

NEVILLE, SCOTT C. NEVILLE, AND STAND D.)
NEVILLE,)

Intervenors.)

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

COME NOW Respondents, the Idaho Department of Water Resources and Gary Spackman, Interim Director (collectively the “Department”), and hereby file this memorandum in opposition to the A&B Irrigation District’s (“A&B”) *Motion to Enforce Orders and Motion for Expedited Hearing* (“Motion”) and *Memorandum in Support of A&B Irrigation District’s Motion to Enforce Orders* (“Memorandum”), filed with the Court on January 28, 2011. In its Memorandum, A&B asks the Court to: (a) order the Director “to comply with this Court’s remand order to determine injury to A&B’s senior water right . . . in accordance with the proper evidentiary standards and burdens of proof,” and (b) order the Director to “consider A&B’s economic and technical feasibility report on the issue of ‘interconnection’ of wells within the A&B project as part of the revised injury determination.” *Memorandum* at 2. In the alternative, A&B moves this Court for a “writ of mandate” to compel the Department to take the above-mentioned actions. *Id.*

FACTUAL AND PROCEDURAL BACKGROUND

This matter arises from A&B’s delivery call against junior ground water users. In his final order, the Director found A&B was not materially injured by junior ground water diversions. On judicial review, this Court affirmed the Director on all points, but remanded the

proceeding for the Director “to apply appropriate evidentiary standard to the existing record. No further evidence is required.” *Memorandum Decision and Order on Petition for Judicial Review* at 49 (May 20, 2010). On November 2, 2010, the Court reaffirmed this position in its *Memorandum Decision and Order on Petitions for Rehearing*. On November 26, 2010, the Court entered its *Judgment I.R.C.P. 54(a)*, which began the time for filing notices of appeal.

A&B, City of Pocatello (“City”), Department, and the Idaho Ground Water Appropriators, Inc. (“IGWA”) filed timely notices of appeal. The City, Department, and IGWA appealed the holding of the Court that remanded the proceeding for application of the proper evidentiary standard. On December 28, 2010, A&B filed its notice of appeal challenging other holdings.

Prior to expiration of the time for filing notices of appeal, the Department received a letter from A&B requesting “confirmation of the remand proceeding and whether the Director would consider an economic and technical feasibility report on ‘interconnection’ of wells within the A&B project.” *Thompson Affidavit*, Exhibit A at 2. On January 12, 2011, after expiration of the time for filing notices of appeal, the Department responded by stating that it would not proceed “with the issue on remand until a final decision has been issued by the Idaho Supreme Court.” *Thompson Affidavit*, Exhibit B at 1. Regarding the interconnection study, the Department responded by stating that it would field questions posed by A&B. *Id.*

ARGUMENT

I. Because The Issue On Remand Is On Appeal, A&B’s Motion To Enforce Must Be Denied

A&B moves the Court “to issue an order and/or writ of mandate to IDWR and the Director to ensure compliance with the Court’s” decision on remand. *Memorandum* at 8.

Because the issue on remand is on appeal, the Court does not have jurisdiction to grant the requested relief.

A. The Idaho Appellate Rules Limit a Court’s Jurisdiction During the Pendency of an Appeal

According to Idaho Appellate Rule 11, an appeal may be taken, as a matter of right, from “[d]ecisions by the district court dismissing, affirming, reversing or remanding an appeal.” Once a notice of appeal has been perfected, the district court is divested of jurisdiction except as provided in I.A.R. 13. *Bagley v. Thomason*, 149 Idaho 799, 803, 241 P.3d 972, 976 (2010). Idaho Appellate Rule 13(a)(13) allows the court to “enter any order required for the enforcement of any judgment or order.” The court’s authority is limited, however, by the jurisdiction it retains following the perfection of an appeal. *Sythe v. Parke*, 121 Idaho 156, 158, 823 P.2d 760, 762 (1991). In considering I.A.R. 13, “[t]he question of jurisdiction is fundamental and cannot be ignored.” *Diamond v. Sandpoint Title Ins., Inc.*, 132 Idaho 145, 148, 968 P.2d 240, 243 (1998).

B. Consistent with *H&V Engineering, Inc. v. Idaho State Board of Professional Engineers and Land Surveyors*, A&B’s Motion must Fail

The Idaho Supreme Court has previously held that a district court’s jurisdiction is limited when it remands a case and an appeal of the issue on remand is perfected. *H&V Engineering, Inc. v. Idaho State Board of Professional Engineers and Land Surveyors*, 113 Idaho 646, 747 P.2d 55 (1987). There, the Board of Professional Engineers and Land Surveyors (“Board”) entered a decision revoking and suspending the licenses of certain professional engineers (“Engineers”). The Engineers sought judicial review of the Board’s decision, asserting that the standard of review used by the Board was unconstitutional. On review, the district court

remanded the case to the Board, requiring it “to articulate the specific standards used in imposing discipline.” *Id.* at 648, 747 P.2d at 57. The Engineers appealed the district court’s decision to the Supreme Court. After the Engineers perfected their appeal, the Board amended its findings to comport with the district court’s order on remand. The district court later entered an order affirming the Board’s decision.

On appeal, the Supreme Court asked whether the district court had “jurisdiction after appeal was taken to this Court from the order of remand.” *Id.* According to the Supreme Court, “[a]bsent from the limited enunciated exceptions to Rule 13 is any provision which authorizes the district court, after remanding the case for further proceedings, to consider and act upon additional Findings of Fact from the Board where, in the interim, appeal of the remand was perfected in this court.” *Id.* The Supreme Court concluded that the district court was divested of its jurisdiction after the Engineers “perfected their appeal, and jurisdiction was vested in this Court.” *Id.* at 649, 747 P.2d at 58. Therefore, “the only substantive issue presented on this appeal properly before us is whether the district court erred in entering the order remanding the case to the Board with specific directions.” *Id.*

C. The Courts’ Previous Rulings in Thousand Springs are Consistent with the Idaho Appellate Rules and *H&V Engineering*

A&B argues that the Department’s “non-action is particularly troubling since this exact issue was recently decided by the Honorable John M. Melanson in the context of the ordered remand in the Spring Users’ delivery call proceeding.” *Memorandum* at 4.¹ In making this

¹ A&B further supports its argument by footnote citation to *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1995) and *American Falls Reservoir District No. 2 v. Idaho Dept. of Water Res.*, 143 Idaho 862, 154 P.3d 433 (2007). In those cases, the underlying district courts held, respectively, that the Director must conjunctively administer water rights while the CM Rules were being promulgated, and that the CM Rules were facially unconstitutional. Stays were sought by the Department in those proceedings because of the uncertainty surrounding conjunctive administration. Here, conjunctive administration is occurring in accordance with the CM Rules.

argument, A&B ignores the critical component of that proceeding—the fact that the issue on remand was not appealed to the Supreme Court.

On judicial review of the Director’s final order in the delivery call filed by Blue Lakes Trout Farm, Inc. (“Blue Lakes”) and Clear Springs Foods, Inc. (“Clear Springs”) (collectively the “Spring Users”), the Honorable John M. Melanson entered an appealable order affirming most of the Director’s findings, but remanded the Director’s conclusion of no material injury to two water rights held by the Spring Users, “so that the Director may apply the appropriate burdens of proof and evidentiary standards when considering seasonal variability” Exhibit A at 12 to *Affidavit of Chris M. Bromley*.

Judge Melanson’s decision was appealed to the Supreme Court by IGWA and the Spring Users. The Department was a respondent. Importantly, no party appealed the issue on remand. During the pendency of the appeal, Blue Lakes filed a *Motion to Enforce Orders* pursuant to I.A.R. 13(a)(13), which was later joined by Clear Springs. Exhibit B at 3 to *Affidavit of Chris M. Bromley*. Blue Lakes moved Judge Melanson to require the Department to issue an order consistent with his remand and consider additional information regarding issues that were on appeal. *Id.* In response, Judge Melanson found he had jurisdiction to order the Department to act on the unappealed issue on remand, but that he did not have jurisdiction to require the Director to consider information that was the subject of appeal. *Id.* at 4.

Following Judge Melanson’s decision, and still during the pendency of the appeal to the Supreme Court, Blue Lakes filed an *Application for Peremptory Writ of Mandate* with this Court, which was later joined by Clear Springs. Blue Lakes sought to compel the Director to “consider updated, improved and/or new data, analysis and methods for determining the impact of junior ground water diversions . . . and to allow Plaintiff to present such evidence in any

proceeding before IDWR . . .” Exhibit C at 1-2 to *Affidavit of Chris M. Bromley*. In denying Blue Lakes’ requested relief, the Court stated as follows: “this Court concludes consistent with Judge Melanson that Idaho Appellate Rule 13 does not provide an exception to this Court which would allow it to issue the writ of mandate ordering the Department to address issues which are the same, or intertwined with, those presently pending on appeal.” *Id.* at 5 (emphasis added).

This reasoning is directly on point with *H&V Engineering*. There, like in this case, the subject of the remand was appealed. If the Court were to grant A&B’s requested relief, the Department would be required to enter a final order, which would trigger the time for filing petitions for judicial review. Idaho Code § 67-5273. In accordance with Idaho Code §§ 67-5277, -5279 and Idaho Rule of Civil Procedure 84, the Court would be required to dispose of the petitions for judicial review. This would put the Court in the exact same position as the district court in *H&V Engineering*—acting on judicial review when the subject of review is on appeal to the Supreme Court. Accordingly, the Court is without jurisdiction to consider A&B’s *Motion* and must deny the requested relief.²

II. A&B Has Not Established A Clear Legal Right To The Relief Sought And Has A Plan, Speedy, And Adequate Remedy In The Ordinary Course Of Law

A decision to issue a writ of mandate is committed to the discretion of the court. Idaho Rule of Civil Procedure 74(b). The party seeking a writ of mandate “must establish a clear legal right to the relief sought.” *Almgren v. Idaho Dept. of Lands*, 136 Idaho 180, 181, 30 P.3d 958,

² The caution that must be exercised when an issue has been remanded is evidenced in the judicial review of the Director’s final order entered in response to the Surface Water Coalition delivery call (CV-2008-551). There, Judge Melanson remanded the Director’s decision to bifurcate the final order on review from his methodology for determining material injury to reasonable in-season demand and reasonable carryover. Following oral argument on rehearing, Judge Melanson entered an order “hold[ing] in abeyance any final decision on rehearing until” the Department complied with the remand. Exhibit D at 3 to *Affidavit of Chris M. Bromley*. This was unlike *H&V Engineering* where the district court entered an appealable order. Only after compliance with the remand did Judge Melanson issue his order on reconsideration, which was appealable to the Supreme Court. Exhibit E at 12 to *Affidavit of Chris M. Bromley*.

959 (2001). In addition, a writ of mandate will not issue where the petitioner has a “plain, speedy and adequate remedy in the ordinary course of law.” Idaho Code § 7-303.

First, this Court should not grant A&B’s requested relief because jurisdiction of the issue on remand is before the Supreme Court.

Second, A&B has failed to establish a clear legal right to the relief sought. A&B has not demonstrated that jurisdiction lies with this Court to enter an order pursuant to I.A.R. 13(a)(13).

Third, A&B has a plain, speedy, and adequate remedy in the ordinary course of law. “A right of appeal is regarded as a plain, speedy and adequate remedy at law in the absence of a showing of exceptional circumstances or of the inadequacy of an appeal to protect existing rights.” *State v. District Court of Fourth Judicial Dist.*, 143 Idaho 695, 152 P.3d 566 (2007). Here, the issue on remand has been appealed to the Supreme Court. While not raised as an “exceptional circumstance,” A&B claims, that it “stands to lose another year in the lawful administration of its senior water right.” *Memorandum* at 5. A&B ignores, however, that no reviewing body has disagreed with the Director’s factual finding that 0.75 miner’s inches per acre is reasonable and that A&B is receiving that amount on a project-wide basis. As a result, A&B cannot make a showing of exceptional circumstances and its requested relief must be denied.

III. Whether To Allow Additional Evidence After Remand Is Solely Within The Discretion Of The Department

Believing that the Court has retained jurisdiction of an issue on appeal to the Supreme Court, A&B goes one step further, and demands the Court “order the Director to consider the proposed [interconnection] feasibility study as part of the ordered remand.” *Memorandum* at 7.

A&B seeks a ruling from the Court that would bootstrap the unappealed interconnection issue³ to the single issue on remand—application of the proper evidentiary standard of proof.

Even if A&B is correct that this Court has retained jurisdiction of the issue on remand, or if the Supreme Court affirms the remand on appeal, this Court could not have more clearly explained the limited scope of its remand: “The case is remanded for the limited purpose of the Director to apply the appropriate evidentiary standard to the existing record. No further evidence is required.” *Memorandum Decision and Order on Petition for Judicial Review* at 49 (emphasis added); *see also Judgment I.R.C.P. 54(a)* at 2.

When remand occurs, a new contested case will be commenced. Idaho Code § 67-5240. At that time, the decision to take additional evidence will be within the discretion of the presiding officer. Idaho Code § 67-5251. A final order will issue and be subject to judicial review after exhaustion of administrative remedies. Idaho Code §§ 67-5270-5271. Therefore, A&B’s Motion must fail because only upon judicial review will the Director’s evidentiary decisions be subject to consideration by this Court.

IV. There Is No Basis For The Director To Prejudge Evidence

A&B’s demand that the Court order the Director “to consider” its proposed feasibility study, *Memorandum* at 7, is nearly identical to a request made by Blue Lakes to Judge Melanson in CV-2008-444. There, Blue Lakes pointed Judge Melanson to language from the hearing officer in support of its demand that the Director had a “duty” to “consider” the information it wished to present. *Affidavit of Chris M. Bromley*, Exhibit B at 3. Judge Melanson concluded he

³ According to this Court, A&B must take “reasonable steps to move water from performing to underperforming areas or alternatively demonstrate physical or financial impracticability.” *Memorandum Decision and Order on Petition for Judicial Review* at 50. The “burden [is] on A&B to demonstrate where interconnection is or is not . . . practical.” *Id.* at 39.

did “not have jurisdiction to order action be taken outside the scope of the prior Orders. The prior Orders affirmed the Director’s use of the trimline and the spring allocation determinations.” *Affidavit of Chris M. Bromley*, Exhibit B at 4. Because this Court does not have jurisdiction over issues that were affirmed, the Court must deny A&B’s requested relief. The Department is willing to field questions about the feasibility study and will assist as it believes reasonable. There is, however, no statutory authority for the Director to prejudge evidence before its presentation in a contested case.

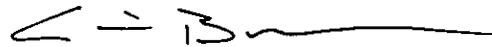
CONCLUSION

Based on the foregoing, the Department respectfully requests that the Court deny A&B’s requested relief.

RESPECTFULLY SUBMITTED this 4th day of February, 2011.

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
CHIEF, NATURAL RESOURCES DIVISION



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

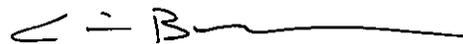
CERTIFICATE OF SERVICE

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 4th day of February, 2011.

Document Served: **IDWR Memorandum in Opposition to A&B Irrigation District's Motion and Memorandum to Enforce Orders**

Deputy Clerk Minidoka County District Court 715 G. Street. P.O. Box 368 Rupert, ID 83350 santos.garza@co.minidoka.id.us	<input 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
Judge Wildman (courtesy copy) SRBA District Court 253 3rd Ave. N P.O. Box 2707 Twin Falls, Idaho 83303-2707 pharrington@srba.state.id.us	<input 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
John K. Simpson Travis L. Thompson Paul L. Arrington BARKER RÖSHOLT & SIMPSON, LLP P.O. Box 485 Twin Falls, ID 83303 jks@idahowaters.com ilt@idahowaters.com pla@idahowaters.com	<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
Jerry R. Rigby RIGBY ANDRUS & RIGBY 25 North 2 nd East Rexburg, ID 83440 jrigby@rex-law.com	<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>Randall C. Budge Candice M. McHugh RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net cmm@racinelaw.net</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>Sarah A. Klahn WHITE JANKOWSKI 511 16th St., Ste. 500 Denver, CO 80202 sarahk@white-jankowski.com</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>



CHRIS M. BROMLEY
Deputy Attorney General