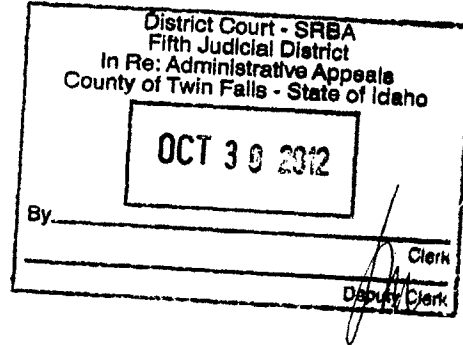


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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

CITY OF POCATELLO,

Petitioner,

vs.

IDAHO GROUND WATER
 APPROPRIATORS, INC.,

Petitioner,

vs.

A&B IRRIGATION DISTRICT,

Cross-Petitioner,

vs.

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

Respondents.

IN THE MATTER OF THE PETITION FOR

) Case No. CV 2011-14409
) (consolidated Minidoka County Case
) No. 2011-604)

) **A&B IRRIGATION DISTRICT'S**
) **MOTION TO DISMISS APPEALS /**
) **SUPPORTING POINTS &**
) **AUTHORITIES**

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

COMES NOW, Cross-Petitioner A&B Irrigation District (“A&B”), by and through its undersigned counsel, and hereby moves this Court for an order dismissing the above-captioned appeals. The Idaho Supreme Court recently held that the Director of the Idaho Department of Water Resources (“Department”) had no jurisdiction to issue the June 30, 2011 *Amended Final Order on Remand Regarding the A&B Irrigation District Delivery Call* (“*Amended Final Order*”) and that the *Amended Final Order* is a “nullity.” Consequently, the case is moot and should be dismissed.

On April 27, 2011, the Director issued the *Final Order on Remand Regarding A&B Irrigation District Delivery Call* (“*Final Order*”). On May 11, 2011, A&B filed a timely *Petition for Reconsideration* of the *Final Order*, pursuant to I.C. § 67-5246 and IDAPA 37.01.01.740. Under section 67-5246, the Director was required to issue a final decision on the merits of A&B’s petition within 21 days. However, rather than issue a decision within that time, the Director issued two orders, on June 1st and June 9th, attempting to “grant” the petition for the sole purpose of “allowing additional time for the Department to respond to the Petition.” The Director finally issued the *Amended Final Order* on June 30, 2011 – 51 days after A&B filed its petition for reconsideration. The above-captioned appeal challenges the Director’s *Amended Final Order*.

On September 14, 2012, the Idaho Supreme Court issued a decision in Appeal No. 39169-2011 addressing the validity of the *Amended Final Order*. In that appeal, A&B asserted


that the Director's issuance of the *Amended Final Order* violated Idaho Code § 67-5246. The Supreme Court agreed, holding that the Director had no jurisdiction to issue the *Amended Final Order* and that, therefore, the *Amended Final Order* is a "nullity." See 2012 Opinion No. 121 (September 14, 2012). The Director's actions after the 21 day timeframe (i.e. after June 1, 2011) were *ultra vires* and void as a matter of law. In other words, "IDWR no longer had jurisdiction in the matter, and the order issued on June 30, 2011, is a nullity." See 2012 Opinion No. 121, at p. 7. In addition, the Petitioners' sole issue on appeal in this consolidated case concerns the proper burden of proof (clear and convincing evidence) to apply in a delivery call. See *IGWA's Petition for Judicial Review* at 2 (July 28, 2011); *Pocatello's Notice of Appeal and Petition for Judicial Review of Agency Action* at 6 (July 27, 2011). That issue was recently decided by the Idaho Supreme Court in *A&B Irrigation Dist. v. IDWR et al*, 2012 Opinion No. 115 (August 2, 2012), at pp. 23-35.

Since these appeals challenge a void agency action, the *Amended Final Order*, and an issue already decided by the Idaho Supreme Court (clear and convincing evidence burden of proof), they should be dismissed as moot. See *Goodson v. Nez Perce County Bd. of County Comm'rs*, 133 Idaho 851, 853 (2000) ("This Court may dismiss an appeal when it appears that the case involves only a moot question. A case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. A case is moot if it presents no justiciable controversy and a judicial determination will have no practical effect upon the outcome."); see also, *Stephen v. Sallaz & Gatewood, Chtd.*, 150 Idaho 521, 528 (2011).

For the above reasons, A&B moves this Court for an order dismissing the above captioned appeal. A&B requests oral argument on this motion.

DATED this 30th day of October, 2012.

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson

Attorneys for A&B Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of October, 2012, I served true and correct copies of the foregoing **A&B IRRIGATION DISTRICT'S MOTION TO DISMISS APPEALS / SUPPORTING POINTS & AUTHORITIES** upon the following by the method indicated:

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