

LAWRENCE G. WASDEN  
ATTORNEY GENERAL

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

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

District Court - SRBA Fifth Judicial District in Re: Administrative Appeals County of Twin Falls - State of Idaho	
NOV 13 2012	
By _____	Clerk
_____	Deputy Clerk

*Attorneys for Respondents*

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

A&B IRRIGATION DISTRICT,

Petitioner,

vs.

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

Respondents,

and

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

Respondents-Intervenors.

Case No. CV-2011-512

**IDWR REPLY TO A&B'S  
OPPOSITION TO REMAND  
PROCEEDING**

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

COME NOW the Idaho Department of Water Resources ("IDWR") and Gary Spackman, Director of IDWR ("Director"), and reply to A&B Irrigation District's ("A&B") *Opposition to Motion to Remand Proceeding to IDWR* ("Opposition").

## I. BACKGROUND

On April 27, 2011, the Director issued a *Final Order on Remand Regarding A&B Irrigation District's Delivery Call* ("April 27 Final Order"). Thereafter, on May 11, 2011, A&B filed a *Petition for Reconsideration of Interim Director's April 27, 2011 Final Order on Remand* ("Petition for Reconsideration"). The Petition for Reconsideration raised 11 issues for the Director to reconsider:

1. Director Failed to Follow Idaho Law in Evaluating Injury to A&B's Decreed Water Right No. 36-2080;
2. Director Erroneously Ruled on Issues Beyond the Scope of the Remand;
3. Director's *Remand Order* Erroneously Implies that all Wells on the A&B Project are Interconnected;
4. Director Wrongly Assumes Available Water Supply to A&B;
5. Director's Assumptions about A&B's 11 Authorized PODs are Erroneous
6. Director's Finding Regarding the Location of Wells in the Southwest Area is Erroneous;
7. Analysis of Irrigation Under Enlargement Water Rights Flawed;
8. A&B's Decreed Rate of Diversion / Motion to Proceed;
9. Failure to Apply CM Rules to Junior Priority GW Rights;
10. Failure to Identify a Reasonable Pumping Level; and
11. Characterization of IGWA Witness as A&B "Board Member."

*Petition for Reconsideration* at 2-13.

It was not until June 30, 2011 that the Director was able to issue a substantive order in response to A&B's Petition for Reconsideration. *See Amended Final Order on Remand Regarding the A&B Irrigation District Delivery Call* (June 30, 2011); *Order Regarding Petition for Reconsideration* (June 30, 2011); *Amended Order Granting Petition for Reconsideration to Allow Time for Further Review* (June 9, 2011); *Order Granting Petition for Reconsideration to Allow Time for Further Review* (June 1, 2011).

As this Court is well aware, and as was discussed in the recent decision issued by the Idaho Supreme Court, the Director's failure to "dispose of" A&B's Petition for Reconsideration, by not addressing its merits within 21 days, resulted in denial of the Petition for Reconsideration. *A&B Irr. Dist. v. Idaho Dept. of Water Resources*, 2012 WL 4055353, \*4 (Idaho 2012) (hereinafter referred to as the "Disposed of Appeal").

On October 29, 2012, the Department filed its *Motion to Remand Proceeding to IDWR* ("Motion to Remand"). On November 9, 2012, A&B filed its Opposition.

## II. ARGUMENT

In its Opposition, A&B frames the issue before the Court as an attempt by IDWR to "undo" or perform an "end-run" around the *Disposed of Appeal*. *Opposition* at 2, 3. A&B's perception is incorrect. IDWR is not seeking to evade the *Disposed of Appeal*; rather, IDWR is seeking to comply with the case's holding and present the Court with IDWR's best analysis.

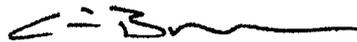
The *Disposed of Appeal* determined IDWR lacked jurisdiction to substantively address the Petition for Reconsideration. "IDWR no longer had jurisdiction in the matter and the order issued on June 30, 2011, is a nullity." *Disposed of Appeal* at \*4 (emphasis added). IDWR seeks to apply the holding of the case by moving this Court to remand the proceeding; thereby allowing IDWR to issue a final order that incorporates its substantive analysis of the 11 issues raised in A&B's Petition for Reconsideration. If remanded, IDWR would have "jurisdiction" to issue a final order that addresses the Petition for Reconsideration and complies with the *Disposed of Appeal*: "During a remand to the . . . administrative agency the appeal shall remain pending . . . but the . . . administrative agency shall have jurisdiction to take all actions necessary to fulfill the requirements of the order of remand." Idaho Appellate Rule 13.3 (emphasis added).

If the Court grants the Motion for Remand, IDWR would issue a final order in a matter of days. The Court would then have before it IDWR's best analysis of the case. Furthermore, judicial economy would be promoted as A&B's appeal would "remain pending," I.A.R. 13.3, and the Court would be able to keep its March 4, 2013 oral argument setting. Because argument is not scheduled to occur until March 4, 2013, the only modification that would need to occur to the Court's October 16, 2012 *Scheduling Order* would be adjustment of the date the agency record is to be lodged with the Court.

### III. CONCLUSION

IDWR respectfully moves this Court to remand the April 27 Final Order for the sole purpose of authorizing IDWR to issue a final order that incorporates the agency's substantive analysis of the 11 issues raised by A&B in its Petition for Reconsideration.

DATED this 13<sup>th</sup> day of November, 2012.



---

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

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the State of Idaho, employed by the Attorney General of the State of Idaho and residing in Boise, Idaho; and that I served one (1) true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto, and by electronic mail, on this 13<sup>th</sup> day of November, 2012.

Document(s) served: **IDWR REPLY TO A&B'S OPPOSITION TO REMAND PROCEEDING**

Person(s) served:

<p>John K. Simpson Travis L. Thompson Paul L. Arrington Barker Rosholt &amp; Simpson 195 River Vista Place, Ste. 204 Twin Falls, ID 83301-3029 <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a> <a href="mailto:tlt@idahowaters.com">tlt@idahowaters.com</a> <a href="mailto:pla@idahowaters.com">pla@idahowaters.com</a></p>	<p>Randall C. Budge Candice M. McHugh Racine Olson Nye Budge &amp; Bailey P.O. Box 1391 201 E. Center St. Pocatello, ID 83204-1391 <a href="mailto:rcb@racinelaw.net">rcb@racinelaw.net</a> <a href="mailto:cmm@racinelaw.net">cmm@racinelaw.net</a></p>	<p>Sarah A. Klahn Mitra Pemberton White &amp; Jankowski LLP 511 Sixteenth St., Ste. 500 Denver, CO 80202 <a href="mailto:sarahk@white-jankowski.com">sarahk@white-jankowski.com</a> <a href="mailto:mitrap@white-jankowski.com">mitrap@white-jankowski.com</a></p>
<p>Jerry Rigby Rigby Andrus 25 North Second East P.O. Box 250 Rexburg, ID 83440 <a href="mailto:jrigby@rex-law.com">jrigby@rex-law.com</a></p>	<p>A. Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83201 <a href="mailto:dtranmer@pocatello.us">dtranmer@pocatello.us</a></p>	<p>SRBA District Court 253 3<sup>rd</sup> Ave. N. P.O. Box 2707 Twin Falls, ID 83303-2707 Fax: (208) 736-3011</p>


---

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