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DEPARTMENT OF
WATER RESOURCES

Docket No. 40169-2013

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 Director
of the IDAHO DEPARTMENT OF WATER RESOURCES; Respondents,
and,
IDAHO GROUND WATER APPROPRIATORS, INC. and THE CITY OF POCA TELLO;
Intervenors-Respondents.

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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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE.....	1
I. Nature of the Case.....	1
II. Course of Proceedings / Statement of Facts.	1
ISSUES PRESENTED ON APPEAL.....	6
STANDARD OF REVIEW	7
SUMMARY OF ARGUMENT	8
ARGUMENT	10
I. The District Court’s Dismissal Violates A&B Irrigation District’s Constitutional Right to Due Process.	10
II. The District Court’s Dismissal of A&B’s Petition for Judicial Review Violates the Law of the Case.	13
III. The District Court Erred as a Matter of Law in Dismissing A&B’s Petition for Judicial Review.....	15
A. The Interconnection Study Obligation Does Not Preclude the Director From Considering and Issuing a Decision on the Merits of A&B’s Delivery Call.	15
B. The District Court’s Dismissal at this Stage of the Litigation Prejudices A&B and Violates this Court’s Long-Standing Policy to Decide Cases on Their Merits.....	18
C. The Merits of A&B’s Appeal Issues #1 & #3 Are Subject to Judicial Review.	22
D. Assuming for Argument’s Sake that the Case is Moot, the District Court Erred in Failing to Recognize an Exception to the Mootness Doctrine Relating to A&B’s Issues #2, #6, and #7.	24
IV. If the District Court’s Interpretation of <i>A&B Irr. Dist. v. IDWR</i> , 153 Idaho 500 (2012) is Correct, then the Court Erred in Failing to Vacate the <i>Remand Order</i>	29
CONCLUSION.....	33
CERTIFICATE OF SERVICE	35

TABLE OF AUTHORITIES

CASES

<i>A&B Irr. Dist. v. IDWR</i> , 153 Idaho 500 (2012).....	passim
<i>A&B Irr. Dist. v. IDWR</i> , 154 Idaho 652, 301 P.3d 1270 (2012).....	passim
<i>American Lung Assoc. of Idaho/Nevada v. Idaho State Dept. of Ag.</i> , 142 Idaho 544 (2006).....	passim
<i>Baruch v. Clark</i> , 154 Idaho 732, 302 P.3d 357 (2013).....	7
<i>Bower v. Moorman</i> , 27 Idaho 162 (1915).....	27
<i>Bradbury v. Idaho Judicial Council</i> , 136 Idaho 63 (2001).....	11, 12
<i>Bunn v. Bunn</i> , 99 Idaho 710 (1978)	22
<i>Burnside v. Gate City Steel Corp.</i> , 112 Idaho 1040 (1987)	21, 31
<i>Christopher v. SmithKline Beecham Corp.</i> , 132 S. Ct. 2156 (2012)	17
<i>Clear Springs Foods, Inc. v. Spackman</i> , 150 Idaho 790 (2011)	27
<i>Defenders of Wildlife v. Norton</i> , 258 F.3d 1136 (9 th Cir. 2001)	17
<i>Dorion v. Keane</i> , 153 Idaho 371 (Ct. App. 2012).....	22
<i>Galli v. Idaho County</i> , 146 Idaho 155 (2008).....	10
<i>Graves v. Cogswell</i> , 97 Idaho 716 (1976).....	12
<i>Idaho Dept. of Health & Welfare v. Doe</i> , 150 Idaho 103 (Ct. App. 2010).....	27
<i>Idaho Mutual Benefit Assoc. v. Robison</i> , 65 Idaho 793 (1944)	12
<i>J.R. Simplot Co., Inc. v. Idaho State Tax Comm'n</i> , 120 Idaho 849 (1991)	30
<i>Jasso v. Camas County</i> , 151 Idaho 790 (2011)	7, 12, 30, 33
<i>Jenkins v. State Dept. of Water Resources</i> , 103 Idaho 384 (1982).....	33
<i>Nelson v. Pumnea</i> , 106 Idaho 48 (1983).....	22
<i>Rammell v. Idaho State Dept. of Agriculture</i> , 147 Idaho 415 (2009)	7
<i>Sagewillow, Inc. v. IDWR</i> , 138 Idaho 831 (2003)	7, 12
<i>Schevers v. State</i> , 129 Idaho 573 (1996).....	11
<i>SE/Z Const., LLC v. Idaho State University</i> , 140 Idaho 8 (2004).....	7
<i>State of Or., Dep't of Human Res. v. Heckler</i> , 651 F. Supp. 6 (D. Or. 1984)	17
<i>State v. Finch</i> , 79 Idaho 275 (1957).....	12
<i>Swanson v. Swanson</i> , 134 Idaho 512 (2000).....	14

<i>Taylor v. Maile</i> , 146 Idaho 705 (2009)	13
<i>United States v. Pioneer Irr. Dist.</i> , 144 Idaho 106 (2007).....	1
<i>Webb v. Webb</i> , 143 Idaho 521 (2006).....	25
<i>Westway Const., Inc. v. Idaho Transp. Dept.</i> , 139 Idaho 107 (2003)	21, 30, 32

CONSTITUTION & STATUTES

Idaho Code § 42-1701	30
Idaho Code § 42-1805	30
Idaho Code § 42-226	31
Idaho Code § 55-101	33
Idaho Code § 67-5201(12)	32
Idaho Code § 67-5246	12
Idaho Code § 67-5270	8, 12, 31, 33
Idaho Code § 67-5279(3)	7
Idaho Code §§ 42-601, et seq	31
IDAHO CONST. Art. I, § 13	11

RULES & REGULATIONS

IDAPA 37.01.01.001, et seq.	31
IDAPA 37.01.01.005.15	32
IDAPA 37.03.11.001, et seq.	31

STATEMENT OF THE CASE

I. Nature of the Case.

This is an appeal of the district court's *Memorandum Decision on Petition for Judicial review*, dated April 25, 2013 ("*Memorandum Decision*"). Clerk's R. 279.¹ The court dismissed A&B Irrigation District's ("A&B" or "District") appeal of the *Final Order on Remand Regarding the A&B Irrigation District Delivery Call* ("*Remand Order*") issued by the Director of the Idaho Department of Water Resources ("IDWR" or "Department"). R. 3469.

II. Course of Proceedings / Statement of Facts.

A&B is the beneficial owner of water right 36-2080² authorizing the diversion of 1,100 cfs (0.88 miner's inches per acre) from 177 active points of diversion, or wells, with a priority date of September 9, 1948.³ R. 3081. The District filed a delivery call in early 1994 seeking the administration of junior priority ground water rights that were injuring the District's senior ground water right. R. 12-14. IDWR accepted the call and initiated a contested case. R. 607 (Notice of Pre-Hearing Conference). IDWR did not refuse to consider the call for any reason related to A&B's alleged misuse of its multiple wells or its failure to present a study on why further interconnection was not financially or technically practical.

¹ References in this Brief to the various records are as follows:

- The Administrative Record will be referenced as "R. #,"
- The Limited Clerk's Record on Appeal will be referenced as "Clerk's R. #," and
- The Supplemental Limited Clerk's Record on Appeal will be referenced as "Clerk's Supp. R. #."

² Water right 36-2080 is held in trust by the United States, for the benefit of A&B and its landowners. *United States v. Pioneer Irr. Dist.*, 144 Idaho 106 (2007).

³ For a brief history of the A&B project and delivery call see *A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 503 (2012).

Following a stay order entered in 1995, A&B filed a *Motion to Proceed* on March 16, 2007. R. 830. Initially, IDWR failed to act on the request forcing the District to seek a writ of mandate from the Minidoka County District Court. R. 1106. The court issued the writ, ordering the Director to “make a determination of material injury, if any, in accordance with Rule 42 of the Conjunctive Management Rules on or before January 15, 2008.” R. 964. IDWR then requested information from A&B.⁴ *Id.*

After reviewing A&B’s information, former Director David R. Tuthill Jr. issued an initial order on January 29, 2008. R. 1105. The Director concluded A&B’s senior ground water right was not materially injured. R. 1150. A&B challenged this initial order and exercised its right to an administrative hearing. R. 1182. Former Chief Justice Gerald F. Schroeder presided and issued a recommended order wherein he found:

Considering the fact that the project was developed, licensed and partially decreed as a system of separate wells with multiple points of diversion, it is not A&B’s obligation to show interconnection of the entire system to defend its water rights and establish material injury. However, it is equally clear that the licensing requested by the Bureau of Reclamation envisioned flexibility in moving water from one location to another. Consequently, there is an obligation of A&B to take reasonable steps to maximize the use of that flexibility to move water within the system before it can seek curtailment or compensation from junior users. A&B has some interconnection within the system to utilize the water it can pump, but the record does not establish whether further interconnection is either financially or technically practical.

R. 3096-97 (emphasis added).⁵ This finding is referred to herein as the “interconnection study obligation.”

⁴ Again, the Director did not dismiss the call or refuse to consider it on the basis that A&B had failed to complete an interconnection study regarding the use of its wells.

⁵ This finding was adopted by the Director. R. 3360.

The Director then issued a final order on June 30, 2009 (“*Final Order*”). R. 3318.

Again, the Director did not “dismiss” A&B’s call or refuse to rule on the merits due to a lack of an interconnection study.

A&B appealed the *Final Order* to district court. R. 3363. On May 4, 2010, the court issued its *Memorandum Decision*.⁶ Clerk’s Supp. R. 366. Regarding the interconnection obligation, the district court determined:

[T]he extent to which the Director may require A&B to move water around within the Unit prior to regulating junior pumpers is left to the discretion of the Director. The Director concluded that A&B must make reasonable efforts to maximize interconnection of the system and placed the burden on A&B to demonstrate where interconnection is not physically or financially practical. The Director did not abuse discretion in imposing such a requirement.

Id. at 404.

The court however, also remanded a portion of the Director’s order back to the agency for further action:

The Director erred by failing to apply the evidentiary standard of clear and convincing evidence in conjunction with the finding that the quantity decreed to A&B’s 36-2080 exceeds the quantity being put to beneficial use for purposes of determining material injury. 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.

Id. at 414.

⁶ The City of Pocatello and the Idaho Ground Water Appropriators, Inc. filed petitions for rehearing. Clerk’s Supp. R. 417, 422. On November 2, 2010 the district court entered its *Memorandum Decision and Order on Petitions for Rehearing* affirming the prior decision. Clerk’s Supp. R. 610. The court then entered its *Judgment* remanding the case to the Director to “apply the appropriate evidentiary standard of clear and convincing evidence to the existing record” to re-evaluate A&B’s delivery call and the Director’s prior no-injury determination. *Id.* at 631-32.

From this point, A&B's call followed two separate paths. First, no party, including IDWR, appealed the court's ordered remand.⁷ Accordingly, that portion of the case continued before the Director for further action. However, the balance of the case was appealed to this Court. *See A&B Irr. Dist. v. IDWR*, 153 Idaho 500.

Shortly after the district court issued its decision denying the petitions for rehearing in November 2010, A&B's counsel requested confirmation of the ordered remand and whether the Director would consider a financial and technical feasibility report on "interconnection" of wells within the project. Clerk's Supp. R. 684. Over two months later IDWR's counsel finally responded and claimed "because the evidentiary standard of review . . . has been appealed, the Department will not proceed with the remand until a final decision has been issued by the Idaho Supreme Court." *Id.* at 688. The response further indicated that IDWR would only "field questions" about A&B's proposed study. *Id.* Since the agency refused to follow the district court's final judgment and provided no assurance that an interconnection study would be accepted, A&B was forced to seek further relief from the district court. Clerk's Supp. R. 664.

In its motion A&B asked for the following: (i) an order compelling the Director to comply with the ordered remand; and (ii) an order requiring the Director to consider an interconnection study to be prepared by A&B. *Id.* at 665. IDWR opposed the motion but admitted that if the court granted A&B's request, then "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." Clerk's Supp. R. 762. Again, IDWR never alleged that the lack of an

⁷ No party filed a motion to "stay" the ordered remand either.

interconnection study at that point prevented the agency from completing the ordered remand and evaluating A&B's call pursuant to the proper burdens of proof and evidentiary standards required by Idaho law.

The district court granted A&B's motion in part and denied it in part. Clerk's Supp. R. 789. In particular, the district court ordered the Director to comply with the remand. *Id.* at 791-93. However, the court refused to order IDWR to consider an interconnection study as part of this case due to the limited nature of the remand and a perceived lack of jurisdiction. *Id.* at 793-94. Although A&B had requested the opportunity to prepare and submit the interconnection study as part of the remand proceeding, the district court stated: "The evidence A&B seeks to introduce to the Director regarding the interconnectivity of its system is outside the scope of the *Order of Remand*. This Court does not have jurisdiction in this case, and under these circumstances, to order that an action be taken outside the scope of the *Order of Remand*." *Id.* at 793.

Importantly, neither the district court nor the Department ever claimed the lack of an interconnection study rendered A&B's call, or the ordered remand, "moot." Instead, the Director complied with the court's order and issued the *Remand Order* on April 27, 2011. R. 3469.

Importantly, the order included the following language:

IT IS FURTHER ORDERED that pursuant to sections 67-5270 and 67-5272, Idaho Code, ***any party aggrieved by the final order*** may appeal the final order to district court by filing a petition in the district court ...

R. 3490 (emphasis added).

A&B filed a petition for reconsideration. R. 3492. The Director then failed to act on A&B's petition within the twenty-one (21) day statutory timeframe. Consequently, A&B filed a timely appeal of the *Remand Order* to district court. However, the court dismissed A&B's petition for judicial review claiming the *Remand Order* was not a final agency action. *See A&B Irr. Dist. v. IDWR*, 154 Idaho 652, 301 P.3d 1270 (2012). The court's dismissal was certified as final and A&B appealed the decision to this Court. This Court reversed and determined that A&B had a right to seek judicial review of the Director's April 27, 2011 *Remand Order*. *Id.*

Following this Court's remittitur, the district court issued a scheduling order on October 16, 2012 to review A&B's petition for judicial review. Clerk's R. 4. IDWR then moved to remand the case back to the agency claiming neither A&B nor the Department "supported" the *Remand Order*.⁸ Clerk's R. 18. The district court denied IDWR's motion and the case proceeded to briefing and oral argument on A&B's petition. Clerk's R. 44.

On April 25, 2013, the district court entered its *Memorandum Decision*. Clerk's R. 279. The court dismissed A&B's petition "with prejudice" on the theory that the case was "moot." This appeal followed.

ISSUES PRESENTED ON APPEAL

A&B presents the following issues on appeal:

A. Whether the district court's dismissal of the case violates A&B Irrigation

District's constitutional right to due process?

B. Whether the district court's dismissal violates the law of the case doctrine?

⁸ IDWR did not allege case was moot at this point, even though the agency filed its motion for remand over two months after this Court issued its decision in *A&B Irr. Dist. v. IDWR*, 153 Idaho 500.

C. Whether the district court erred as a matter of law in dismissing A&B's petition for judicial review?

D. Whether the district court erred in failing to vacate the *Remand Order* in light of its reliance on this Court's decision in *A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 284 P.3d 225 (2012)?

STANDARD OF REVIEW

Any party "aggrieved by a final order in a contested case decided by an agency may file a petition for judicial review in the district court." *Sagewillow, Inc. v. IDWR*, 138 Idaho 831, 835 (2003). An agency's decision must be overturned if it (a) violates "constitutional or statutory provisions," (b) "exceeds the agency's statutory authority," (c) "was made upon unlawful procedure," (d) "is not supported by substantial evidence in the record as a whole" or (e) is "arbitrary, capricious or an abuse of discretion." *Chisholm v. IDWR*, 142 Idaho 159, 162 (2005) (citing Idaho Code § 67-5279(3)). Further, this Court recently held that a "reviewing court must vacate and remand for further agency action if" the agency's decision violates any provision of section 67-5279. *Jasso v. Camas County*, 151 Idaho 790, 793 (2011).

When reviewing a decision of the district court acting in its appellate capacity, this Court directly reviews the district court's decision. *Rammell v. Idaho State Dept. of Agriculture*, 147 Idaho 415, 419 (2009). The Supreme Court exercises free review of the legal issues analyzed by the district court. *Baruch v. Clark*, 154 Idaho 732, 302 P.3d 357, 361 (2013). This Court also exercises free review over constitutional issues. *SE/Z Const., LLC v. Idaho State University*, 140 Idaho 8, 12 (2004).

SUMMARY OF ARGUMENT

The district court's decision erroneously throws A&B Irrigation District into the ultimate administrative "Catch-22." On the one hand, the Director issued a final administrative order determining the legal rights regarding A&B's water delivery call. The district court ordered the Director to take this action both through a final judgment and later by granting A&B's motion to enforce. On the other hand, the court later dismissed A&B's petition for judicial review of the Director's *Remand Order* alleging the case was "moot." The court and the agency cannot have it both ways. Either the *Remand Order* is a final agency action and subject to judicial review by law, or it is not, and should be vacated accordingly. The District submits the court erred for the following reasons and that this Court should reverse and remand the case accordingly.

First, the failure to provide judicial review of a final agency action violates A&B's constitutional right to due process. If the Director's *Remand Order* is a final agency action, which the order plainly states that it is, then A&B is entitled to appeal that decision to district court. The court's dismissal violates A&B's constitutional right and is further contrary to the provisions of Idaho's APA. I.C. § 67-5270.

Second, the law of the case doctrine precludes the district court's action. Since the court previously ordered the Director to re-evaluate injury to A&B's senior water right, through application of the proper burdens of proof and evidentiary standards, the court could not thereafter declare the case moot. After all, the court's final judgment ordering the remand was not appealed and therefore became law of the case. The court's dismissal violates this doctrine and therefore should be reversed and set aside for that reason as well.

Next, the lack of an interconnection study does not preclude resolving A&B's call on its merits. IDWR accepted the call, held an administrative hearing, and issued a final order. The agency never requested, and did not claim it lacked jurisdiction due to the lack of any interconnection study from A&B. Moreover, the district court accepted A&B's initial petition for judicial review resulting in the first appeal to this Court. *A&B Irr. Dist. v. IDWR*, 153 Idaho 500. No party, including IDWR, ever alleged the case was "moot" or that the remand could not proceed as ordered. Whereas established agency precedent allows IDWR to decide the merits of a call and withhold implementing curtailment, the agency wrongly switched positions and the district court erroneously dismissed A&B's petition for judicial review. Further, the failure to decide A&B's petition for judicial review was prejudicial and violated this Court's policy to decide cases on their merits.

Next, assuming the case is "moot" for argument's sake, the district court failed to apply an established exception to the doctrine that would have allowed for a decision on the merits. Finally, assuming the district court correctly interpreted this Court's decision in *A&B Irr. Dist. v. IDWR*, the court erred in failing to vacate the *Remand Order*. If the interconnection study was a valid precondition to the filing of A&B's call, then the Director did not have any authority to decide the merits and issue the decisions in this case. Stated another way, the Director has no authority to issue final orders that are insulated from judicial review. The district court should have vacated the *Remand Order* accordingly.

For these reasons A&B respectfully requests this Court to correct these errors of law and reverse the district court accordingly.

ARGUMENT

I. The District Court's Dismissal Violates A&B Irrigation District's Constitutional Right to Due Process.

The Director issued the *Remand Order* on April 27, 2011. R. 3469. As ordered by the district court, the Director was required to apply the “clear and convincing evidence” standard to the record and evaluate whether A&B’s senior water right was materially injured. At the administrative hearing, all of A&B’s landowners testified they could beneficially use 0.88 miner’s inches per acre on their individual farms. Clerk’s R. 75, 76. IDWR also represented to the district court that A&B has the right to beneficially use its decreed quantity. Clerk’s Supp. R. 169 (“A&B maintains the ability to exercise the full extent of its right ... at no time in these proceedings was A&B informed, or should it infer, that it was not authorized to exercise the full extent of its right”).

Despite the undisputed evidence showing that A&B could beneficially use its decreed quantity, the Director erroneously concluded that A&B’s senior ground water right was not materially injured. R. 3489. The Director’s decision was not supported by evidence in the record and was clearly erroneous. *Galli v. Idaho County*, 146 Idaho 155, 159-60 (2008). In light of this final administrative order affecting A&B’s and its landowners’ water rights, or real property right interests, A&B filed a notice of appeal and petition for judicial review with the district court. Clerk’s R. 25.

Despite scheduling the case for briefing and oral argument, the district court failed to review the Director’s *Remand Order* and instead dismissed A&B’s petition on the theory that the

case was “moot.” Clerk’s R. 287. Relying upon this Court’s decision in *A&B Irr. Dist. v. IDWR*, 153 Idaho 500, the court concluded that A&B had an obligation to work reasonably to “interconnect some individual wells or well systems before a delivery call could be filed.” *Id.* The court further noted that there was “no finding by the Director that A&B has taken the reasonable interconnection steps contemplated by the Idaho Supreme Court ... Therefore, A&B is not entitled to the relief it seeks.” *Id.*

Although A&B had previously requested the opportunity to complete and submit an interconnection study as part of the ordered remand, the district court denied A&B’s request, asserting it had no jurisdiction and that such evidence was beyond the scope of the remand. Clerk’s Supp. R. 793. In other words, the court concluded there was no avenue to present the interconnection study as part of the record in this case. Yet in its *Memorandum Decision* the district court used the lack of an interconnection study against A&B as a basis to dismiss the petition for judicial review. The court’s dismissal violates A&B’s constitutional right to due process.

The Fourteenth Amendment to the United States Constitution secures both substantive and procedural due process rights. *Bradbury v. Idaho Judicial Council*, 136 Idaho 63, 70 (2001). Like the Federal Constitution, the Idaho Constitution also includes a due process clause, which states that “[n]o person shall ... be deprived of life, liberty or property without due process of law.” IDAHO CONST. Art. I, § 13; *Schevers v. State*, 129 Idaho 573, 577 (1996).

The due process clause of the Fourteenth Amendment “prohibits deprivation of life, liberty, or property without ‘fundamental fairness’ through governmental conduct that offends

the community's sense of justice, decency, and fair play." *Bradbury*, 136 Idaho at 72. Notice and an opportunity to be heard are components of due process. *Jasso*, 151 Idaho at 796.

Due process also requires that parties be afforded a meaningful opportunity for judicial review. *Bradbury*, 136 Idaho at 72. This Court has repeatedly held that unless an appeal is provided from a decision of an administrative agency to a court of law, due process has not been satisfied and is denied. *See Graves v. Cogswell*, 97 Idaho 716, 717 (1976); *State v. Finch*, 79 Idaho 275 (1957); *Idaho Mutual Benefit Assoc. v. Robison*, 65 Idaho 793 (1944).

There is no question that the Director's *Remand Order* is a final agency action under Idaho's Administrative Procedures Act. I.C. § 67-5246. The APA provides A&B with an express right to judicial review. I.C. § 67-5270; *see also, Sagewillow, Inc.*, 138 Idaho at 835. On its face the *Remand Order* plainly provides that A&B is entitled to "appeal the final order to district court." R. 3490. Moreover, this Court previously found that A&B was entitled to seek judicial review of the *Remand Order*. *A&B Irr. Dist.*, 301 P.3d at 1274 ("A&B was entitled to seek judicial review of that order, and the district court erred in dismissing its petition on the ground that the April 27 order was not final."). A&B exercised its constitutional and statutory right to appeal the Director's *Remand Order*. Clerk's R. 25.

Despite challenging the Director's action on remand, and demonstrating how his decision was "clearly erroneous" and not supported by any evidence in the agency record, the district court claimed the case was "moot" and dismissed A&B's petition "with prejudice." Clerk's R. 287, 295. In doing so, the district court violated A&B's constitutional right to due process. In other words, the district court wrongly insulated the Director's *Remand Order* from judicial

review contrary to the United States and Idaho Constitutions. *See, e.g., American Lung Assoc. of Idaho/Nevada v. Idaho State Dept. of Ag.*, 142 Idaho 544, 546 (2006) (“To hold that a subsequent determination moots a pending appeal from a prior determination would preclude judicial review of the determinations”). Therefore, this Court should reverse the district court and remand the case for further proceedings.

II. The District Court’s Dismissal of A&B’s Petition for Judicial Review Violates the Law of the Case.

In addition to violating A&B’s constitutional right to due process, the district court’s dismissal is contrary to the law of the case. The “law of the case” doctrine “prevents consideration on a subsequent appeal of alleged errors that might have been, but were not, raised in the earlier appeal.” *Taylor v. Maile*, 146 Idaho 705, 709 (2009). Here, the “law of the case” prevents the district court from finding the case is “moot” and dismissing A&B’s petition for judicial review.

In its original decision on judicial review issued in May 2010, the district court concluded:

[T]he extent to which the Director may require A&B to move water around within the Unit prior to regulating junior pumpers is left to the discretion of the Director. The Director concluded that A&B must make reasonable efforts to maximize interconnection of the system and placed the burden on A&B to demonstrate where interconnection is not physically or financially practical. The Director did not abuse discretion in imposing such a requirement.

Clerk’s Supp. R. 404.

Importantly, and at the same time, the court also remanded a portion of the case back to IDWR for further consideration and analysis:

The Director erred by failing to apply the evidentiary standard of clear and convincing evidence in conjunction with the finding that the quantity decreed to A&B's 36-2080 exceeds the quantity being put to beneficial use for purposes of determining material injury. 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.

Id. at 414.

No party, including IDWR and its Director, appealed this portion of the district court's decision. In fact, the district court later issued a specific order requiring the Director to issue an order on remand in response to A&B's *Motion to Enforce*. Clerk's Supp. R. 789.

In other words, rather than dismissing the case due to A&B's failure to submit an interconnection study before filing its delivery call, the district court recognized that A&B's call could – and should – proceed for a determination on the merits consistent with Idaho law.

If it was true that A&B's appeal of the *Remand Order* was moot due to the failure to provide an interconnection study, then the district court would have had no basis to remand the matter back to the Director for further proceedings. However, the court did order a remand to IDWR which was certified as a final judgment. Clerk's Supp. R. 631. As such, the law of the case doctrine precludes the district court from dismissing a case that was already ordered to proceed on the merits before the agency. *See Swanson v. Swanson*, 134 Idaho 512, 516 (2000) (the "law of the case" doctrine applies to district court decisions that are not appealed and further providing that "[t]he doctrine of the law of the case provides that where an appellate court states a principle of law in deciding a case, that rule becomes the law of the case and is controlling both in the lower court and on subsequent appeals as long as the facts are substantially the same").

Since the law of this case provides that A&B's call would proceed on remand before the agency, and the Director issued a final order without an interconnection study in the record, the district court wrongly dismissed A&B's petition for judicial review. This Court should reverse the district court's decision and remand it for a decision on the merits.

III. The District Court Erred as a Matter of Law in Dismissing A&B's Petition for Judicial Review.

In addition to the reasons set forth above, the district court erred in dismissing A&B's appeal for the following reasons: (i) compliance with the interconnection study obligation does not prevent the Director from making findings on the merits of A&B's call based upon agency precedent and the actual course of proceedings in this case; (ii) the court's dismissal at this stage prejudices A&B and is contrary to this Court's policy to decide cases on their merits; (iii) the issues raised by A&B are live and subject to judicial review; and (iv) an exception to the mootness doctrine applies.

As explained below, each error provides another basis to reverse the district court decision and remand it for a consideration of A&B's petition on its merits.

A. The Interconnection Study Obligation Does Not Preclude the Director From Considering and Issuing a Decision on the Merits of A&B's Delivery Call.

The district court erred in its determination that the Director cannot take any action on the delivery call before an interconnection study is provided by A&B.⁹ The Director never imposed

⁹ Regardless of the language in *A&B v. IDWR*, 153 Idaho 500, 513 (2012), the district court's reliance upon that statement does not reflect the actual events in this case. If the interconnection study was truly a "precondition" to filing A&B's call, then the entire contested case should have been dismissed and declared void at the outset. Instead, IDWR accepted the call and allowed the case to proceed to a full administrative hearing on the merits. Next, judicial review was taken before the district court, then two appeals to this Court, and a final agency order was

such a requirement over the near two decade history of the administrative case. Moreover, based on established agency precedent, the Director could decide the merits of A&B's appeal and then withhold ordering curtailment or mitigation until A&B complies with the interconnection study obligation.¹⁰ Indeed, this is exactly how IDWR handled Clear Springs Foods, Inc.'s delivery call at its Crystal Springs facility. Clerk's R. 272.

In Clear Springs' case, the Director accepted the call and evaluated the injury to the senior surface rights at Crystal Springs. R. 262-75. The Director decided the merits of the call and identified the impacts caused by junior ground water pumping but then withheld ordering further curtailment until Clear Springs submitted a feasibility study on improving and extending the collection canal. *Id.* In other words, the case was not dismissed as moot, rather it was decided on the merits. However, the Director did not order further curtailment until Clear Springs complied with the feasibility study requirement.

The obligation imposed on Clear Springs, the senior water right holder, only stayed implementation of the Director's order, it did not "moot" the case or delivery call. Based on this agency precedent it was arbitrary and capricious for IDWR to take a completely opposite approach and argue that A&B's call should be dismissed altogether at the eleventh hour in this case.

issued on remand. The case cannot simply be "undone" at this point based on any misinterpretation by A&B (in its statement of issues in the first appeal) or through this Court's affirming the interconnection study requirement. If the study was a jurisdictional precondition to the filing of A&B's call, IDWR never enforced it at any time during the course of this proceeding from 1994 through 2011.

¹⁰ The district court completely ignored this argument below. Clerk's Supp. R. 231-35; 263-75.

The Department's inconsistent treatment of similar situations should not stand. In fact, courts regularly refuse to give deference to agency actions that are "inconsistent" with prior actions. *See, e.g., Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) ("deference is likewise unwarranted when there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question.' This might occur when the agency's interpretation conflicts with a prior interpretation"); *State of Or., Dep't of Human Res. v. Heckler*, 651 F. Supp. 6, 9 (D. Or. 1984) ("the court finds that the DHHS's actions with respect to interpreting section 403(a)(3) were sufficiently inconsistent as to make it inappropriate for this court to defer to the agency's latest interpretation"); *c.f. Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1146 (9th Cir. 2001) ("Nor do we owe deference to the interpretation of the statute now advocated by the Secretary's counsel-newly minted, it seems, for this lawsuit, and inconsistent with prior agency actions").

If the Director correctly applies the law and finds injury to A&B's senior water right through a proper application of the required burdens and standards, he can then withhold implementing an order for curtailment or mitigation until the interconnection study is completed. That is exactly the course IDWR took in the Clear Springs example. Nothing in this Court's *A&B Irr. Dist.* decision prevents such a result. In fact, that is how this entire case has actually proceeded. *See infra* Part II. Again, A&B's call has been pending since 1994 and has been actively pursued and litigated since 2007. During that time, the agency has issued multiple orders, held a three week administrative hearing, and multiple appeals have been filed and heard by this Court. At no time has the agency claimed or any court held that the Director did not have

jurisdiction to take any action without an interconnection study in the record. If the interconnection study was jurisdictional then all decisions by IDWR and the reviewing courts should be rendered void.

Since IDWR accepted and decided the merits of A&B's call without requiring an interconnection study, and it has taken similar actions in other water right delivery call cases, A&B's petition for judicial review is not "moot" and should be decided on its merits. The Court should reverse the district court accordingly.

B. The District Court's Dismissal at this Stage of the Litigation Prejudices A&B and Violates this Court's Long-Standing Policy to Decide Cases on Their Merits.

The district court's ruling is particularly troubling due to the stage of these proceedings. First, it is undisputed IDWR accepted A&B's call and allowed a full contested case to proceed to hearing. The agency did not bar the door with an interconnection study obligation, either when the delivery call was first filed in 1994, or later when the case was resumed in 2007. Since that time the parties have expended a significant amount of time, energy and resources in litigating their interests in this case. Never, at any point during the process did IDWR indicate that A&B's case was "moot" because of the interconnection study obligation.

At the outset in 1994 the Director did not refuse to consider A&B's delivery call on the basis the District had not shown the technical or financial feasibility of interconnecting wells across the project. In November of 2007, the Director asked for further information relating to A&B's water use. R. 964. Again, he did not require A&B to demonstrate why interconnection was not technically or financially practical before proceeding with the case. *Id.* The Director's

initial January 2008 order did not dismiss the call for a lack of interconnection information either. The contested case on this initial order proceeded to a decision on the merits by the Hearing Officer. The Director's final order did not conclude the call was prohibited due to a lack of evidence of such a study in the record.

In 2009, A&B appealed the final order to the district court, which upheld the interconnection study obligation. Clerk's Supp. R. 404. However, rather than declare the case "moot," the district court remanded the matter for further proceedings before the Director. *Id.* at 414. Then, two years later the district court changed course and dismissed A&B's petition for judicial review with prejudice, despite no change in the agency record on the interconnection study issue.

When the Director refused to comply with the district court's ordered remand, A&B was forced to file a motion to seek enforcement of that final judgment. Clerk's Supp. R. 664. Given the uncertainty with the remand, and the findings relating to the interconnection study, A&B asked the district court to require the Director to review an interconnection study. *Id.* According to A&B:

In response to the Court's decision and the Hearing Officer's recommendation on this issue A&B requested confirmation that the Director would consider A&B's feasibility study [i.e. interconnection study] in conjunction with the ordered remand. *See Ex. A to Thompson Aff.* Since IDWR was required to re-evaluate A&B's delivery call and material injury to its senior water right, A&B believed it would be efficient and expeditious for IDWR to consider the feasibility report as part of its new injury determination.

However, prior to engaging technical consultants and spending time and resources on the study, A&B wanted assurance that the Director would actually consider and not disregard the prior report. *See id.* In response,

IDWR's counsel only stated that "the Department is willing to field questions A&B may have about its study. *See* Ex. B to *Thompson Aff.* Accordingly, it is unclear whether the Director would even consider A&B's proposed feasibility study, particularly since IDWR refuses to proceed with the ordered remand.

Id. at 670.

IDWR opposed A&B's request. Clerk's Supp. R. 756.¹¹ Yet, the agency never claimed that the matter was "moot" due to the interconnection study obligation. *Id.* A&B's request to order IDWR to consider such a study was rejected by the district court – even though it had previously determined that an interconnection study was required. Clerk's Supp. R. 789.

The Director proceeded to decide the merits of A&B's delivery call on remand. The *Remand Order* makes no mention of any interconnection study obligation as a prerequisite to A&B being able to file a delivery call. R. 3469. Neither does the *Remand Order* make any determination that A&B's case could not continue due to the lack of an interconnection study before the call was filed. *Id.* Rather, the Director applied the clear and convincing evidence standard and decided the merits, concluding that any aggrieved party had the right to appeal the *Remand Order* to district court. *Id.*

After the Director issued the *Remand Order*, he then tried to issue an untimely amended final order. *A&B Irr. Dist.*, 154 Idaho at 652. In moving to dismiss A&B's appeal of the *Remand Order*, the Director never claimed that the decisions made in the *Remand Order* – or even the amended final order – were moot. *Id.* Next, although the district court initially

¹¹ Although IDWR represented that a contested case on the *Remand Order* would have allowed the Director to decide whether additional evidence on an interconnection study would be taken, Clerk's Supp. R. 764 ("When remand occurs, a new contested case will be commenced ... At that time, the decision to take additional evidence will be within the discretion of the presiding officer"), the Director never acted on A&B's request for hearing, R. 3505.

dismissed A&B's petition for judicial review, it made no findings that the appeal was moot. *Id.* This Court reversed and concluded that A&B's appeal of the *Remand Order* was timely and appropriate under Idaho's APA. *Id.*

After all of this – more than 6-years after A&B's call was resumed – the district court dismissed A&B's appeal as moot on the basis there was no evidence in the record that an interconnection study had been filed. Clerk's R. 287. However, the lack of a study did not stop IDWR from accepting the call, holding a hearing, or the district court from ruling on the merits in the first place. Had the requirement truly been viewed as a precondition, as they claimed it was, then IDWR was without authority to make the decisions it did and the entire case would be deemed void as a matter of law.¹² *A&B Irr. Dist. v. IDWR*, 301 P.3d at 1274 (“IDWR no longer had jurisdiction in the matter, and the order issued on June 30, 2011, is a nullity”); *Burnside v. Gate City Steel Corp.*, 112 Idaho 1040, 1047 (1987).

Obviously IDWR and the Director did not believe that the lack of an interconnection study precluded further action when the *Remand Order* was issued. Indeed, when A&B asked for a stay of the administrative proceedings on remand, that request was refused by the Director, who concluded that “[b]y 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.” R. 3514 (emphasis added).

¹² This point further begs the question if the Director did not have authority to issue the *Remand Order* due to the lack of an interconnection study, then the order could not be considered “final” and the district court would not have had any jurisdiction to issue its *Memorandum Decision* either. See *Westway Const., Inc. v. Idaho Transp. Dept.*, 139 Idaho 107 (2003).

The district court, likewise, did not believe that the interconnection study obligation rendered A&B's call moot. Indeed, in its initial decision on the A&B call, the district court affirmed the interconnection requirement *and* remanded certain issues to the Director for further action at the same time. *Supra*. Had the interconnection requirement truly represented a jurisdictional bar, as the district court now concludes, then there would have been nothing to remand – the matter should have simply ceased. *See infra* Argument Part IV.

However, the case did not end. Instead, the district court remanded the matter to the agency and the Director decided the merits of A&B's call. That *Remand Order* specifically provided that “any party aggrieved by the final order may appeal the final order to district court.” R. 3490. A&B exercised its statutory right to appeal. That is what the law allows. Indeed, it is the long-standing policy of Idaho Courts that appeals should be decided on their merits. *See Dorion v. Keane*, 153 Idaho 371, 376 (Ct. App. 2012); *Nelson v. Pumnea*, 106 Idaho 48, 50 (1983); *Bunn v. Bunn*, 99 Idaho 710, 711 (1978).

Accordingly, this Court should reverse the district court's dismissal and remand for further proceedings on the merits of A&B's appeal.

C. The Merits of A&B's Appeal Issues #1 & #3 Are Subject to Judicial Review.

Notwithstanding the district court's dismissal of A&B's petition as “moot,” the court went on to conclude certain issues could not be reviewed due to its prior decision:

1. Whether the Director unconstitutionally applied the CM Rules to A&B's decreed senior water right for purposes of administration.

...

3. Whether the Director erred in using an undefined “crop maturity” standard, not the water right, for purposes of administration.

Clerk’s R. 284-85. The district court refused to consider these issues – determining that “the issues ... were previously addressed by this Court.” *Id.* at 288. This decision is also in error and should be reversed and set aside.

In order to understand the error of the district court’s decision, it is important to understand the prior proceedings and their context. A&B appealed the Director’s original final order to the district court in 2009. *A&B Irr. Dist.*, 153 Idaho at 505. That petition for judicial review challenged, among other things, the Director’s failure to apply the proper burden of proof and evidentiary standards in the evaluation of injury to A&B’s decreed senior water right.

The district court agreed with A&B and determined that the Director “erred by failing to apply the correct presumptions and burdens of proof” and remanded the matter to the Director to apply the proper standards and determine whether A&B’s senior water right was materially injured. *A&B Irr. Dist.*, 153 Idaho at 506-07. A&B prevailed on this issue concerning the Director’s unlawful material injury analysis.

Importantly, given the ordered remand, the distinct court was not in a position at that point to analyze whether the Director erred in reducing A&B’s diversion rate per acre “from 0.88 to 0.75 miners inches.” Clerk’s Supp. R. 366. Indeed, the district court could not have conducted any such analysis in light of its findings that (1) the reduction in A&B’s decreed quantity must be “supported by clear and convincing evidence,” and (2) the Director had failed to apply that standard in his evaluation. Clerk’s R. 289. In short, the district court determined

that the finding of no-injury was not ripe for review and remanded that issue so that the Director could apply the proper standard. Clerk's Supp. R. 366; *see also A&B Irr. Dist.*, 153 Idaho at 506-07 ("The case is remanded for the limited purpose of the Director to apply the appropriate evidentiary standard to the existing record").

Accordingly, the district court's recent and revised explanation that it did not "reject" the Director's evidentiary findings in its first decision on judicial review is of no consequence. Clerk's R. 289. After all, if "clear and convincing evidence" does not exist to support the Director's decision, which can only be determined after judicial review of the *Remand Order*, then the finding of no injury must be reversed and set aside. Given the district court's ordered remand, the court could not have made that decision in the first case as it now claimed it did.

As ordered, the Director applied the standard in the *Remand Order*. A&B's challenge to that decision, including whether the Director properly applied the standard under the law in determining that A&B only needs 0.75 miners inches rather than the decreed 0.88 miners inches is subject to judicial review. Contrary to the district court, this decision was not made in the first appeal. Accordingly, the Court should correct this error of law and the matter should be remanded for consideration of the merits of A&B's appeal.

D. Assuming for Argument's Sake that the Case is Moot, the District Court Erred in Failing to Recognize an Exception to the Mootness Doctrine Relating to A&B's Issues #2, #6, and #7.

The district court determined that A&B's appeal was moot and dismissed it with prejudice. Clerk's R. 288, 295. In making this finding, the court concluded no exception to the mootness doctrine applied:

As an initial matter, the exception [to the mootness doctrine] cited applies only to general legal issues, and does not apply to the issues raised on judicial review pertaining to specific findings unique to a particular proceeding. ... Therefore, the exception cannot be applied to save the issues raised by A&B which simply challenge the Director's specific factual findings particular to this incident (i.e. issues 2, 6, and 7 identified above).

Id. As discussed below, this holding is in error.

A case is moot “if it does not present a real and substantial controversy that is capable of being concluded through judicial decree of specific relief.” *American Lung Assoc. of Idaho/Nevada*, 142 Idaho at 546. Such a case will generally be dismissed. However, a moot case may still be considered if the challenged decision “is likely to evade judicial review and thus capable of repetition.” *Id.*; *see also, Webb v. Webb*, 143 Idaho 521, 524 (2006).

The district court determined that this exception did not apply claiming it “applies only to general legal issues, and does not apply to the issues raised on judicial review pertaining to specific findings unique to a particular proceeding.” Clerk’s R. 288. This conclusion is in error.

In *American Lung Assoc.* this Court addressed a challenge to a decision by the Idaho State Department of Agriculture (“DOA”) that authorized crop burning. Idaho Code § 22-4803 required the DOA director to determine whether there were economically viable alternatives to burning. 142 Idaho at 545. The director issued such decisions in 2001, 2003, 2004 and 2005. *See Id.* at 546. The *American Lung Assoc.* case only addressed the director’s 2004 decision. The DOA asserted that the appeal was moot due to the fact that the 2005 decision was subsequently issued. This Court rejected that assertion:

The Department asks us to hold, however, that the Petitioners were required to have appealed the 2005 determination in order to preserve their right to challenge the 2004 determination. There is no contention that the 2005 determination alleviated the Petitioner's objections to the 2004 determination. In fact, it incorporated the 2004 determination by reference. The Department simply asks us to dismiss this appeal for the Petitioners' failure to appeal the 2005 determination, even though the filing of such appeal would have been a mere formality that would not have in any way affected the substantive issues presented by this appeal. We decline to do so.

142 Idaho at 546.

Importantly, the petitioners in that case challenged the agency's specific findings in the 2004 decision. *Id.* For example:

The Petitioners contend that the Director did not follow the dictates of the statute because he did not calculate any rates of return; he did not calculate the costs of field burning, and he did not calculate the monetary benefits of composting crop residues rather than burning them.

Id. at 548.

Furthermore, they contended “that the Director erred by failing to take into consideration environmental and health concerns” and failing “to discuss all evidence in the administrative record and to explain the information that runs counter to his ultimate determination.” *Id.* at 549. Notwithstanding the fact the petitioners challenged specific findings in the 2004 order, this Court determined that the exception to the mootness doctrine applied and decided the merits of the case. Accordingly, contrary to the district court’s analysis, there is no “bright-line” test that prohibits application of the exception to all cases that concern challenges to specific issues before an administrative agency.

Similar to the facts in *American Lung Assoc.*, here A&B challenged specific findings and conclusions in the Director's *Remand Order*. Indeed, in *American Lung Assoc.* this Court concluded that an exception to the mootness doctrine could still apply despite a specific challenge.

The district court misinterpreted *Idaho Dept. of Health & Welfare v. Doe*, 150 Idaho 103, 108 (Ct. App. 2010), to support its conclusion that the exception to the mootness doctrine “would only be applicable as to the general legal issues raised.” Clerk’s R. 288. Like the *American Lung Assoc.* decision, the Court of Appeals recognized that an otherwise moot appeal may still be heard when the issues raised are “potentially capable of evading review and thus capable of repetition.” 150 Idaho at 108. In *Doe*, the Court stated the exception would only apply to “general legal issues” in that case because the case had already been dismissed as to the two younger children. The Court recognized “the magistrate’s dismissal of the case as to R.L. and B.L. indicates that the Department has already been divested of custody of the two younger children-thus, a judicial determination would have no practicable effect on the outcome as to them.”¹³ *Id.*

Accordingly, there was no “specific” issue to resolve as to those children for purposes of an exception to the mootness doctrine. As such, the Court stated it “would only be applicable to the general legal issues raised that are potentially capable of evading review and thus capable of

¹³ Unlike the facts in *Doe*, a judicial determination will have an effect on A&B’s delivery call. A meaningful judicial review of the Director’s *Remand Order* will provide A&B relief as to the administration of its senior ground water right. Since the Director’s decision is in error, the district court can provide relief to A&B to ensure its senior water right is protected as required by law. See *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 811 (2011); *Bower v. Moorman*, 27 Idaho 162, 181 (1915).

repetition and would not be applicable to the magistrate's specific findings unique to this particular incident." *American Lung Assoc. of Idaho/Nevada*, 150 Idaho at 108. Contrary to the district court's conclusion, the *Doe* case did not establish a new rule that only "general legal issues" can be reviewed under the exception to the mootness doctrine. The court simply missed the unique facts in that case.

Moreover, the district court did not find that the issues raised in A&B's appeal are not "potentially capable of evading review and thus capable of repetition." Rather, the court only determined that certain issues were "too specific." Clerk's R. 288. In particular, the district court found the following issues to be too specific:

2. Whether the Director erred in applying the clear and convincing evidence standard in finding that A&B could not beneficially use the quantity of its decreed water right for irrigation purposes.

...

6. Whether the Director violated the mandate rule and exceeded the Court's *Memorandum Decision* by reconsidering settled findings beyond the scope of the ordered remand.

7. Whether the Director erred in making findings that are not supported by clear and convincing evidence to conclude A&B's water right is not materially injured.

Id. 284-85; 288.

However, just like the 2004 crop burning order in *American Lung Assoc.*, and irrespective of any "specific" issues, the findings challenged in A&B's appeal are capable of repetition and should be reviewed. Moreover, A&B's appeal does not simply concern challenges to the Director's "specific findings unique to this particular incident." Indeed, the Director's

application of the clear and convincing standard will likely continue to be the subject of any future proceedings on A&B's delivery call, as well as potentially other groundwater delivery call cases. How the Director applies that standard to the facts and circumstances of a particular call could have impacts on future administrative proceedings – even beyond the confines of the A&B case.

Importantly, the *Remand Order* constitutes the first administrative decision to apply the clear and convincing standard in a ground water right delivery call context since it was affirmed by this Court in *A&B, supra*. Absent meaningful judicial review, the Director will likely continue to err in the application of the standard. The determination that A&B's appeal is moot and that the District must wait until future administrative proceedings to challenge the Director's application of the clear and convincing evidence standard is contrary to this Court's prior decisions on the exceptions to the mootness doctrine. Consequently, assuming for argument's sake the case is moot, the district court erred in its analysis as to the applicable exception.

Since an exception to the mootness doctrine applies, the district court's decision to dismiss issues 2, 6 and 7 should be reversed and this matter remanded for a determination of the merits of A&B's appeal.

IV. If the District Court's Interpretation of *A&B Irr. Dist. v. IDWR*, 153 Idaho 500 (2012) is Correct, then the Court Erred in Failing to Vacate the *Remand Order*.

The district court determined that A&B's appeal was "moot" because the District had "not complied with the interconnection obligations placed upon it." Clerk's R. 287. Assuming the court correctly interpreted the law on this matter then the court erred in failing to vacate the

agency's *Remand Order*. Stated another way, if the *Remand Order* was not a final agency action subject to judicial review, then the court should have declared the same for purposes of future administrative proceedings.¹⁴ Otherwise, A&B is left in the untenable position of being subject to a final agency order that cannot be appealed, something not allowed by Idaho law.¹⁵ See *Supra*, Argument Part I.

A district court must vacate an agency decision “if the agency's findings, inferences, conclusions, or decisions are (a) in violation of constitutional or statutory provisions; [or](b) in excess of the statutory authority of the agency.” *Jasso, supra*. An agency must follow the law. See *J.R. Simplot Co., Inc. v. Idaho State Tax Comm'n*, 120 Idaho 849, 862 (1991) (“Only if the agency has received this authority will it be ‘impliedly clothed with power to construe’ the law”); see also, I.C. §§ 42-1701 & 42-1805 (identifying the duties of the Director). Failure to do so renders the agency's actions null and void. *Jasso, supra*.

According to the district court, the following language from *A&B Irr. Dist.* placed an obligation upon A&B that warranted dismissal if not met:

Given the language in the CM Rules, we find that the Director did not act arbitrarily or violate Idaho law when he found that A&B must work to reasonably interconnect some individual wells or well systems before a delivery call can be filed, and we affirm the district court's finding in this regard.

153 Idaho at 516.

¹⁴ Again, if the *Remand Order* is not final, then the district court had no jurisdiction to issue the *Memorandum Decision* either. See *Westway Const., Inc. v. Idaho Transp. Dept.*, 139 Idaho 107 (2003).

¹⁵ Such a position prejudices A&B since IDWR or other parties would likely claim findings and conclusions in the *Remand Order* were final and res judicata in the event of a future call or challenge to IDWR's lack of lawful administration of A&B's senior water right.

Since no interconnection study was filed “before [A&B’s] delivery call,” the district court dismissed A&B’s appeal of the *Remand Order*. R. 287. If the district court is correct, and an “interconnection obligation” is jurisdictional and must be met “before a delivery call can be filed,” then the district court erred in failing to also vacate the *Remand Order*.

In other words, if an interconnection study was required “before a delivery call can be filed,” then the Director had no authority to accept the call and hold a contested case on the matter. The Director would have had no authority to issue any orders because the call would not be properly postured before IDWR. As such, the district court erred in not vacating the *Remand Order* or declaring it to be void and of no force and effect. *A&B Irr. Dist.*, 301 P.3d at 1274; *Burnside*, 112 Idaho at 1047.

Second, the APA mandates that the *Remand Order* either be vacated or constitute an appealable agency action. The Director’s authority to supervise and preside over the administration of water rights is provided by statute and regulation. *See* I.C. §§ 42-226, 42-601 *et seq.*; IDAPA 37.03.11.001, *et seq.* Any agency proceedings in association with that administration must be conducted pursuant to the APA. IDAPA 37.03.11.003; I.C. § 42-1701A (“All hearings required by law to be held before the director of the department of water resources shall be conducted in accordance with the provisions of chapter 52, title 67, Idaho Code, and rules of procedure promulgated by the director”); *see also* IDAPA 37.01.01.001, *et seq.* (IDWR administration provisions governing administrative actions).

The APA provides that any person aggrieved by an agency decision – including an “order” – may challenge that action in the district court. I.C. § 67-5270. The APA defines an

agency decision – i.e. an “order” – as “an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons.” I.C. § 67-5201(12) (emphasis added); IDAPA 37.01.01.005.15 (same).

Accordingly, if the *Remand Order* determines A&B’s legal rights, duties and privileges, then it is a challengeable final action under the APA. If not, then it is not a final agency action and must be vacated to the extent it poses as such. In other words, the *Remand Order* cannot be both “final” and “unappealable.”

In *Westway Const., Inc. v. Idaho Transp. Dept.*, 139 Idaho 107 (2003), this Court addressed how to determine whether or not an agency decision falls within the scope of the APA’s judicial review provisions.

Whether or not that decision determines legal rights, duties, privileges, immunities or other legal interests requires a two-step analysis.

First, has the legislature granted the agency the authority to determine the particular issue? ...

Second, does the agency decision on the issue determine “the legal rights, duties, privileges, immunities, or other legal interests” of one or more persons?

139 Idaho at 112.

Each of the above elements is met in this case. First, the Director has authority to supervise and preside over the administration of water rights including A&B’s delivery call. Second, the *Remand Order* determines A&B’s legal rights, duties and privileges as it relates to its decreed senior water right and the administration of that right as against junior priority rights. The Director determined that A&B is not suffering material injury and, therefore, had no right to

seek curtailment or mitigation from junior priority ground water rights. The failure to properly administer A&B's decreed water right infringes on that property right interest in violation of Idaho law. *See* I.C. § 55-101; *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 388 (1982). As such, under the APA, the *Remand Order* is a final decision subject to judicial review by the district court.

However, if the District Court is correct, and A&B does not have a right to appeal the *Remand Order* due to the interconnection study obligation, then the APA mandates that the *Remand Order* be vacated. *See Jasso*, 151 Idaho at 793. Notwithstanding the law, the district court failed to vacate the *Remand Order*. By denying A&B any relief, the district court has essentially turned the *Remand Order* into an unchallengeable agency mandate. If the findings and obligations contained in the *Remand Order* are held binding on A&B in future proceedings then it is clear the district court's decision violates Idaho law. *See* I.C. § 67-5270; *see also* R. 3490 (any party aggrieved by the *Remand Order* may appeal that order to the district court).

Accordingly, if the dismissal of A&B's petition for judicial review is upheld, then this Court should find the district court erred by not vacating the Director's *Remand Order*.

CONCLUSION

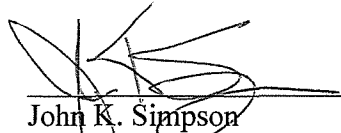
The district court erred in dismissing A&B's petition for judicial review. A&B had a right to appeal the Director's *Remand Order* under Idaho law. The dismissal violates A&B's constitutional right to due process as well as the established law of the case. Moreover, it is the policy of this state's judiciary that cases be decided on their merits.

Alternatively, if the determination the case is “moot” is upheld, the district court erred in application of a well-established exception to that doctrine. In addition, the court further erred in not vacating the *Remand Order* in that circumstance.

A&B respectfully requests the Court to reverse the district court’s *Memorandum Decision* and remand it for further proceedings as required by law.

DATED this 17th day of October, 2013.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of October, 2013, I served true and correct copies of **A&B IRRIGATION DISTRICT'S OPENING BRIEF** upon the following by the method indicated:

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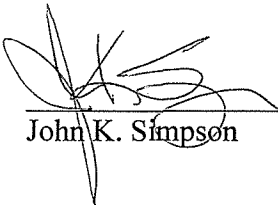
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CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the email addressed identified above.

DATED and certified this 17th day of October, 2013.



John K. Simpson