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; and,
Defendants-Respondents,

v.

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

A&B IRRIGATION DISTRICT'S OPENING BRIEF

Appeal from the District Court of the Fifth Judicial District for Minidoka County
Honorable Eric J. Wildman, District Judge, Presiding

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STATEMENT OF THE CASE

I. Nature of the Case

The A&B Irrigation District ("A&B") appeals the district court's *Amended Order on Motion to Dismiss and Motion to Strike* issued on August 29, 2011. Clerk's R. Vol. 1 at 167.

II. Course of Proceedings / Statement of Facts

On May 4, 2010, the district court issued its *Memorandum Decision and Order on Petition for Judicial Review* reversing and remanding the Director's finding of no material injury for application of the appropriate burden of proof and evidentiary standard.[1] On November 2, 2010, the court denied petitions for reconsideration filed by IGWA and the City of Pocatello and reaffirmed its previous decision remanding the case to the Idaho Department of Water Resources ("IDWR" or "Department").

On November 10, 2010, A&B requested confirmation that IDWR would proceed with the remand as ordered by the district court. Clerk's R. Vol. 1 at 152. Unfortunately, and without any legal basis, the Department refused to follow the court's ordered remand, forcing A&B to seek further judicial relief. *See Order Granting Motion to Enforce in Part and Denying Motion in Part* (Minidoka County Dist. Ct., Fifth Jud. Dist., Case No. CV-2009-647) (February 15, 2011). After the district court ordered the agency to comply with the remand order, it took the Department over 60 days to issue the *Final Order on Remand Regarding A&B Irrigation District Delivery Call* (April 27, 2011). Clerk's R. Vol. 1 at 3.

On May 11, 2011, A&B requested IDWR to reconsider the final agency order. *See* I.C. § 67-5246(4) ("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.") and IDAPA

[1] *See A&B Irr. Dist. v. IDWR et al.* (Minidoka County Dist. Ct., Fifth Jud. Dist., Case No. CV-2009-647). The district court's decision is presently on appeal to the Idaho Supreme Court in Docket No. 38403-2011. However, no party appealed or requested a stay of the court's ordered remand to IDWR.

37.01.01.740.02.a ("Any party may file a petition for reconsideration of [a] final order within fourteen (14) days of the service date of this order.").

Under the APA, the Department had 21 days to "issue a written order ***disposing of the petition***." I.C. § 67-5246(4) (emphasis added). Exactly 21 days later, on June 1, 2011, the Director issued an *Order Granting Petition for Reconsideration to Allow Time for Further Review*. Clerk's R. Vol. 1 at 33. In that order, the Director extended the mandatory 21-day timeframe for a decision on A&B's petition to June 9, 2011. *Id.* The Director stated A&B's petition was granted "for the sole purpose of allowing additional time for the Department to respond to the Petition." *Id.* at 33-34. The Director missed his self-created deadline and again pushed out the due date by an amended order, this time to June 30, 2011.[2] *Id.* at 37.

Since the Director failed to "dispose of" A&B's petition for reconsideration within 21 days as required by law, A&B exercised its statutory right to appeal the Director's decision to district court. Clerk's R. Vol. 1 at 26. Three days later, on June 30, 2011, the Director attempted to enter an *Order Regarding Petition for Reconsideration* along with an *Amended Final Order on Remand Regarding the A&B Irrigation District Delivery*.[3] Clerk's R. Vol. 1 at 48, 67. The amended final order purported to supersede the Director's April 27, 2011 *Final Order*. *Id.* at 67.

IDWR filed a *Motion to Dismiss* A&B's petition for judicial review. Clerk's R. Vol. 1 at 40. A&B responded to IDWR's motion and filed a motion to strike the *Affidavit of Chris M. Bromley*. *Id.* at 107, 118.

On August 11, 2011, the district court issued its *Order on Motion to Dismiss and Motion to Strike*. Clerk's R. Vol. 1 at 155. The district court later amended the order and issued a Rule

[2] Importantly, the timelines set by the Director in both the June 1st and June 9th orders were his own, not tied to any statute or regulation.

[3] As explained in this opening brief, the Director had no statutory authority to issue these decisions on June 30, 2011, hence they are *ultra vires* and void as a matter of law. *See infra*, Argument Part IV.

54(b) certificate. *Id.* at 167. The court granted IDWR's motion to dismiss, finding the term "disposed of" in section 67-5246 to be ambiguous and holding that the agency was not required to decide the merits of A&B's petition for reconsideration within 21 days. *Id.* at 171, 174. A&B appealed the district court's decision. Clerk's R. Vol. 1 at 178.

ISSUES PRESENTED ON APPEAL

A. Whether the district court erred by ignoring the plain meaning of the Idaho APA in concluding that IDWR did not have to dispose of A&B's petition for reconsideration within twenty-one (21) days as required by Idaho Code § 67-5246 and IDAPA 37.01.740.02.a?

B. Whether the petition for reconsideration was denied as a matter of law when the Director failed to dispose of the petition within 21 days as required by law?

C. Whether the district court erred in dismissing A&B's petition for judicial review of the Director's April 27, 2011 *Final Order on Remand Regarding A&B Irrigation District Delivery Call*?

D. Whether the district court erred in denying A&B's motion to strike the *Affidavit of Chris M. Bromley*?

STANDARD OF REVIEW

IDWR moved to dismiss A&B's petition on the grounds that the April 27, 2011 *Final Order* had been superseded and was no longer "ripe" for judicial review. Relying upon its interpretation of section 67-5246, the district court granted IDWR's motion to dismiss. The interpretation of a statute is a question of law over which this Court exercises free review. *Doe v. Boy Scouts of America*, 148 Idaho 427, 430, 224 P.3d 494, 497 (2009). Whether the district court had jurisdiction over this action is a question of law over which this Court exercises free

review. *City of Eagle v. Idaho Dept. of Water Resources*, 150 Idaho 449, 451, 247 P.3d 1037, 1039 (2011).

A&B moved to strike the *Affidavit of Chris M. Bromley* and its exhibits on the basis that the Director's actions taken after A&B had filed a petition for judicial review violated section 67-5246 and therefore were *ultra vires* and void as a matter of law. The district court denied A&B's motion to strike based upon its ruling on IDWR's motion to dismiss. Clerk's R. Vol. 1 at 174. 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).

SUMMARY OF ARGUMENT

The issues on appeal concern the interpretation of a straight forward and unambiguous statute. The Idaho APA contains precise and well-defined timelines. After an agency issues a final order, section 67-5246 allows a party to file a petition for reconsideration within 14 days. If a petition is filed and the agency head fails to "dispose of" the petition by written order within 21 days, the petition is deemed denied by operation of law. *See* I.C. § 67-5246(4), (5). IDWR's rules of procedure contain similar requirements and deadlines. *See* IDAPA 37.01.01.740.02.a.

Rather than acting on the merits of A&B's petition, the Director unilaterally enlarged the Department's statutory deadline twice, claiming the right to "grant" A&B's petition for reconsideration, but only "for the sole purpose of allowing additional time for the Department to respond to the Petition." Clerk's R. Vol. 1 at 34, 37. Thereafter, after "granting" the petition, the Director then denied it.[4] *Id.* at 64. Yet, the agency had no authority to grant itself these unilateral extensions because when IDWR failed to "dispose of" A&B's petition for

[4] The Director granted A&B's petition in part to correct his erroneous characterization of an IGWA witness as being a member of the A&B board of directors. Clerk's R. Vol. 1 at 64.

reconsideration within 21 days the petition was deemed denied by operation of Idaho law. The district court wrongly affirmed IDWR's procedure on the theory that section 67-5246 and the term "dispose of" was ambiguous. Clerk's R. Vol. 1 at 171. The court's interpretation is erroneous as a matter of law and should be reversed on appeal.

ARGUMENT

I. The Term "Disposed of" in the Idaho APA is Unambiguous.

The district court found the term "disposed of" in section 67-5246 ambiguous on the basis that it was "not a defined term under IDAPA" and "reasonable minds might differ as to its interpretation, making it subject to conflicting interpretations."[5] Clerk's R. Vol. 1 at 171. The court erred as a matter of law.

The objective of statutory construction is to derive the intent of the legislature. *Kelso v. State Ins. Fund,* 134 Idaho 130, 134, 997 P.2d 591, 595 (2000). Statutory interpretation must begin with the literal words of the statute and those words must be given their plain, usual, and ordinary meaning. *Harrison v. Binnion*, 147 Idaho 645, 649, 214 P.3d 631, 635 (2009); *State v. Gill*, 150 Idaho 183, 185, 244 P.3d 1269, 1271 (Ct App. 2010) (language of statute is to be given its plain, obvious, and rational meaning). If the statute is not ambiguous, a court must not construe it and follow the law as written. 147 Idaho at 649, 214 P.3d at 635; *see also, Idaho Power Co. v. Idaho Dept. of Water Resources*, 151 Idaho 266, 255 P.3d 1152, 1158 (2011). Contrary to the district court's interpretation, "dispose or disposed of" is unambiguous, therefore statutory construction is unnecessary and courts must apply the term's plain meaning.

[5] The Court made the same finding for IDWR's rule of procedure (IDAPA 37.01.01.0740.02.a).

"Dispose of" is an expression and a term of art with a settled legal meaning often used and understood by the courts and practitioners. The term has a "plain, obvious, and rational meaning," defined as follows:

> To alienate or direct the ownership of property, as disposition by will. ***Used also of the determination of suits. To exercise finally, in any manner, one's power of control over;*** to pass into the control of someone else; to alienate, relinquish, part with, or get rid of; to put out of the way; ***to finish with***; to bargain away. Often used in restricted sense of "sale" only, or so restricted by context.

Black's Law Dictionary, 6th ed. (1991) (emphasis added).[6]

As used in Idaho's APA, the term "dispose of" has one meaning, to finally determine or finish with. I.C. § 67-5246(4), (5). After all, when the agency "disposes of" a party's petition for reconsideration, that action triggers the deadline for taking the next step, filing a petition for judicial review in district court. Similarly, failing to "dispose of" a petition for reconsideration within 21 days operates as a denial by operation of law, likewise triggering the deadline for a petition for judicial review. The timeframes are precise and ensure timely and efficient judicial review.

Although the term is not defined in Idaho's APA or IDWR's regulations, "dispose of" has been found to have a plain, obvious and unambiguous legal meaning. The Idaho Supreme Court in *Evans State Bank v. Evans* equated the term "disposes of" with "determines":

> A final judgment has been defined to be one which ***disposes of*** the subject-matter of the controversy or ***determines*** the litigation between the parties on its merits.

30 Idaho 703, 167 P. 1165, 1166 (1917) (emphasis added); *see also, Williams v. State Bd. of Real Estate Appraisers*, 149 Idaho 675, 678, 239 P.3d 780, 783 (2010) (citing *Evans*).

[6] The Idaho Supreme Court has previously applied definitions in Black's Law Dictionary when interpreting undefined terms in the Idaho Administrative Procedures Act. *See Williams v. State Bd. of Real Estate Appraisers*, 149 Idaho 675, 678, 239 P.3d 780, 783 (2010) (referencing Black's Law Dictionary's definition of "interlocutory order" in I.C. § 67-5271).

Similarly, in *Williams v. State Bd. of Real Estate Appraisers* the Idaho Supreme Court also equated the term "dispose of" with "determine" when referencing the holding in another case. 149 Idaho at 678, 239 P.3d at 783 ("In fact, ***it did not determine*** any of those issues. *See Thornton v. Hickox*, 126 Idaho 474, 475, 886 P.2d 779, 780 (1994) ('[T]he denial of the motion to dismiss ***did not dispose of*** any claim.')") (emphasis added).

Next, in *Smith v. Clyne*, the Idaho Supreme Court held that "[a] defendant, who has filed a demurrer or motion addressed to the complaint, is not in default until after such demurrer and motion are ***disposed of***." 16 Idaho 466, 101 P. 819 (1909) (emphasis added); *see also, Culver v. Mountain Home Electric Co.*, 17 Idaho 669, 107 P. 65(1910) ("[t]he filing of a demurrer to a complaint presents an issue of law which ***the court is required to decide***, and the defendant is not in default until such issue of law is ***disposed of***...and it is error for the court to permit default to be entered or to enter judgment against the defendant until such demurrer is overruled.") (emphasis added).

These cases demonstrate that when in reference to a motion or issue in the case, the term "dispose of" means having the questions finally determined or decided by the court. *See also, Cent. Deep Creek Orchard Co. v. C.C. Taft Co.*, 34 Idaho 458, 202 P. 1062, 1064 (1921) (a special appearance presents a question of law, and the court should be required to dispose of that issue before it assumes jurisdiction); *Perry v. Perkins*, 73 Idaho 4, 12, 245 P.2d 405, 409 (1952) ("each case should be disposed of as substantial justice may seem to require."); *Philpot v. Gerard*, 88 Idaho 422, 424, 400 P.2d 383, 385 (1965) ("The court stated that the summary judgment disposed of the appellant's motion for leave to file an amended complaint.").

Where the statute is plain and unambiguous, courts are constrained to follow that plain meaning, and can neither add to nor take away language by judicial construction. *Johnson v.*

Boundary School Dist. No. 101, 138 Idaho 331, 335, 63 P.3d 457, 461 (2003) (*citing Canal/Norcrest/Columbus Action Committee v. City of Boise*, 136 Idaho 666, 670, 39 P.3d 606, 610 (2011); *Moon v. Investment Board*, 97 Idaho 595, 596, 548 P.2d 861, 862 (1976)). In this case the district court wrongly changed the term "disposed of" to "accepted," a term not used in the statute.[7] Clerk's R. Vol. 1 at 173 (citing law review article stating "it is only necessary that the petition be accepted.").

The district court further erroneously allowed IDWR to ignore the 21-day time limit for "disposing of" A&B's petition for reconsideration. The district court found the statute to be ambiguous because "reasonable minds might differ as to its interpretation." Clerk's R. Vol. 1 at 171. This reasoning is in error. Although IDWR and A&B presented differing interpretations, that does not make the statute or the term "disposed of" ambiguous.

To the contrary, the Idaho Supreme Court has instructed that a statute is ambiguous when:

> [T]he meaning is so doubtful or obscure that reasonable minds might be uncertain or disagree as to its meaning. ***However, ambiguity is not established merely because different possible interpretations are presented to a court.*** If this were the case then all statutes that are the subject of litigation could be considered ambiguous....

Canty v. Idaho State Tax Commission, 138 Idaho 178, 182, 59 P.3d 983, 987 (2002) (internal citations and quotations omitted) (*citing Rim View Trout Co. v. Higginson*, 121 Idaho 819, 823, 828 P.2d 848, 852 (1992)) (emphasis added).

The term "dispose of" does not fall within the category of having a "doubtful" or "obscure" meaning. Therefore, the district court erred in finding the statute to be ambiguous. Since the term "dispose of" in section 67-5246 is unambiguous, no statutory construction was necessary. The court was bound to follow the law as written and should have denied IDWR's

[7] The district court had no basis to ignore the plain language of the statute and attempt to substitute a word with a different meaning. *See e.g. Erickson v. Idaho Bd. of Registration of Professional Engineers and Professional Land Surveyors*, 146 Idaho 852, 856, 203 P.3d 1251, 1255 (2009) (term "issuance" does not mean "service").

motion to dismiss. *See Idaho Power Co.*, 151 Idaho 266, 255 P.3d at 1158. Since A&B's petition for reconsideration was denied by operation of law on June 1st, A&B had a statutory right to appeal the Director's April 27, 2011 *Final Order*. The district court failed to properly interpret the statute and wrongly dismissed A&B's petition for judicial review. This Court should reverse the district court accordingly.

II. The District Court's Interpretation of Section 67-5246 Does Not Follow Idaho's Canons of Statutory Construction.

Assuming for argument's sake that the term "dispose of" is ambiguous, the district court's interpretation still fails under Idaho's canons of statutory construction. First, the court's interpretation erroneously renders the 21-day timeframe irrelevant, a reading that cannot stand. Second, the court's interpretation is unreasonable when considering other sections of Idaho's APA. Consequently, the district court's analysis is erroneous and should be reversed.

A. The District Court's Interpretation Erroneously Renders the Requirement to Decide a Petition for Reconsideration Within 21 Days Irrelevant.

Pursuant to the Idaho APA, any party aggrieved by a final agency order has the right to either ask the agency to reconsider the order or file a petition for judicial review in district court. *See* I.C. §§ 67-5246, 5270.[8] Pursuant to section 67-5246, an aggrieved party knows that if he or she files a petition for reconsideration, a decision must be issued within 21 days, otherwise it is deemed denied by operation of law. *See* I.C. § 67-5246(4). Consequently, even if a petition for reconsideration is filed, any aggrieved party to the proceeding is assured that judicial review may be taken in a timely manner (at most after 21 days from the filing of the petition for reconsideration).

[8] *See also* IDAPA 37.01.01.740; 791.

Under Idaho law, when a court engages in statutory construction it has a duty to ascertain the legislative intent and give effect to that intent. *State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999). Further, it is incumbent upon a court to give a statute an interpretation which will not render it a nullity. *State v. Gill*, 150 Idaho 183, 185, 244 P.3d 1269, 1271 (Ct. App. 2010).

The district court's interpretation of "disposed of" in this case erroneously renders the agency's mandatory 21-day timeframe irrelevant or a nullity. Instead of being required to decide a party's petition, the district court's interpretation allows the agency to merely "accept" it, and then issue a decision at some unknown future date, with absolutely no deadline. This interpretation clearly does not follow the statute's mandate requiring the agency to finally act within 21 days. Accordingly, the court's interpretation cannot be upheld.

Moreover, if state agencies were allowed to give themselves an indeterminate amount of time to decide the merits, it creates uncertainty and a disincentive to file a petition for reconsideration in the first place. As noted by the district court, the agency should be given the first opportunity to correct its possible errors. Clerk's R. Vol. 1 at 160. Ironically, the district court's reasoning would have the opposite effect on parties to administrative cases—especially considering that section 67-5246(5) allows for the final order to become effective while the agency head is further considering the petition's merits.

If an adverse decision is rendered, state law allows a party to seek timely judicial review (within 28 days from the issuance of the final order, or 28 days after a decision on a petition for reconsideration). If the agency is not required to decide a petition for reconsideration by a certain deadline, as suggested by the district court, the agency could prevent timely judicial review for an indefinite period of time. Consequently, the judiciary would become the first

forum of choice to timely cure agency errors, and petitions for reconsiderations would all but cease to exist if no firm timeline governed the agency's actions on such petitions.

This result does not follow the legislature's intent or the 21-day timeframe set forth in the statute. Accordingly, the district court's interpretation is erroneous as a matter of law and should be reversed.

B. The District Court's Interpretation is Unreasonable When Read Together With Other Sections of Idaho's APA.

In addition, courts must construe all sections of applicable statutes together to determine the legislature's intent. *In re Idaho Dept. of Water Resources Amended Final Order Creating Water District No. 170*, 148 Idaho 200, 211, 220 P.3d 318, 329 (2008). The district court's interpretation of "disposed of" in section 67-5246(4) cannot rationally or logically be read in conjunction with "disposed of" in section 67-5246(5). The district court reasoned that the Director "disposed of" the petition for reconsideration within 21 days when he "granted" the petition only to allow for more time to actually decide it. Clerk's R. Vol. 1 at 174. This interpretation fails to account for the timing of when final orders become effective under the Idaho APA, and the consequences of that effectiveness.

Section 67-5246 governs final orders and their effectiveness. The district court does not distinguish "disposing of," "dispose of," or "disposed of" as between the provisions of section 67-5246(4) and (5). Instead, the district court correctly interprets them as one in the same. Clerk's R. Vol. 1 at 171. The court generally addresses "dispose of" in terms of section 67-5246 as a whole, without analyzing the effects of the interpretations of the two provisions when read together. This is significant, because the district court's interpretation of "dispose of" as read in paragraph four would clearly be irrational or unreasonable in the context of paragraph five.

Under section 67-5246(5), the effective date of a final order is tolled for fourteen (14) days unless a petition for reconsideration has been filed.[9] If a petition for reconsideration is filed, the final order's effectiveness is further tolled until the petition for reconsideration is disposed of; or the petition is deemed denied by operation of law. *See* I.C. § 67-5246(5). The statute allows for the effectiveness of a final order to be held in check until a party has an opportunity to file a petition for reconsideration, and then further until the agency decides the petition. Pursuant to the district court's rationale, the effectiveness of the agency's final order would only be tolled up until the point the agency accepted the petition for reconsideration (with the merits to be decided at a later date). This interpretation is unreasonable as it would render section 67-5246(5) and the tolling of the effectiveness of a final agency order superfluous.

The following fact pattern better illustrates this point:

1) the Department issues a Final Order (effectiveness of final order tolled for 14 days);
2) a Petition for Reconsideration is filed (effectiveness of final order further tolled);
3) the Department grants the Petition within 21 days (thus "disposing of" it under the district court's interpretation), but does not decide the merits (to be decided later)

Under this example, since the Department "disposed of" the petition the final order would then be effective under section 67-5246(5)(a). However, the above interpretation creates a conundrum if the agency's final order changes at a later date, or when the Department finally makes a decision on the merits. At that point, the parties will have operated under the first agency order, which would be effective for however long it takes IDWR to actually make a

[9] Pursuant to section 67-5246(4), a party has fourteen (14) days to file a petition for reconsideration. The agency's order is not effective until the 14 day period ends.

decision on the petition.[10] If the Department changes the decision on reconsideration the parties would then be subject to the new order, despite the effectiveness of the prior order. The only other option under the district court's interpretation is that "dispose of" pursuant to section 67-5246(4) means the "acceptance" of a petition, while "dispose of" pursuant to section 67-5246(5) concerns the actual merits of the petition—essentially two different interpretations of the same term. This interpretation would also be irrational as any reasonable person would not know when a petition for reconsideration was considered to be "disposed of." Therefore, the court's reading would render the different parts of section 67-5246 ineffective when read together, an interpretation that cannot stand under Idaho law.

Next, when reviewing other complementary statutes in Idaho's APA it is clear that the court's interpretation is without a reasonable basis. Pursuant to section 67-5273, a petition for judicial review of a final order must be filed within twenty-eight (28) days of the service of the final order, or, if reconsideration is sought, within twenty-eight (28) days after service of the decision thereon. *See* I.C. § 67-5273(2). Pursuant to the district court's interpretation, A&B's petition for reconsideration was *disposed of* on June 1, 2011, however the merits were to be decided at a later date. In *Erickson,* the petition for judicial review was filed more than twenty-eight days after the agency issued its order denying (i.e. disposing of) the motion for reconsideration but within twenty-eight days of service. 146 Idaho at 854. The appeal was dismissed holding that the twenty-eight-day appeal period began on the day that the agency

[10] If IDWR grants a petition for reconsideration solely to provide more time for a decision, what is the agency's deadline? 30 days? 6 months? 1 year? If the agency takes several months or longer to finally decide a party's petition for reconsideration, which is allowed under the district court's interpretation, but ultimately "denies" the requested relief, the statutory timeframes that ensure timely judicial review are unlawfully circumvented, leaving a party without any timely remedy in court. Such an example is problematic in water right administration cases like A&B's. Although A&B requested confirmation that IDWR would proceed with the ordered remand in November 2010, the agency failed to take any action and prevented timely judicial review until the middle of the 2011 irrigation season.

issued the order on reconsideration, which was the day the order on reconsideration was signed and dated. *Id.* at 853–54.

Under the district court's reasoning, pursuant to section 67-5273, there is ambiguity surrounding the deadline for the filing of the petition for judicial review in this case. The Director "disposed of" the petition for reconsideration by written order issued on June 1, 2011. However, IDWR did not decide the merits until a later date, thus offering a second decision on the petition. Under the district court's interpretation there is additional uncertainty and ambiguity about when A&B was required to file a petition for judicial review under section 67-5273. However, under A&B's interpretation, the answer is clear since the petition was denied by operation of law on June 1st and the statutes seamlessly work logically and rationally with one another to allow for timely judicial review.

In sum, the interpretation offered by the district court cannot stand when reading the entire statute and other sections together. Since a party has a right to timely judicial review of any final agency order, filing a petition for reconsideration does not render those provisions in section 67-5246 meaningless. If a petition is filed, the agency must decide or "dispose of" the petition with 21 days. This ensures a party's right to timely judicial review under section 67-5273. The Department has no authority to "grant" the petition, and then decide the merits on its own schedule without restriction. The Court should reverse the district court accordingly.

III. Assuming the Term "Disposed of" is Ambiguous, the Court Erred by Giving Deference to the Department's Interpretation Under the Test Set Forth in *J.R. Simplot Co. v. Idaho State Tax Comm'n.*

The Court found the term "disposed of" was ambiguous, and then analyzed the Department's interpretation under the four prong test announced in *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991). Pursuant to this test, the

court found there were several rationales underlying IDWR's interpretation, and that "application of the *Simplot Test* weighs in favor of deference to the agency interpretation." Clerk's R. Vol. 1 at 173 (emphasis in original). Assuming for argument's sake the term "disposed of" is ambiguous, the district court erred in its application of the four-prong *Simplot Test.*[11]

Next, the Idaho Supreme Court has instructed that even though an agency's interpretation may be entitled to deference:

> "the ultimate responsibility to construe legislative language to determine the law" rests with the judiciary, and the underlying consideration whether or not such deference is granted is to ascertain and give effect to legislative intent.

Sons & Daughters of Idaho, Inc. v. Idaho Lottery Com'n, 144 Idaho 23, 26, 156 P.3d 524, 527 (2007) (citing *Mason v. Donnelly Club*, 135 Idaho 581, 583, 21 P.3d 903, 905 (2001)).

Furthermore, an agency's interpretation is only entitled to deference if it is reasonable and not contrary to the express language of the statute. *Id.* Since IDWR's interpretation contradicts the plain language of section 67-5246, the district court erred in its application of the *Simplot Test.*

A. First Prong

Under the first prong of the *Simplot Test*, the agency must be entrusted with the responsibility to administer the statute at issue in order to be "impliedly clothed with power to construe" the law. *J.R. Simplot Co., Inc.*, 120 Idaho at 854, 820 P.2d at 1211. The court must first determine whether the agency has been entrusted with the responsibility to administer the statute at issue—and only if the agency has received this authority will it be "impliedly clothed with power to construe" the law. *Id.*

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[11] Since the district court erred in its interpretation of section 67-5246, it is unnecessary for this Court to review whether or not IDWR's interpretation is entitled to *Simplot* deference. *See Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 388, 398, 111 P.3d 73, 83 (2005) ("Whether or not the SIF's interpretation of former I.C. § 72-911 is entitled to *Simplot* deference is a moot issue if the district court's finding that the statute did not place a limit on the amount of premiums the SIF could set aside for its surplus is proper.").

The district court erred in finding IDWR was "entrusted to administer Idaho Code § 67-5246 with respect to petitions for reconsideration filed in the administrative actions before it." Clerk's R. Vol. 1 at 172. Although IDWR falls within the purview of the APA generally, IDWR is not specifically charged to administer the statute. Section 67-5246 falls under the purview of Chapter 52, Title 67, Idaho Code (the Idaho Administrative Procedure Act), which governs State Government and Affairs. On the other hand, IDWR is created under section 42-1701, and charged with the duties and responsibilities of administration derived under Title 42. *See Henderson v. Eclipse Traffic Control & Flagging, Inc.*, 147 Idaho 628, 632, 213 P.3d 718, 722 (2009). IDWR is just one of several state agencies subject to the procedures and requirements in the APA. *See Vickers v. Lowe*, 150 Idaho 439, 442, 247 P.3d 666, 669 (2011) (APA governs contested cases before state agencies, which includes the Idaho Transportation Department).[12]

Statutes like the APA that apply to agencies generally do not meet the first prong of the *Simplot Test*. In *Westway Const., Inc. v. Idaho Transp. Dept.*, 139 Idaho 107, 73 P.3d 721 (2003), the Idaho Supreme Court addressed a similar issue:

> Here, the ITD has not been entrusted by the legislature with the responsibility to administer Idaho Code § 54-1904C. ***That statute applies generally to any public entity*** receiving bids for public works construction, not just to bids submitted to ITD. ***Therefore, any interpretation by the ITD of the statute would not be entitled to deference.***

139 Idaho at 116, 73 P.3d at 730 (emphasis added).

Like the Idaho Transportation Department and the general public works bidding statute in *Westway Const., Inc.*, here IDWR is not charged to administer Idaho's APA. Considering there are a multitude of different agencies, and possible interpretations, the Department has not been entrusted with the sole responsibility to administer the statute at issue to garner the deference provided in *Simplot*. *See also, Kopp v. State*, 100 Idaho 160, 163, 595 P.2d 309, 312 (1979).

[12] The APA is not exclusive to any particular state agency.

Otherwise, IDWR would be empowered to interpret the APA on behalf of every state agency, a power that has never been entrusted to the Department or the Director.

B. Second Prong

The second prong of the test is that the agency's statutory construction must be reasonable. *J.R. Simplot Co., Inc.*, 120 Idaho at 862, 820 P.2d at 1219. In *State v. Omaechevviaria*, the Idaho Supreme Court indicated that deference would not be appropriate when an agency interpretation "is so obscure and doubtful that it is entitled to no weight or consideration." *Id.* (quoting and citing to *State v. Omaechevviaria*, 27 Idaho 797, 152 P. 280, 281 (1915)); *see also, Breckenridge v. Johnston,* 62 Idaho 121, 108 P.2d 833 (1940).

The district court found IDWR's interpretation to be reasonable on the basis that some petitions for reconsideration can be "complex" and may require a briefing schedule and argument that could extend beyond the 21-day timeframe in the statute.[13] Clerk's R. Vol. 1 at 172. The court was concerned about the agency having sufficient time to consider and respond to a petition for reconsideration. However, the timing to decide a petition for reconsideration is clearly defined by statute (21 days). *See* I.C. § 67-5246. Despite the district court's concern for IDWR to have sufficient time to fully consider and respond to "complex" petitions for reconsideration, that decision is for the legislature, not the court or the agency.[14] *See Johnson v. Boundary School Dist. No. 101*, 138 Idaho 331, 336, 63 P.3d 457, 462 (2003) (courts are constrained to follow the plain meaning of statute, and neither add to the statute nor take away by judicial construction); *Gibson v. Bennett*, 141 Idaho 270, 274, 108 P.3d 417, 421 (Ct. App. 2005)

[13] In this case IDWR did not order additional briefing or argument on A&B's petition for reconsideration. Therefore, the court's reasoning that a "complex" petition may require additional proceedings did not apply based on the facts in the record.

[14] The legislature could amend section 67-5246 to create an exception for certain petitions or specifically give an agency authority to extend the time period to respond in its discretion. However, the legislature has done nothing of the sort, and courts are constrained to follow the law as written.

("If the statute as written is socially or otherwise unsound, the power to correct it is legislative, not judicial.").

In light of the plain wording of section 67-5246, the Department's interpretation is unreasonable and entitled to no deference since it would provide no objective standard for reviewing and deciding petitions for reconsideration. Agencies could "grant" petitions to allow for further decision without restriction, thus preventing timely judicial review. Allowing for this interpretation would essentially render a petition for reconsideration a useless nullity, which cannot stand.

C. Third Prong

The third prong for allowing agency deference is that a court must determine that the statutory language at issue does not expressly treat the precise question at issue. *J.R. Simplot Co., Inc.*, 120 Idaho at 862, 820 P.2d at 1219. An agency construction will not be followed if it contradicts the clear expressions of the legislature. *Id.* at 862-63, 820 P. 2d at 1219-20.

The district court states, "[s]ince the term 'disposed of' is undefined, and subject to conflicting interpretations, the third prong of the test is met." Clerk's R. Vol. 1 at 172. As explained earlier, there is no room for construction of a statute whose terms, though not defined, have a plain, obvious, and rational meaning. *Idaho Power Co.*, 151 Idaho 266, 255 P.3d at 1158. Accordingly, contrary to the district court's analysis, the twenty-one (21) day provision found in section 67-5246 plainly expresses the legislature's intentions and precisely addresses the question at issue. Therefore, the third prong of the *Simplot Test* is not met in this case and IDWR's interpretation should not have been afforded any deference.

D. Fourth Prong

Assuming for argument's sake that the first three prongs are met, under the fourth prong a court must decide whether any of the rationales underlying the rule of deference are present. The district court reasoned that one of the rationales underlying deference is that the agency interpretation is "practical," and the agency has "expertise." Clerk's R. Vol. 1 at 173. The district court relies on an approach it deems practical inasmuch as it is not always "possible or practical for an agency head to have to rule on the merits of a petition for reconsideration with 21 days of filing, especially where the agency head desires further briefing to be submitted and oral argument on the issues raised" *Id.* at 172-73. This practicality argument does not address the statute's tolling of the final order's effectivness, the complementary statutes regarding petition for judicial review timing, or why the legislature created a 21-day deadline in the first place. The "practical" problem the district court has created is that the legislature's requirement to "dispose of" a petition for reconsideration in 21 days is now nothing more than a license for the agency head to issue a written decision on the merits whenever the agency wants. This interpretation cannot stand.

The agency likewise lacks the expertise to interpret a general administrative statute of broad applicability like the APA. *See Westway Const., Inc.*, 139 Idaho at 116, 73 P.3d at 730. IDWR does not have any more or less expertise than any other state agency when determining the meaning of "disposed of" as used in section 67-5246. Accordingly, the fourth prong is not satisfied in this case.

In sum, the term is "disposed of" is not ambiguous, however if it were, the Department's interpretation would not garner any deference pursuant to the four prong *Simplot Test.*

IV. The District Court Erroneously Denied A&B's Motion to Strike.

A&B moved to strike the *Affidavit of Chris M. Bromley* as it contained two orders issued by the Director after the 21-day deadline set forth in section 67-5246. Clerk's R. Vol. 1 at 118. Since the Director had no authority to issue the orders, his actions were *ultra vires* and therefore void as a matter of law. *Burnside v. Gate City Steel Corp.*, 112 Idaho 1040, 1047, 739 P.2d 339, 346 (1987). The void documents had no relevance to the judicial review proceeding before the district court and should have been stricken pursuant to I.R.C.P. 12(f).

Relying upon its interpretation of section 67-5246, the district court denied A&B's motion to strike. Clerk's R. Vol. 1 at 174. For the reasons set forth above, the court erred as a matter of law in its interpretation of the term "disposed of" in section 67-5246. Consequently, the district court's ruling on A&B's motion to strike is erroneous as well. The district court had no legal basis to admit the documents that resulted from *ultra vires* actions of the Director. Therefore, the district court abused its discretion and its denial of A&B's motion to strike should be reversed.

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CONCLUSION

The Department failed to "dispose of" A&B's petition for reconsideration within 21 days as required by section 67-5246. By operation of law, the petition was denied on June 1, 2011. A&B properly filed a timely petition for judicial review. The district court failed to properly interpret the plain and unambiguous statute and consequently erred in dismissing A&B's petition for judicial review. In addition, the district court wrongly denied A&B's motion to strike. The Court should reverse and remand the case accordingly.

DATED this 13 day of December, 2011.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of December, 2011, I served true and correct copies of the foregoing *A&B Irrigation District's Opening Brief* upon the following by the method indicated:

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