

**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 DENYING REQUEST**
GROUND WATER MANAGEMENT AREA) **FOR STAY OF FINAL ORDER**
_____)

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* 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 *Stipulated Motion and Proposed Order to Stay Proceedings on Remand* (“Request for Stay”). In addition to A&B, the Request for Stay was signed by the City of Pocatello (“Pocatello”), Freemont Madison Irrigation District *et al.* (“FMID”), and the Idaho Ground Water Appropriators, Inc. (“IGWA”). Also on May 11, 2011, A&B filed a *Petition for Reconsideration of Interim Director’s April 27, 2011 Final Order on Remand/Request for Hearing* (“Petition for Reconsideration”). The Director will consider the Petition for Reconsideration separately. IDAPA 37.01.01.740; Idaho Code § 67-5246.

According to the Request for Stay:

Rather than continue with additional proceedings and judicial review of the Director’s *Recommended Order*, in the interests of administrative and judicial economy, the parties hereby stipulate to stay all further administrative proceedings until the Idaho Supreme Court issues a decision in the consolidated appeals (Docket No. 38382-2010). Once a final decision is issued by the Court, the parties will request a status conference with IDWR to resume this proceeding, if necessary (i.e. if decision is not mooted by the Supreme Court’s review). The parties agree that all rights to further administrative and judicial review proceedings are reserved and that the stay will not affect those rights, including seeking reconsideration and judicial review of the *Remand Order*.

Request for Stay at 2.

The Director acknowledges the request, but will deny the stay. On May 4, 2010, the Fifth Judicial District Court, in and for the County of Minidoka, issued its *Memorandum Decision and Order on Petition for Judicial Review* (“Memorandum Decision”) in CV-2009-647.¹ The *Memorandum Decision* affirmed the Director’s June 30, 2009 Final Order, but remanded the Director’s finding of material injury for application of the clear and convincing evidentiary standard of review. The Final Order was silent on which evidentiary standard of review was applied. IGWA and Pocatello filed petitions for reconsideration regarding the court’s decision that the proper evidentiary standard of review to apply in conjunctive administration is clear and convincing. 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*.

Subsequently, 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. The Department later withdrew its notice of appeal to the Idaho Supreme Court.

On January 28, 2011, after notices of appeal were lodged with the Idaho Supreme Court, A&B filed, with the district court, a *Motion to Enforce Orders* (“Motion”), *Memorandum in Support of A&B Irrigation District’s Motion to Enforce Orders* (“Memorandum”), and the *Affidavit of Travis L. Thompson*. In its Motion, A&B asked “the Court to issue an order and/or writ of mandate compelling the Idaho Department of Water Resources (‘IDWR’) and its Interim Director, Gary Spackman, to comply with this Court’s ordered remand.” *Motion* at 2. Because “the 2011 irrigation season is fast approaching,” A&B sought consideration of its Motion on an “expedited basis.” *Id.* In its Memorandum, A&B demanded “that this Court issue an order and/or writ of mandate that requires the Director to comply with this Court’s remand order to determine injury to A&B’s senior water right #36-2080 in accordance with the proper evidentiary standards and burdens of proof.” *Memorandum* at 2. A&B stated that the Director must act “promptly and completely” in carrying out his duties under the court-ordered remand. *Id.* at 4.

Because the evidentiary standard of proof was directly on appeal, the Department responded to A&B’s Motion and Memorandum by arguing that the district court lacked jurisdiction to compel the Director to act until a decision was entered by the Idaho Supreme Court. *IDWR Memorandum in Opposition to A&B Irrigation District’s Motion and Memorandum to Enforce Orders* (February 4, 2011). Neither IGWA nor Pocatello took a position on the issue.

On February 14, 2011, after oral argument, the court issued its *Order Granting Motion to Enforce in Part and Order Denying Motion to Enforce in Part* (“Order Granting Motion to Enforce”). The court held that, during the pendency of appeal, it had “jurisdiction and authority . . . [to] enforce its *Order of Remand*.” *Order Granting Motion to Enforce* at 4. The court

¹ 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).

ordered the Department to “forthwith comply with this Court’s *Order of Remand.*” *Id.* at 5. Therefore, the court specifically granted the relief sought by A&B; namely, requiring the Director to issue a final order on remand that applied the clear and convincing evidentiary standard of review to the record.

On April 27, 2011, the Director issued his Final Order on Remand, which applied the clear and convincing evidentiary standard of review to the record and found that A&B was not materially injured.

Now, after the Department was ordered by the district court to “forthwith comply with this Court’s *Order of Remand*[,]” A&B, FMID, IGWA, and Pocatello ask the Director to stay the administrative proceeding. The Director will not stay the administrative proceeding as the request is contrary to the court’s *Order Granting Motion to Enforce.*

By order of the district court, the Department is required to issue a final order, which is therefore subject to judicial review. Idaho Code § 67-5246. Once a final order is issued that is subject to judicial review, the Department will have complied with the *Order Granting Motion to Enforce.* A&B, FMID, IGWA, and Pocatello are not without a remedy. If judicial review is sought, A&B, FMID, IGWA, and Pocatello may obtain the same relief from the court that is now sought before the Department.

ORDER

Based upon the foregoing, IT IS HEREBY ORDERED that the Request for Stay is DENIED.

Dated this 23rd day of May, 2011.



GARY SPACKMAN
Interim Director

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the **ORDER DENYING REQUEST FOR STAY OF FINAL ORDER** 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 23rd day of May, 2011.

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