IDAHO SUPREME COURT

Docket No. 40169-2013

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 POCATELLO,
Intervenors-Respondents.

IDAHO GROUND WATER APPROPRIATORS, INC.'S RESPONSE BRIEF

On Appeal from the Fifth Judicial District, Minidoka County Case No. 2011-512

Honorable Eric J. Wildman, District Judge, Presiding

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STATEMENT OF THE CASE

I. Nature of the Case

This is A&B Irrigation District's (A&B) third appeal from a delivery call hearing before the Idaho Department of Water Resources (IDWR) in 2008. In this appeal, A&B challenges the district court's *Memorandum Decision on Petition for Judicial Review* issued April 25, 2013 (2013 Memorandum Decision).[1,2] This decision was issued in response to A&B's petition for judicial review of the *Final Order on Remand of A&B Irrigation District Delivery Call* (Remand Order), issued by the Director of the IDWR in 2011.[3]

II. Statement of Facts / Course of Proceedings

A&B Irrigation District is located in south-central Idaho near the town of Rupert.[4] The "A" portion of the District is supplied by surface water from the Snake River; the "B" portion is supplied by groundwater from the Eastern Snake Plain Aquifer (ESPA).[5] Idaho Ground Water Appropriators, Inc. (IGWA) represents hundreds of farmers, municipalities, and businesses who also rely on the ESPA for their water.[6]

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[1] Citations to the record will be as follows:

- Administrative record created before the IDWR (3,527 pages) is referred to as "R. #."
- *Limited Clerk's Record on Appeal* (319 pages) is referred to as "Clerk's R. #."
- *Supplemental Limited Clerk's Record on Appeal* (836 pages) is referred to as "Clerk's Supp. R. #."

[2] Clerk's R. at 279.

[3] R. at 3318.

[4] *A&B Irr. Dist. v. Idaho Dept. of Water Resources*, 153 Idaho 500, 503 (2012) ("*A&B I*").

[5] R. at 1665.

[6] R. at 3081-82.

This appeal relates to A&B's groundwater right number 36-2080. This water right is unique in that it allows A&B to divert groundwater from any 188 different points of diversion for use anywhere within A&B Irrigation District.[7]

A. A&B delivery call.

In 1994, A&B filed a petition for delivery call with the Director of the IDWR, seeking curtailment of junior-priority groundwater rights, and designation of the ESPA as a Ground Water Management Area.[8] In 1995, the delivery call was stayed by stipulation of the parties, with the requirement that A&B file a "Motion to Proceed" with the Director to resume the call.[9] A&B filed a Motion to Proceed in 2007.[10]

In 2008, the Director issued a final order, finding that A&B was not materially injured, and denying A&B's request to designate the ESPA as a Ground Water Management Area.[11] A&B filed a petition for rehearing, which resulted in an evidentiary hearing before former Chief Justice Gerald Schroeder as the hearing officer. Evidence was presented by A&B, IDWR, IGWA, and the City of Pocatello.

In 2009, the hearing officer issued a recommended order for the Director's approval.[12] Among the hearing officer's pertinent findings:

> [T]he Idaho Ground Water Act is applicable to the administration of water rights involved in this case, including those rights that preexisted the adoption of the

[7] *A&B I*, 153 Idaho at 503.

[8] *Id*.

[9] *Id*. at 504.

[10] *Id*.

[11] R. at 1150-1151.

[12] R. at 3078.

> Ground Water Act in 1951, and are subject to administration consistent with the subsequent amendment to the Act.
>
> . . . .
>
> It is proper to consider the system as a whole.
>
> . . . .
>
> [T]here is an obligation of A&B to take reasonable steps to maximize the use of [interconnection] to move water within the system before it can seek curtailment or compensation from juniors.
>
> . . . .
>
> Crops may be grown to full maturity on less water than demanded by A&B in this delivery call.
>
> . . . .
>
> The conditions in the southwest area that make the recovery of water from the wells difficult do not justify curtailment or other mitigation.
>
> . . . .
>
> A&B has not been required to exceed reasonable pumping levels.[13]

Later that year, the Director issued a final order, adopting the hearing officer's recommendations and adding some comments of his own.[14]

B. First petition for judicial review.

Dissatisfied with the Director's order, A&B petitioned for judicial review. In May of 2010, the district court issued its *Memorandum Decision on Petition for Judicial Review* (2010

[13] *A&B I*, 153 Idaho at 504.

[14] R. at 3318, 3322.

Memorandum Decision), affirming the Director's order in all respects but one.[15] The district court remanded the case for the limited purpose of applying the clear and convincing evidence standard to the question of whether "the quantity decreed to A&B's 36-2080 exceeds the quantity being put to beneficial use."[16]

C. First appeal to Supreme Court (*A&B I*).

The district court decision was appealed to this Court in December of 2010.[17] This Court issued its opinion in *A&B Irrigation District v. Idaho Dept. of Water Resources*, 153 Idaho 500 (2012) ("*A&B I*") in August of 2012, affirming the district court decision, holding: (1) A&B's 1948 groundwater right is subject to the provisions of the 1951 Idaho Ground Water Act and its subsequent amendments; (2) A&B has not been required to pump water beyond a reasonable ground water pumping level; (3) the Director did not unconstitutionally apply the CM Rules by finding that A&B must interconnect individual wells or well systems across the project before a delivery call can be filed; and (4) the proper evidentiary standard in the determination of material injury is clear and convincing evidence.[18]

D. Remand proceeding.

Shortly after notices of appeal had been filed in *A&B I*, and despite the fact that numerous issues were being appealed, A&B filed a motion asking the district court to force the Director to (i) proceed with the remand and evaluate material injury based on the clear and

[15] Clerk's Supp. R. at 366.
[16] *Id*. at 414.
[17] *A&B I*, 153 Idaho at 505.
[18] *Id*. at 525.

convincing evidentiary standard, and (ii) review an economic and technical feasibility report on the issue of interconnection of wells within A&B Irrigation District.[19] The district court ordered the Director to proceed with the remand, but denied A&B's request to augment the record with an interconnection study.[20]

In April of 2011, the Director issued a *Final Order on Remand* (Remand Order).[21] He found, by clear and convincing evidence, that A&B was not materially injured by junior groundwater pumping.[22] The Director summarized the basis for this finding as follows:

> The record establishes that A&B is authorized to divert up to 1,100 cfs for irrigation of 62,604.3 acres. The record establishes with reasonable certainty that A&B irrigates 4,081.9 acres more than are authorized under its calling water right. The record establishes with reasonable certainty that A&B' s water use has decreased as a result of converting its project from gravity to sprinkler irrigation and employing other efficiency measures. The record establishes with reasonable certainty that A&B has not had the capacity to divert its full water right during the peak season, and does not utilize the capacity it has during the peak season when water is most needed. While A&B is authorized to divert from 188 points of diversion, it only pumps from 177 wells. The record establishes with reasonable certainty that since 1992, when a majority of the project had been converted to sprinklers-and not taking into consideration the 1,447 acres that were converted from ground water to surface water in the southwestern area of the project, or the capacity that could be gained from putting the 11 unused wells into production—A&B's actual diversions have averaged 0.65 miner's inches per acre during the peak season. Importantly, testimony from farmers that grow crops on and around A&B, combined with crop data and the Department's METRIC and NDVI modeling, demonstrate with reasonable certainty that, in spite of irrigating more acres than are authorized under 36-2080, not pumping to full capacity, and not utilizing all of its wells, crops are grown to full maturity on A&B lands. The clear and convincing evidence in the record supports the Director's conclusion that the 1,100 cfs (0.88 miner's inches per acre) decreed to A&B under 36-2080 exceeds

[19] Clerk's Supp. R. at 665.

[20] *Id*. at 795.

[21] R. at 3469.

[22] R. at 3490.

> the quantity being put to beneficial use for purposes of determining material injury. *Memorandum Decision* at 49. The clear and convincing evidence in the record supports the Director's conclusion that the quantity available to A&B is sufficient for the purpose of irrigating crops. *Memorandum Decision On Rehearing* at 7. The Director concludes, by clear and convincing evidence, that A&B is not materially injured.[23]

A&B petitioned the Director to reconsider the Remand Order.[24] The same day, A&B, IGWA, and Pocatello filed a stipulated motion to stay any additional proceedings on the Remand Order until a decision was entered in *A&B I*.[25] The Director denied the motion, concluding that he was obligated by the district court's enforcement order to issue a final, appealable remand order.[26] Accordingly, the Director addressed A&B's petition for reconsideration, issuing an amended remand order in June of 2011.[27]

E. Second petition for judicial review.

While A&B did not care for the initial Remand Order, it was equally disappointed with the amended order. In response, A&B petitioned the district court to vacate the amended order, since it was issued after the twenty-one (21) day period prescribed by Idaho Code § 67-5246.[28] The district court held the Director had jurisdiction to issue the amended order and that it was the proper order for judicial review.[29]

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[23] R. at 3489 (emphasis added).

[24] R. at 3492.

[25] R. at 3507.

[26] R. at 3512.

[27] *A&B Irr. Dist. v. Idaho Dept. of Water Res.*, __ Idaho __, 301 P.3d 1270, 1271 (2012) ("*A&B II*")

[28] *Id*.

[29] *Id*.

F. Second appeal to Supreme Court (*A&B II*).

A&B appealed the district court decision to this Court in *A&B Irr. Dist. v. Idaho Dept. of Water Res.*, __ Idaho __, 301 P.3d 1270 (2012) ("*A&B II*"). This Court reversed the district court, holding that the Director was without jurisdiction to issue an amended remand order after the twenty-one day (21) period.[30] Justice Jones, joined by Justice Burdick, concurred "reluctantly," explaining:

> If the objective was to speed along appellate consideration of the final order issued by IDWR on April 27, 2011, it is not clear that such objective has been well served. Indeed, the consideration of that order on appeal has been delayed about a year and a half, while the parties have contested the 21-day issue. A&B filed its motion for reconsideration on May 11, 2011. Apparently, it did so because it was unhappy with the final order and sought changes. The decision on the merits was not forthcoming until June 30, 2011, clearly beyond the 21-day period. However, the decision on the merits was made shortly after the deadline, and the appeal from that decision would likely have come before this Court well before the time frame in which the appeal of the initial final order will be considered. When asked at oral argument why A&B chose to appeal on the timeliness issue, counsel responded that it was for the purpose of expediting action by IDWR. It is questionable whether that objective has been attained. Consideration of the initial order on the merits has been substantially delayed and the appeal will involve a final order that A&B was apparently not happy with in the first place.[31]

In any case, the *A&B II* decision enabled A&B to seek judicial review of the original Remand Order.[32]

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[30] *A&B II*, 301 P.3d at 1274.

[31] *Id*. at 1274-75.

[32] *Id* at 1274.

G. Third petition for judicial review.

A&B petitioned for judicial review of the Remand Order in October of 2012.[33] In its opening brief, A&B raised seven issues:

> 1. Whether the Director unconstitutionally applied the CM Rules[34] to A&B's decreed senior water right for purposes of administration.
>
> 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.
>
> 3. Whether the Director erred in using an undefined "crop maturity" standard, not the water right, for purposes of administration.
>
> 4. Whether the Director erred in failing to apply CM Rules 20.03 and 40.05 for purposes of evaluating whether junior ground water right holders were "wasting" water.
>
> 5. Whether the Director erred in applying a concept of "full economic development" based upon a misreading of I.C. § 42-226 and statements in CM Rule 20.03, most of which the Idaho Supreme Court has declared void in *Clear Springs Foods, Inc., et al. v. Spackman, et al.*, 150 Idaho 790 (2011).
>
> 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 that A&B's water right is not materially injured.[35]

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[33] Clerk's R. at 25.

[34] In 1994 the IDWR adopted *Rules for Conjunctive Management of Surface and Ground Water Resources*, referred to herein as the "CM Rules," located at IDAPA 37.03.11. The CM Rules "prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply." CM Rule 1.

[35] Clerk's R. at 64.

Briefs filed by the IDWR and IGWA requested dismissal of A&B's petition because of A&B's failure to comply with the Supreme Court's holding in *A&B I* that "A&B must work to reasonably interconnect some individual wells or well systems before a delivery call can be filed."[36] IDWR, IGWA, and Pocatello also argued that some of A&B's issues should be dismissed with prejudice because they had been previously decided by the district court, or had been waived as a result of A&B's failure to raise them in its first petition for judicial review.[37]

In April of 2013, the district court issued its *Memorandum Decision on Petition for Judicial Review* (2013 Memorandum Decision).[38] The court dismissed six of the seven issues raised in A&B's petition for judicial review because they were rendered moot by this Court's *A&B I* decision requiring A&B to interconnect some of its wells before seeking to curtail juniors.[39] The court decided the remaining issue (Issue 5) on the merits, based on the "issue of general legal significance" exception to the mootness doctrine.[40]

In addition, of the six issues dismissed based on mootness, the court found that two of them (Issues 1 and 3) were decided previously, and one (Issue 4) was waived as a result of A&B's failure to raise it in its first appeal.[41] These were dismissed with prejudice. The other three (Issues 2, 6 and 7) were dismissed solely on grounds of mootness, without prejudice.

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[36] Clerk's R. at 119, 195.

[37] *Id*. at 129, 147, 158, 196-199.

[38] *Id*. at 279.

[39] *Id*. at 287.

[40] *Id*. at 291-294.

[41] *Id*. at 291, 288.

H. Third appeal to Supreme Court (*A&B III*).

In this appeal, A&B contends the district court erred by (i) finding that its petition for judicial review has been rendered moot by the *A&B I* decision;[42] (ii) finding that Issues 1 and 3 were decided previously;[43] (iii) not addressing Issues 2, 6 and 7 on their merits based on an exception to the mootness doctrine;[44] and (iv) not vacating or voiding the Remand Order.[45]

ISSUES ON APPEAL

A&B asserts 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?

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)?[46]

A&B's arguments in support of the foregoing issues are somewhat intermingled, making it difficult to present a concise response. Therefore, in the interest of clarity, and pursuant to I.A.R. 35(b)(4), IGWA re-states the issues as follows:

1. Whether the district correctly determined that this Court's interconnection ruling in *A&B I* rendered A&B's petition for judicial review moot?

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[42] A&B Opening Br. 10-22.

[43] *Id*. at 22-24.

[44] *Id*. at 24-29.

[45] *Id*. at 29-33.

[46] *Id*. at 6-7.

2. Whether the district court correctly dismissed issues 1 and 3 with prejudice because they had been decided previously?

3. Whether the Idaho Administrative Procedures Act requires the district court to vacate the Remand Order or declare it void?

STANDARD OF REVIEW

Judicial review of agency orders is governed by the Idaho Administrative Procedure Act.[47] This Court must affirm the Remand Order unless the Court finds the Director's findings, inferences, conclusions, or decisions violate any of the provisions in Idaho Code § 67-5279(3), and that a substantial right of A&B has been prejudiced.[48]

The district court's determination that the issues asserted by A&B on judicial review have been waived, previously decided, or are moot are conclusions of law over which this Court exercises free review.[49] To the extent this Court examines findings of fact, they must be based on the record created before the agency.[50] The Court is not to substitute its judgment for that of the agency as to the weight of the evidence.[51]

[47] Idaho Code § 42-1701A (4); Idaho Code § 67-5240.

[48] Idaho Code § 67-5279(4).

[49] *Vickers v. Lowe*, 150 Idaho 439, 442 (2011); *see also Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1286 (9th Cir. 2013) ("We review standing, ripeness, and mootness de novo.").

[50] Idaho Code § 67-5277.

[51] Idaho Code § 67-5279(1).

SUMMARY OF THE ARGUMENT

This is a meaningless appeal, because it is incapable of providing any practical relief to A&B. Since A&B has yet to interconnect wells as required by this Court's *A&B I* decision, even a favorable ruling will not result in curtailment of junior water rights.

Moreover, review of the Director's material injury analysis in the Remand Order would be inherently incomplete because it could not take into account the effects of interconnecting wells will materially change the factual landscape governing future analyses of material injury.

By definition, A&B's petition for judicial review is moot, and the district court properly dismissed it as such, save for Issue 5 which was properly decided on the merits. The district court also properly dismissed Issues 1, 3 and 4 with prejudice since they were decided previously or waived as a result of A&B's failure to raise them in its first appeal.

Therefore, this Court should affirm the 2013 Memorandum Decision, and put an end to A&B's seemingly endless string of appeals that have plagued this case for the last four years.

ARGUMENT

I. The district court correctly determined that this Court's interconnection ruling in *A&B I* rendered A&B's petition for judicial review moot.

The district court dismissed A&B's petition for judicial review due to A&B's failure to comply with this Court's ruling in *A&B I* that "A&B must work to reasonably interconnect some individual wells or well systems before a delivery call can be filed."[52] A&B claims its failure to

[52] Clerk's R. at 287.

interconnect does not preclude it from curtailing junior water rights, and argues that dismissal of its petition violates due process and the law of the case.[53]

As set forth below, A&B's failure to interconnect is a clear bar to curtailment, the district court correctly determined that A&B's petition for judicial review is moot, and the district court's dismissal did not violate due process or the law of the case.

A. A&B's failure to interconnect is a bar to curtailment of junior water rights.

A&B argues that 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."[54] According to A&B, the Director "never imposed such a requirement."[55] A&B further argues that even if interconnection is a pre-requisite, A&B "misinterpreted" the issue and should be excused from its enforcement.[56] These arguments do not stand up to the record.

It is inconceivable that A&B could have misinterpreted the meaning or import of the interconnection ruling. A major focus of the evidentiary hearing was the historical development of A&B's water right number 36-2080, and the expectation that water would be moved around within A&B Irrigation District from one location to another. This led to Hearing Officer Schroeder's recommendation, which the Director adopted, that A&B interconnect its well system before seeking to curtail juniors:

[53] A&B Opening Br. 10-18.
[54] *Id*. at 15 (emphasis in original).
[55] *Id*. at 15-16.
[56] *Id*. at 16, n. 9.

> **9. A&B's duty to interconnect the system before calling for curtailment.** It appears that interconnection of the entire pumping system is not simple or inexpensive either legally or practically. 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.[57]

A&B clearly understood the above recommendation, as it petitioned the hearing officer to reconsider, asserting: "A&B does not have to interconnect its separate points of diversion (wells) as a condition to seek administration of junior priority ground water rights."[58] A&B acknowledged that the recommendation imposed "an obligation [upon A&B] to move water within its system before seeking administration,"[59] and argued that it "should not be required to interconnect its individual well systems as a prerequisite to administration,"[60] and "should not be required to undertake the interconnection of all or even part or all of its delivery system as a predicate to an injury finding to its senior water right."[61] A&B's petition for reconsideration was denied by the hearing officer.[62]

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[57] R. at 3096-97 (emphasis added).

[58] R. at 3137 (emphasis added).

[59] R. at 3138 (emphasis added; internal quotation marks removed).

[60] R. at 3218 (emphasis added).

[61] R. at 3221 (emphasis added).

[62] R. at 3231.

A&B next tried to persuade the Director to abandon the interconnection ruling, asserting: "A&B does not have to interconnect its separate points of diversion (wells) as a condition to seek administration of junior priority ground water rights."[63] The Director considered A&B's argument, but accepted the hearing officer's recommendation.[64] A&B then petitioned the Director to reconsider, arguing: "Nothing in the water distribution statutes or CM Rules requires a senior water right holder to 'interconnect' different points of diversion, or show that it is not feasible, as a precondition to seeking the administration of junior priority rights that are injuring that water right."[65] The Director denied A&B's petition for reconsideration.[66]

On judicial review, A&B again challenged the interconnection ruling, framing the issue as follows: "Whether the Director erred in finding A&B is required to take additional measures to interconnect individual wells (points of diversion) or well systems across the A&B irrigation project before a delivery call against junior priority ground water rights can be filed."[67] In its brief, A&B argued it "does not have to interconnect its separate points of diversion (wells) as a condition to seeking administration of junior priority ground water rights."[68] The district court disagreed, concluding it was proper for the Director to require A&B to "make reasonable efforts to maximize interconnection of the system and place[] the burden on A&B to demonstrate where

[63] R. at 3296 (emphasis added).
[64] R. at 3322.
[65] R. at 3338 (emphasis added).
[66] R. at 3360.
[67] Clerk's Supp. R. at 71 (emphasis added).
[68] Clerk's Supp. R. at 124 (emphasis added).

interconnection is not physically or financially practical."[69] The court required A&B to comply with the interconnection requirement "prior to seeking regulation of junior pumpers."[70]

Displeased with the district court's ruling, A&B appealed to this Court, framing the issue as: "Whether the Director unconstitutionally applied the CM Rules by finding that A&B must interconnect individual wells or well systems across the project before a delivery call can be filed even though water right 36-2080 was developed, licensed and decreed with 177 individual wells?"[71] A&B then argued in its brief that "mandating interconnection as a prerequisite to administration is an unconstitutional application of the CM Rules," and that "[t]he Director cannot refuse to administer junior rights causing injury to A&B's senior right on the 'theory' that A&B, the senior water right holder, must first interconnect its separate points of diversion."[72] This Court thoroughly examined A&B's argument, but disagreed, holding: "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."[73]

The record is clear that interconnection is, for A&B, a pre-requisite to curtailment of junior priority water rights. A&B cannot reasonably argue that the Director did not make

[69] Clerk's Supp. R. at 404.

[70] *Id*. at 404.

[71] A&B Opening Brief, Idaho Supreme Court Docket No. 38403-2011 (July 1, 2011), excerpt attached hereto as ***Appendix A***, at 9 (emphasis added).

[72] *Id*. at 35-36 (emphasis added).

[73] *A&B I*, 153 Idaho at 516 (emphasis added).

interconnection a pre-requisite, or that it misunderstood the interconnection ruling, or that its purported misunderstanding excuses A&B from this Court's decision in *A&B I*.

B. The district court properly applied the mootness doctrine.

A&B argues that since the Idaho Administrative Procedures Act "provides A&B with an express right to review," and since "A&B exercised its constitutional and statutory right to appeal the Director's *Remand Order*," the district court erred when it found A&B's petition for judicial review to be moot.[74] In other words, A&B contends the district court is obligated to take up and decide moot issues. This is not the law in Idaho.

A case becomes moot when "the issues presented are no longer live" or "a judicial determination will have no practical effect upon the outcome."[75] "The issue is also moot if a favorable judicial decision would not result in any relief or the party lacks a legally cognizable interest in the outcome."[76] This Court has upheld numerous district court decisions involving agency actions where the district court declined to decide moot issues.[77]

In this case, A&B's petition for judicial review became moot once the *A&B I* decision upheld A&B's interconnection obligation. Since A&B had not interconnected wells, no decision the district court could have made would enable A&B to curtail or seek compensation from juniors. A favorable decision would not have granted A&B any relief.

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[74] A&B Opening Br. 16.

[75] *Schools for Equal Education Opportunity v. Idaho State Bd. of Education*, 128 Idaho 276, 281 (1996).

[76] *State v. Rogers*, 140 Idaho 223, 227 (2004).

[77] *See, e.g., Buckskin Props. v. Valley* County, _ Idaho _, 300 P.3d 18 (2013), *Chavez v. Canyon County*, 152 Idaho 297 (2012), and *Wylie v. State*, 151 Idaho 26 (2011).

Further, judicial review of the Remand Order would necessarily be incomplete, since it would not be able to consider the effect of interconnecting wells, which will increase the supply of water available to A&B, materially changing the facts governing the Director's determination of material injury. Judicial review of the Remand Order without consideration of such facts would be merely an academic exercise, making it moot.[78]

A&B contends the district court "wrongly insulated the Director's *Remand Order* from judicial review."[79] However, there is no right to review of moot issues. Stated differently, since judicial review of the Remand Order would not provide the relief A&B seeks, constitutional due process does not entitle A&B to such review.

Notably, even before *A&B I* was issued, A&B recognized the *A&B I* decision may render the Remand Order moot. Shortly after the Remand Order was issued, the parties filed a stipulated motion, which counsel for A&B prepared, asking the Director to stay further proceedings on the Remand Order. [80] The motion states: "Once a final decision is issued by the [Supreme] Court, the parties will request a status conference with IDWR to resume this proceeding, if necessary (i.e. if decision is not mooted by Supreme Court's review)."[81]

When this Court upheld the interconnection requirement, A&B's mootness concern was realized. The district court was correct in concluding that "A&B is not entitled to the relief it seeks, and the issues presented are no longer live, as it has not complied with the interconnection

[78] *Bettwieser v. New York Irr. Dist.*, _ Idaho _, 297 P.3d 1134, 1143 (2013).
[79] A&B Opening Br. 12.
[80] R. at 3507.
[81] R. at 3508.

obligations placed upon it under [*A&B I*]."[82] Therefore, this Court should uphold the district court's ruling that A&B's petition for judicial review is moot.

C. The dismissal of A&B's petition does not violate due process.

A&B also contends the district court's dismissal of its petition "violates A&B's constitutional right to due process."[83] A&B's argument is two-fold. First, A&B claims it was given "no avenue to present the interconnection study as part of the record in this case."[84] Second, A&B claims it has been left without a "meaningful opportunity for judicial review."[85]

i. A&B had ample opportunity to present interconnection evidence during the evidentiary hearing.

The notion that A&B did not get a fair opportunity to present interconnection evidence is absurd. When A&B made its delivery call, it knew the Director would consider whether A&B was "using water efficiently and without waste," and whether A&B's water needs "could be met with [its] existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices."[86] At the hearing, other parties demonstrated that A&B was not utilizing all of its points of diversion, that some of its operating wells produce excess water, and that A&B could use water more efficiently by interconnecting wells.[87] Nothing prevented A&B from introducing its own interconnection evidence at the hearing.

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[82] Clerk's R. at 287.

[83] A&B Opening Br. 11.

[84] *Id.*

[85] *Id*. at 12.

[86] CM Rules 42.01 and 42.01.g.

[87] Ex. 481; R. at 3093, 3095-97.

What A&B really complains of is the district court's decision in 2011 to not allow A&B to augment the record with interconnection evidence after the evidentiary hearing had ended.[88] This is not a violation of due process.

The agency record "constitutes the exclusive basis for the agency action in contested cases."[89] After the evidentiary hearing concluded, all decisions were to be based solely on "the evidence in the record of the contested case and on matters officially noticed in that proceeding."[90]

When A&B asked the district court to instruct the Director to consider an interconnection study on remand, it was effectively requesting leave to present additional evidence pursuant to Idaho Code § 67-5276. This statute allows additional evidence only if "there were good reasons for failure to present it in the proceeding before the agency," or "there were alleged irregularities in procedure before the agency."[91] In addition, the request to augment the record must be timely.[92] Whether to allow augmentation is a discretionary decision of the reviewing court.[93]

As mentioned above, A&B had as good an opportunity as anyone else to present interconnection evidence at the evidentiary hearing. Further, A&B's request to augment the record after the district court had already ruled on its petition for judicial review is patently untimely. This Court has held that a motion to augment the record is untimely if it is not filed

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[88] Clerk's Supp. R. at 795.

[89] Idaho Code § 67-5249.

[90] *Id*. § 67-5248(2).

[91] Idaho Code § 67-5276.

[92] *Crown Point Dev., Inc. v. City of Sun Valley*, 144 Idaho 72, 76 (2007).

[93] *Spencer v. Kootenai County*, 145 Idaho 448, 458 (2008).

until after a decision is entered by a reviewing district court.[94] Thus, the district court properly acted within its discretion when it declined A&B's request to augment the record.[95]

More importantly, A&B is foreclosed from arguing now that the district court erred in 2011 when it denied A&B's motion to augment the record. That decision was made more than two years ago, and A&B didn't appeal it. It is *res judicata*.

Since A&B had ample opportunity to present interconnection evidence at the hearing, and since A&B did not timely appeal the district court's 2011 decision to limit the remand to evidence already in the record, this Court should reject A&B's argument that it has been denied due process.

ii. A&B mistakenly assumes moot issues were dismissed with prejudice.

A&B's concern with due process appears to stem from its mistaken assumption that the district court dismissed its entire petition for judicial review "with prejudice."[96] A careful reading of the 2013 Memorandum Decision reveals that's not the case.

The Judgment entered by the district court in connection with the 2013 Memorandum Decision reads:

> IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the *Second Amended Petition for Judicial Review* filed by the Petitioner on October 30, 2012, is hereby dismissed **in part** with prejudice and to those matters not dismissed the *Final Order on Remand Regarding the A&B Irrigation District Delivery Call* issued on April 27, 2011, by Director Gary Spackman in IDWR Docket No. CM-DC-2011-001 is affirmed consistent with this Court's *Memorandum Decision.*

[94] *Id*. at 458.

[95] Clerk's Supp. R. at 793-795.

[96] A&B Opening Br. 12, 24.

> The City of Pocatello's and the Idaho Ground Water Appropriators, Inc.'s request for attorney's fees is denied.[97]

While neither the Judgment nor the 2013 Memorandum Decision explicitly state which issues were dismissed with prejudice and which were not, established jurisprudence provides the answer. "The difference between a dismissal without prejudice and a dismissal with prejudice is that the former permits the plaintiff to refile the complaint as if it had never been filed, while the latter bars the refilling of the dismissed complaint."[98] Issues previously litigated are dismissed with prejudice.[99] Likewise, issues that have been waived are dismissed with prejudice.[100]

In contrast, where a matter was not decided upon the merits, the judgment is without prejudice.[101] Accordingly, moot issues are dismissed without prejudice.[102]

In this case, the district court deemed A&B's petition moot.[103] Had the court ended there, every issue would have been dismissed without prejudice. However, based on an exception to the mootness doctrine, the court decided Issue 5 on the merits.[104] In addition, the court found Issues 1 and 3 were litigated previously,[105] and Issue 4 has been waived,[106] dismissing them with

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[97] Clerk's R. at 277 (emphasis added).

[98] *Castle v. Hays*, 131 Idaho 373, 374 (1998).

[99] *Farmers Nat'l Bank v. Shirey*, 126 Idaho 63, 70 (1994).

[100] *Pines Grazing Ass 'n, Inc. v. Flying Joseph Ranch, LLC*, 151 Idaho 924, 930 (2011).

[101] *Young v. Extension Ditch Co.*, 28 Idaho 775, 782-783 (1916); see also *Sullivan v. Allstate Ins. Co.*, 1990 Ida. Lexis 102, *18 (Bistline, J., dissenting) ("Of course, it is well-recorded that a dismissal which is not based on the merits of the alleged controversy does not operate as a dismissal with prejudice.").

[102] *Castle v. Hays*, 131 Idaho 373, 374 (1998).

[103] Clerk's R. at 287.

[104] *Id*. at 294.

[105] *Id*. at 289, 291.

[106] *Id*. at 288.

prejudice. Issues 2, 6 and 7 were dismissed solely on grounds of mootness, without prejudice. Should A&B file a delivery call after complying with the interconnection requirement, it can raise arguments related to Issues 2, 6 and 7, based on the factual record developed in that case.

D. The district court did not err by declining to apply an exception to the mootness doctrine to Issues 2, 6, and 7.

A&B also contends the district court erred by not deciding Issues 2, 6, and 7 on the merits, based on an exception to the mootness doctrine that provides for a decision on the merits of the issue "is likely to evade judicial review and thus capable of repetition."[107] This exception applies only in exceptional circumstances, and this isn't one of them.

The "likely to evade judicial review and capable of repetition" exception is "limited to situations where two elements combine: (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration; and (2) there is a reasonable expectation or demonstrated probability that the same complaining party will be subjected to the same action again."[108]

The "duration" element is met in cases where the challenged action will expire before the judiciary is capable of providing relief, which may occur when the case involves things like

[107] A&B Opening Br. 25.

[108] 5 Am Jur 2d Appellate Review § 602.

election procedures, short-term transactions,[109] abortion,[110] and injunctions.[111] The duration element is not met if the challenged action will not expire before it is fully litigated.[112]

The "repetition" element is met where the complaining party will be subject to "the same action."[113] It is not met where "there is no more than a theoretical possibility that the same party will be subject to the same action again," or "the plaintiff can show only that other people may litigate a similar claim in the future."[114]

A&B relies principally on the *American Lung Association* decision to support its argument that the "likely to evade judicial review and capable of repetition" exception applies here.[115] That reliance is misplaced. The *American Lung Association* case involved an almost annual crop burning determination by the Director of the Idaho Department of Agriculture.[116] Before the plaintiffs could fully litigate one determination, the Director would issue a subsequent determination that superseded the disputed determination. *Id*. Had this Court not applied the "likely to evade judicial review and capable of repetition" exception, the plaintiff could have never obtained judicial resolution of its grievance.

In contrast, nothing precludes A&B from fully litigating a subsequent delivery call after it interconnects wells and takes other action required by the Director. Moreover, A&B will not be

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[109] *Alcoa, Inc. v. Bonneville Power Admin*., 698 F.3d 774, 786-787 (9th Cir. 2012).

[110] *Roe v. Wade*, 410 U.S. 113, 125 (1973).

[111] *Shell Offshore, Inc. v. Greenpeace, Inc*., 709 F.3d 1281, 1287 (9th Cir. 2013).

[112] *Alcoa*, 698 F.3d at 787.

[113] *Turner v. Rogers*, 131 S. Ct. 2507, 2515 (2011).

[114] 5 Am Jur 2d Appellate Review § 602.

[115] A&B Opening Br. 25-28.

[116] 142 Idaho 544, 546 (2006).

subject to the "same action" because interconnecting wells will materially change the facts by which the Director evaluates material injury.

Thus, the "likely to evade judicial review and capable of repetition" exception to the mootness doctrine does not apply to Issues 2, 6, and 7. Therefore, this Court should affirm the district court's decision to dismiss Issues 2, 6, and 7 based on mootness.

E. The district court's prior remand does not invalidate its determination that A&B's current petition for judicial review is moot.

A&B also contends the district court's prior remand prohibits the district court from determining A&B's petition for judicial review is moot. According to A&B, "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."[117] A&B asserts that since the district court did remand the matter back to the Director, "the law of the case prevents the district court from finding the case 'moot' and dismissing A&B's petition for judicial review."[118] In other words, A&B treats mootness as if it is subject to some statute of limitation, and that courts are forced to decide moot issues that are not dismissed immediately. A&B cites no precedence for this, and it would indeed be poor judicial policy to pigeonhole courts in this way.

IGWA agrees that when the district court originally upheld A&B's interconnection obligation, it could have declined to address the evidentiary standard issue on the basis that it was moot. But the court did address the issue, presumably because of its general legal

[117] A&B Opening Br. 14.
[118] *Id*. 13.

significance. And when the court remanded the case to the Director to apply the clear and convincing standard, none of the parties petitioned the court to reconsider. Perhaps more importantly, by the time A&B filed its motion to enforce the remand, it had appealed the interconnection ruling to this Court, throwing into question whether A&B would ultimately be required to interconnect before pursuing curtailment. In light of this, it is understandable that the district court allowed the remand to go forward.

Regardless of whether the remand was the best course of action, by no means does it prohibit the district court from finding A&B's subsequent petition for judicial review to be moot. Therefore, this Court should find that the district court's dismissal of A&B's petition for judicial review did not violate the law of the case.

F. Interconnection was not a prerequisite to A&B's original delivery call, but it is prerequisite to a subsequent call.

A&B also argues: "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."[119] This misconstrues the nature of the interconnection ruling.

The Director did not rule that interconnection was a prerequisite to A&B's original delivery call, or that it is a prerequisite to delivery calls that may be filed by other water users in other contexts. Rather, he found, based on the evidence presented at the hearing, that A&B had

[119] A&B Opening Br. 15, n. 9.

not put forth sufficient effort to use its existing water supplies to meet its water needs, as required by CM Rule 42.01.g.[120] This Court acknowledged this in *A&B I*, explaining:

> The Director did not impose a new condition, but rather he used his discretion to analyze A&B's delivery call using his statutory authority in the manner governed by the CM Rules.
>
> . . .
>
> Idaho law does not explicitly state that interconnection is a condition of administration, but the CM Rules allow the Director to consider reasonable diversion in his determination.[121]

A&B's assertion that interconnection was a jurisdictional prerequisite to its original delivery call is mistaken. The interconnection ruling does not mean A&B's original delivery call was void, but it does mean A&B must interconnect before making a future call.

G. The law of the case doctrine precludes A&B from re-litigating this Court's interconnection ruling in *A&B I*.

Finally, A&B argues that even if its failure to comply with the interconnection obligation renders its petition for judicial review moot, it should not be required to file a new delivery call after interconnecting.[122] Rather, A&B contends, the Director should simply "withhold implementing an order for curtailment or mitigation until the connection study is completed."[123]

As an initial matter, A&B's repeated assertion that it need merely submit a "study" in order to satisfy its interconnection obligation mischaracterizes the rulings of the Director and this Court. The Director's 2009 final order and the *A&B I* decision of this Court require A&B to

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[120] R. at 3096.

[121] *A&B I*, 153 Idaho at 515-516.

[122] A&B Opening Br. 17.

[123] *Id*.

actually interconnect wells, or demonstrate it is not feasible, before filing another delivery call.[124] A&B's apparent effort to diminish that obligation must be rejected.

That aside, it is ironic that A&B is asking that the Director be ordered to withhold implementation of the Remand Order while it completes an interconnection study. Perhaps A&B has forgotten it took the Director to task for issuing an amended remand order beyond the twenty-one (21) day deadline prescribed by Idaho Code § 67-5246, dragging the other parties all the way to this Court over the issue.[125] Were A&B permitted to augment the record with an interconnection study, the Director would need to issue an amended order, which, until now, A&B has taken great offense at.

As a practical matter, the requirement that A&B file a new delivery call is perfectly acceptable. The act of interconnecting wells, as well as other events since the original hearing in 2008, will materially change the facts upon which the Director evaluates material injury, necessitating development of a new factual record.

But that is beside the point. The law of the case precludes A&B from re-litigating this Court's ruling that A&B must file a new delivery call after interconnecting wells. The "law of the case" doctrine provides that if this Court, or a district court acting in an appellate capacity, "states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in

[124] R. at 3096-97; *A&B I*, 153 Idaho at 516.
[125] *A&B II*, 301 P.3d 1270.

the trial court and upon subsequent appeal . . . ."[126] In this case, the *A&B I* decision explicitly states that "A&B must work to reasonably interconnect some individual wells or well systems before a delivery call can be filed."[127] That ruling cannot be re-litigated here.

In addition, A&B's request to withhold enforcement of the order while A&B presents interconnection evidence amounts to a request to augment the record, and must be rejected for the reasons set forth on page 21 above.

II. The district court correctly dismissed Issues 1 and 3 with prejudice because they were argued and decided previously in the 2010 Memorandum Decision.

A&B argues that the district court erroneously found that Issues 1 and 3 had been decided previously, contending that if this Court "understand[s] the prior proceedings and their context," it will find otherwise.[128] As explained below, the district court was right.

A. Issue 1.

Issue 1 is: "Whether the Director unconstitutionally applied the CM Rules to A&B's decreed senior water right for purposes of administration."[129] A&B argued in its petition for judicial review that the Director failed "to analyze whether A&B's senior water right was materially injured using the 'correct presumptions and burdens of proof.'"[130] A&B continued:

> Rather than commence the inquiry with the water right and evaluate whether A&B could beneficially use the decreed quantity (0.88 miner's inches per acre), the Director relied upon pre-decree information and theoretical average water

[126] *Swanson v. Swanson*, 134 Idaho 512, 515-516 (2000) (internal citations omitted).

[127] *A&B I*, 153 Idaho at 516 (emphasis added).

[128] A&B Opening Br. 22-23.

[129] Clerk's R. at 284.

[130] *Id*. at 69.

> deliveries from prior years to re-adjudicate A&B's water right. The result is an unlawful and unconstitutional application of the CM Rules. The Court should correct these errors of law accordingly.[131]

The assertion that this issue was not raised previously is startling. As noted by the district court, A&B raised this issue in almost identical terms in its first petition for judicial review: "Whether the Director unconstitutionally applied the CMR by disregarding the proper presumptions and burdens of proof resulting in (i) reducing A&B's diversion rate per acre from 0.88 to 0.75 miners inches; . . . ?"[132] The district court addressed this issue directly in its 2010 Memorandum Decision, ruling that "any finding by the Director that the quantity decreed exceeds that being put to beneficial use must be supported by clear and convincing evidence."[133] On appeal, this Court likewise held that "proof of 'no injury' by a junior appropriator in a water delivery call must be by clear and convincing evidence."[134]

Moreover, to the extent A&B wishes to attack the CM Rules from a different angle, it is foreclosed from doing so.[135] An issue that "could have been, but was not, presented in a previous appeal, is waived and will not be considered by an appellate court upon a second appeal in the same action."[136] This "discourages piecemeal appeals and is consistent with the broad scope of claim preclusion under the analogous doctrine of res judicata."[137]

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[131] Clerk's R. at 70.

[132] Clerk's Supp. R. at 373.

[133] *Id*. at 403.

[134] *A&B I*, 153 Idaho at 524.

[135] *Swanson*, 134 Idaho at 517.

[136] *Dopp v. Idaho Comm'n of Pardons & Parole*, 144 Idaho 402, 407, n.3 (Ct. App. 2007).

[137] *Capps v. Wood*, 117 Idaho Ct. App. 614, 618 (1990).

B. Issue 3.

Issue 3 is related to Issue 1. It reads: "Whether the Director erred in using an undefined "crop maturity" standard, not the water right, for purposes of administration."[138] While A&B asserts that the district court erred by finding this issue was decided previously, it offers no argument in support of that assertion. Consequently, this Court should not address whether the district court erred in this manner:

> This Court has held that if an appellant does not assert his assignments of error with particularity and to support his position with sufficient authority, those assignments of error are too indefinite to be heard by the Court. Further, where the argument is merely a general attack on the findings and conclusions of the district court, without specific reference to evidentiary or legal errors, this Court will not consider the issue. Therefore, issues that are not argued and supported as required by the Appellate Rules are deemed to have been waived.[139]

Moreover, district court's finding that Issue 3 was decided previously is sound, and A&B has waived its ability to take a different angle on the issue now.[140]

Therefore, this Court should affirm the district court ruling that Issues 1 and 3 cannot be re-litigated, since they were addressed previously, or, at a minimum, have been waived.

III. The Remand Order should not be vacated or declared void.

Lastly, A&B contends that if the district court did not err in dismissing its petition as moot, the court "erred in not vacating the *Remand Order* or declaring it to be void and of no effect."[141] A&B gives two reasons for this argument, neither of which pass muster.

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[138] Clerk's R. at 285.

[139] *Bettwieser*, 297 P.3d at 1142-1143 (internal quotes and cites omitted).

[140] Clerk's R. at 290.

[141] A&B Opening Br. 31.

First, A&B argues the interconnection ruling is "jurisdictional," and that the Director "had no authority to accept the call and hold a contested case" and "no authority to issue any orders because the call would not be properly postured before IDWR."[142] This argument mischaracterizes of the nature of the interconnection ruling. As explained above, interconnection was not a jurisdictional prerequisite to A&B's original delivery call, though it is prerequisite to any future call.[143]

Second, A&B argues that if the Remand Order cannot be challenged based on mootness, then it "is not a final agency action and must be vacated to the extent it poses as such," asserting that the Idaho Administrative Procedures Act requires as much.[144] A&B complains, "the district court has essentially turned the *Remand Order* into an unchallengeable agency mandate."[145]

A&B misapprehends what it means for an issue to be "moot." An issue is moot if it is "no longer live" and "judicial determination will have no practical effect upon the outcome."[146] That does not mean the action from which the issue arose must be declared void or vacated.

While the Idaho Administrative Procedures Act instructs courts to either affirm or set aside agency orders, it presumes the court has reviewed the merits of the order.[147] Where an issue is moot, the court does not reach the affirm/set aside juncture, so the court should do neither. It would certainly be inappropriate to affirm issues that are not decided on the merits,

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[142] A&B Opening Br. 31.

[143] *See* p. 27, *supra*.

[144] A&B Opening Br. 32.

[145] *Id*. at 33.

[146] *Schools for Equal Education Opportunity v. Idaho State Bd. of Education*, 128 Idaho 276, 281 (1996).

[147] Idaho Code § 67-5279.

and equally inappropriate to void undecided issues as if they violate the criteria prescribed in Idaho Code § 67-5279.

As a practical matter, declaring the Remand Order void would seem to have little effect, which begs the question of why A&B is asking for it. Presumably, A&B desires to evade the district court's decision on Issue 5 on the merits, and/or its ruling that Issues 1, 3, and 4 were previously decided or have been waived. This would be inappropriate and unfair to the other parties. Therefore, IGWA respectfully asks the Court to not void the Remand Order.

CONCLUSION

Based on the foregoing, IGWA respectfully asks the Court to affirm the district court's 2013 Memorandum Decision. The district court properly dismissed Issues 1, 3, and 4, with prejudice; properly dismissed Issues 2, 6, and 7, without prejudice; and properly affirmed the Director's legal analysis as it related to Issue 5. (The district court's rulings on Issues 4 and 5 were not appealed.)

RESPECTFULLY SUBMITTED November 14, 2013.

RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED

By: _____
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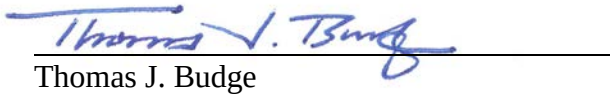
CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November, 2013, the above document was served on the following persons in the manner indicated. Electronic copies are submitted in compliance with I.A.R. 34.1.



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Appendix A

Excerpts from A&B Opening Brief
Idaho Supreme Court Docket No. 38403-2011 (July 1, 2011)

Docket No. 38403-2011

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 IDAHO GROUND WATER APPROPRIATORS, INC.; THE CITY OF POCATELLO; FREMONT-MADISON IRRIGATION DISTRICT, ROBERT & SUE HUSKINSON; SUN-GLO INDUSTRIES; VAL SCHWENDIMAN FARMS, INC.; DAVID SCHWENDIMAN FARMS, INC.; DARRELL C. NEVILLE; SCOTT C. NEVILLE; STAN D. NEVILLE,
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

3318. A&B requested and was denied reconsideration of the *Final Order*, and this appeal followed.

ISSUES PRESENTED

A&B presents the following issues on appeal:

A. Whether the Director erred in concluding that A&B's 1948 water right is subject to the provisions of the 1951 Idaho Ground Water Act (Idaho Code §§ 42-226 *et seq.*) and the 1953 amendment, even though the statute provides that "This act shall not effect the rights to the use of ground water in this state acquired before its enactment"?

B. Whether the Director erred in finding that A&B has not been required to pump water beyond a "reasonable ground water pumping level" even though the Director failed to identify a specific pumping level as required by Idaho Code § 42-226?

C. Whether the Director erred in failing to analyze water availability at the 177 individual wells or points of diversion for purposes of an injury analysis to A&B's senior water right?

D. Whether the Director unconstitutionally applied the CM Rules by finding that A&B must interconnect individual wells or well systems across the project before a delivery call can be filed even though water right 36-2080 was developed, licensed and decreed with 177 individual wells?

B. Idaho Law Does Not Require A&B to Interconnect its Separate Points of Diversion (Wells) as a Condition to Administer Junior Priority Ground Water Rights.

Notwithstanding the actual layout of the A&B project and the individual decreed points of diversion, the Director concluded "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 juniors." R. 3096. This decision was affirmed by the District Court, which held that the Director had the discretion to order interconnection of the well systems, Clerk's R. at 83, and that A&B must either interconnect its systems or change its water right through a transfer proceeding, before it can seek administration of juniors, *id.* at 84-85. The District Court and Director have created a new "condition" to the administration of A&B's water right that is contrary to the elements of A&B's partial decree. Moreover, this condition results in an application of the CM Rules that is contrary to Idaho's constitution and water law code.

First, mandating interconnection as a prerequisite to administration is an unconstitutional application of the CM Rules. Idaho is a prior appropriation state. *See* IDAHO CONST. Art XV, § 3; *Clear Springs Foods, Inc.*, 2011 WL 907115 at *9 ("It is the unquestioned ruled in this jurisdiction that priority of appropriations shall give the better right between those using the water."). Denying A&B's water delivery call on the basis of a new "condition" to administration unlawfully diminishes A&B's 1948 priority. *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 388 (1982) ("to diminish one's priority works an undeniable injury to that water right holder."). The Director cannot refuse to administer junior rights causing injury to A&B's senior

right on the "theory" that A&B, the senior water right holder, must first interconnect its separate points of diversion.

Second, the Director's action contradicts the plain terms of A&B's water right decree. The SRBA Court decreed 177 individual points of diversion, or wells, for A&B's water right 36-2080 in 2003.[32] Ex. 139. The decree is binding on IDWR and "shall be conclusive as to the nature and extent" of the water right. I.C. § 42-1420(1). As decreed, the water right does not contain any special conditions, remarks, or general provisions that condition the exercise of the water right, further define or clarify the point of diversion element, or that are necessary for administration. I.C. § 42-1411(2)(i), (j), (3). The Director and state watermasters are bound to honor the plain terms of the decree for purposes of administration. *See Stethem v. Skinner*, 11 Idaho 374, 379 (1905). If the Director wants to condition the administration of a water right, the necessary general provisions or remarks must be included in the SRBA decree. *State v. Nelson*, 131 Idaho 12, 16 (1998) ("If the provisions define a water right, it is essential that the provisions are in the decree, since the watermaster is to distribute water according to the adjudication or decree. . . . Provisions necessary for the efficient administration of water rights should be preserved in the SRBA decree, not merely in the Administrative rules and regulations.").

A&B's water right decree did not "condition" or limit A&B's ability to seek administration of junior priority water rights in any way. There is no condition that requires A&B to interconnect its individual well systems before the District can seek administration of

[32] A&B filed an application for transfer in 2006 to add 11 points of diversion. Ex. 423. Of the 188 total authorized points of diversion, only 177 are active production wells. R. 3081 & 3098. The approved transfer did not include any "interconnection" conditions either.