the Department is filing a *Motion to Augment* which seeks to augment the record with A&B's amended notice of appeal. The district court has not yet taken any action on A&B's amended notice of appeal.

[14] As the district court noted in its decision, A&B did not move to strike the Second Affidavit of Chris M. Bromley filed on August 2, 2011 in this matter.

CONCLUSION

The Director, when faced with A&B's petition for reconsideration, identified substantive issues in his order that needed to be reconsidered. Consistent with the plain language of Idaho Codes § 67-5246(4), he issued a "written order disposing of" the petition within twenty-one days by issuing a written order granting the petition. The Director then subsequently issued an order on reconsideration (his *Amended Final Order*). The *Amended Final Order* represented a substantive revision, revising his analysis of key parts of the original order, and expressly superseding the original order. The Director's actions in this case are consistent with the plain language of the APA. Moreover, the actions are consistent with the contemporaneous interpretation of the APA provided by Gilmore and Goble, recognized authorities on the APA, the written comments to the *Attorney General's Model Rules of Procedure*, and the Department's rules of procedure.

Significantly, the Department's actions are also in line with the sound policy reasons for this interpretation. The Department's approach allows for agencies to have time to undertake a thoughtful, considered approach to complex cases. It serves no purpose to force an agency head to issue partially considered decisions if legitimate issues are raised on reconsideration. Such actions only foster litigation and result in wasted time and money for the courts and parties, as the courts will be forced to remand matters which might have been addressed by the agency if it had sufficient time to consider and parties will have to spend resources on appeals that might have been resolved before the agency. It does not make sense to limit informed decision making.

If this Court agrees that the term "disposing of" is ambiguous, the Court should affirm the district court's holding that the Department's interpretation is entitled to deference under the *Simplot* deference test. The four prongs of the *Simplot* test have been met in this case. The

Department has been "clothed with the power to construe this law" as the Legislature has expressly entrusted the Department to administer the APA and to promulgate rules related to the APA. The Department's interpretation is reasonable as it is consistent with the plain language of the statue and is in accord with the sound policy reasons of encouraging judicial economy and informed decision making. The rationales underlying deference are also present here and support the Department's interpretation.

Whether under a plain reading of Idaho Code § 67-5246(4) or using the *Simplot* agency deferent test, for the reasons discussed above, the Department respectfully requests that this Court affirm the district court's dismissal of A&B's petition for judicial review.

DATED this 17 day of January, 2012.

LAWRENCE G. WASDEN
ATTORNEY GENERAL

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

Garrick L. Baxter
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 two true and correct copies of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereon on this 17th day of January, 2012.

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