Docket No. 40169-2013

IN THE SUPREME COURT FOR 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 POCATELLO,
Intervenors-Respondents.

CITY OF POCATELLO'S RESPONSE BRIEF

On Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Minidoka, Docket No. 2011-512

Honorable Eric J. Wildman, District Judge, Presiding

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I. STATEMENT OF THE CASE

This matter comes before the Court on A&B Irrigation District's ("A&B") third appeal[1] involving its delivery call before the Idaho Department of Water Resources ("IDWR" or "Department"). In this matter, A&B has appealed the district court's *Memorandum Decision on Petition for Judicial Review*, April 25, 2013 ("2013 Memorandum Decision") arguing that it is caught in a procedural "Catch-22." Open. Br. at 8. In reality, it is the courts of Idaho and the litigants in this case that are caught in the endless cycle of A&B's "Catch-22" litigation. In this appeal (referred to herein as "*A&B III*"), A&B argues that the 2013 Memorandum Decision should be reversed because the district court applied this Court's ruling in *A&B I* and found three of A&B's seven issues on appeal to be moot on the grounds that A&B has not yet installed a reasonable means of diversion. A&B appears to believe that if it can have the district court's order reversed and remanded for consideration of the three issues on the merits, it can have reconsidered—or perhaps avoid—this Court's requirement that it "reasonably interconnect" its system prior to pursuing a delivery call.[2] The City of Pocatello urges the Court to reject these arguments. A&B is apparently no closer today to complying with the Court's requirements in *A&B I* than it was 18 months ago; if A&B wants to pursue its claims of injury, it can do so within the existing judicial framework of *A&B I*.

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[1] *A & B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 284 P.3d 225 (2012), Idaho Supreme Court Docket No. 38403-2011 ("*A&B I*"); *A & B Irrigation Dist. v. Idaho Dep't of Water Res.*, 154 Idaho 652, 301 P.3d 1270 (2012), Idaho Supreme Court Docket No. 39196-2011 ("*A&B II*").

[2] "[W]e 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 . . . ." *A&B I*, 153 Idaho at 516, 284 P.3d at 241.

Contrary to A&B contentions, the district court did not "dismiss" its entire appeal—it found certain issues to be moot given this Court's decision in *A&B I*, other issues to be waived by A&B per the law of the case, and decided an additional issue on the merits. If A&B is correct that issues 2, 6 and 7 should have been considered on their merits, despite this Court's decision in *A&B I* that interconnection is a prerequisite to proceeding with this delivery call, this Court may remand the matter back to the district court. However, such remand will not achieve A&B's ultimate goal—to reverse the opinion of this Court in *A&B I* that A&B must reasonably interconnect its system before proceeding with its delivery call before the Department. Accordingly, consideration of issues 2, 6 and 7 on the merits is futile and moot because it will provide no relief to A&B.

A&B's continued attempts to remake its case should be denied by this Court. A&B's Opening Brief wholly ignores important facts and findings that are the law of the case in this matter. A&B's inability to accept the findings of this Court should not require the parties in this appeal to continue to respond to specious arguments.

II. 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. Idaho Dep't of Water Res.*, 138 Idaho 831, 835, 70 P.3d 669, 673 (2003). An agency's decision must be overturned if it was: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; or (d) arbitrary, capricious, or an abuse of discretion." I.C. § 67-5279(2) (2013). An agency's decision must also be overturned if it was not supported by substantial evidence on the record as a whole. I.C. § 67-5279(3)(b)

(2013). 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).

In Idaho, the "law of the case" doctrine "precludes relitigation of issues" that could have been raised and either did or did not reach the Idaho Supreme Court during the first appeal. *Swanson v. Swanson*, 134 Idaho 512, 517, 5 P.3d 973, 978 (2000) ("Since George did not avail himself of this avenue for appealing the trial court's ruling on the characterization issue, we hold that the 'law of the case' doctrine precludes him from reopening the issue at this time."). "[A]n 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." *Dopp v. Idaho Comm'n of Pardons & Parole*, 144 Idaho Ct. App. 402, 407 n.3, 162 P.3d 781, 786 n.3 (2007).

Finally, the Supreme Court "may uphold [lower court] decisions on alternate grounds from those stated in the findings of fact and conclusions of law on appeal." *Martel v. Bulotti*, 138 Idaho 451, 453; 65 P.3d 192, 194 (2003).

III. PROCEDURAL HISTORY[3]

A. Hearing Before IDWR

On January 29, 2008, the Director issued an *Order* ("Original Order") denying A&B's Petition for Delivery Call ("Petition"), finding that A&B's 36-2080 water right had not suffered material injury. R. 1105−60. A hearing was conducted in December 2008 before Hearing Officer Gerald F. Schroeder ("Hearing Officer"). The Hearing Officer entered an *Opinion*

[3] The procedural history of this proceeding is quite extensive and important to understanding why A&B's appeal is meritless. The City of Pocatello has provided a truncated version in this brief for purposes of judicial economy, and adopts the procedural history found in Idaho Ground Water Appropriators, Inc.'s Response Brief. Appendix 2 to this brief contains a visual depiction of pertinent events in the procedural history of the A&B delivery call for this Court's reference.

Constituting Findings of Fact, Conclusions of Law and Recommendations ("Opinion") on March 27, 2009, agreeing that A&B had not suffered material injury to its water right. R. 3078−120. The Hearing Officer found, *inter alia*, that "there 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." *Id.* at 3096. On June 30, 2009, the Director issued the *Final Order Regarding the A&B Irrigation District Delivery Call* ("Final Order") accepting all substantive recommendations of the Hearing Officer. R. 3318−25.

B. 2010 District Court Decision, Case No. CV 2009-000647

A&B appealed the Director's Final Order, raising the following issue, among others: "Whether the Director erred and unconstitutionally applied the CMR by concluding that A & B must interconnect individual wells or well systems across the project before a delivery call can be filed . . . ." Clerk's Supp. R. 374. The district court affirmed the Director's Final Order in a *Memorandum Decision and Order on Petition for Judicial Review* ("2010 District Court Decision") on all issues litigated and determined by the Department. *Id.* at 414−15. The district court found that "[t]he 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.

However, the Court's agreement with the Director's finding of no material injury was limited by the "proviso" that the Director had failed "to apply the constitutionally protected presumptions and burdens of proof" in reaching his conclusion of no material injury. *Id.* at 389. The Court remanded the matter to the Department for consideration of the evidence in the

existing record under the clear and convincing standard of proof, stating that "no further evidence is required." *Id.* at 414.

C. A&B's Motion to Enforce Orders, Case No. CV 2009-000647

On January 31, 2011, A&B filed a *Motion to Enforce Orders* in Case No. CV 2009-000647, requesting that the district court order the Director to comply with the Court's remand to apply the clear and convincing evidence standard and to consider A&B's proposed new evidence regarding interconnection feasibility as part of the remand. Clerk's Supp. R. 675. A&B has not prepared any study regarding interconnection and has not actually interconnected any of its system: instead, "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 proposed report." *Id.* The district court ordered the Director to comply with the remand and apply the clear and convincing standard to the evidence in the record, but denied A&B's request that the Director consider its proposed "interconnection" feasibility study in conjunction with the ordered remand because the study was not part of the record in *A&B I*. Clerk's Supp. R. 789−96.

No party appealed the district court's order. To date, A&B has not submitted any additional evidence regarding interconnection to the Department.

D. Department's 2011 Remand Order, IDWR Matter No. CM-DC-2011-001

On remand, the Director considered the evidence in the record and determined, by clear and convincing evidence, A&B was not materially injured. R. 3469−91 (*Final Order on Remand Regarding the A&B Irrigation District Delivery Call* ("Remand Order")). The Director made the following findings:

> [1] IT IS HEREBY ORDERED that the Director concludes by clear and convincing evidence that A&B Irrigation District is not materially injured and its delivery call is DENIED.
>
> [2] IT IS HEREBY FURTHER ODERED that prior to seeking curtailment of junior-priority ground water users, A&B must have mechanisms in place to limit its place of use to the place of use for the calling water right.
>
> [3] Prior to seeking curtailment of junior-priority ground water users, A&B must exercise all of its appurtenant points of diversion.

Id. at 3490.

In this matter, A&B has only appealed the first of these three findings of the Director regarding clear and convincing evidence. Open. Br. at 6−7.

E. 2012 Idaho Supreme Court Decision

Approximately four months after the Director issued the Remand Order, the Idaho Supreme Court affirmed the district court's 2013 Memorandum Decision in Case No. CV 2009-000647 in all aspects, finding *inter alia*, that (1) "the Ground Water Act applie[d] to the administration of A & B's water right"; (2) "the Director had substantial and competent evidence to support his decision not to set a reasonable groundwater pumping level and to analyze the water right on a system-wide as opposed to a well-by-well basis"; (3) and that the Director's determination regarding material injury in a delivery call is subject to a clear and convincing evidence standard. *A&B I*, 153 Idaho at 524−25, 284 P.3d at 249−50. *See generally* Appendix 2.

The Idaho Supreme Court devoted a significant portion of its opinion to responding to A&B's appeal regarding "[w]hether 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." *Id.* at 514, 284 P.3d at 239. The Court affirmed, stating that "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." *Id.* at 516, 284 P.3d at 241 (emphasis added).[4]

This Court also affirmed the Director's finding that A&B is not water short, and that before it can claim it is water short, it must cease irrigating junior and enlargement acres:

> A & B argues that interconnection will not solve the ultimate problem of diminishing water supply . . . . Absent findings that A & B has exceeded a reasonable pumping level, there does not appear to be any evidence to support A & B's argument. Additionally . . . A & B seeks to curtail junior users while it simultaneously irrigates junior and enlargement acres. If water supply was an issue for A & B, it seems unlikely that they would continue this practice.

Id.

F. Appeal of Director's Remand Order, Case No. 2011-000512

After the Idaho Supreme Court decision was released, A&B proceeded on its appeal of the Director's Remand Order. *See generally* Appendix 2. On April 25, 2013, the district court issued its Memorandum Decision on Petition for Judicial Review, addressing each of the following issues raised by A&B:

1. Whether the Director unconstitutionally applied the CM Rules 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] Contrary to A&B's assertions, a "study" of interconnection will not satisfy this Court's prerequisite. A&B must reasonably interconnect its wells or well systems.

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 A&B's water right is not materially injured.

Clerk's R. 284−85.

The district court dismissed issues 1, 3, and 4 as improperly raised by A&B because those issues either were or could have been raised in the CV 2009-000647 appeal, and were precluded from relitigation. *Id. at* 291 ("[I]ssues no. 1 and 3 were previously addressed by this Court in the first *Petition for Judicial Review* in Minidoka County Case No. CV-2009-647. A&B's attempt to re-raise theses same issues in this judicial review proceeding is improper."); *id.* at 288 ("[Issue #4] is an issue that could have been raised in the first *Petition for Judicial Review* in Minidoka County Case No. CV-2009-000647 but was not. Since A&B failed to raise this issue in the prior proceeding it is deemed waived . . . .").

With respect to issues 2, 6 and 7, the Court found "the issues presented are moot, 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 obligations placed upon it under [*A&B I*]." *Id.* at 287−88. "[B]ased on the Idaho Supreme Court's holding A&B has a duty to 'work to reasonably to interconnect some individual wells or well systems before a delivery call can be filed.' The

Court's language . . . imposes certain interconnection obligations on A&B as a precondition to filing a delivery call involving water right 36-2080." *Id.* at 287 (internal citation omitted).

Finally, the Court addressed issue 5 on the merits after finding that an exception to mootness applied, finding that "the Director did not misapply I.C. § 42-226 in support of his conclusions." *Id.* at 294.

A&B has appealed the district court's determination of issues 1, 2, 3, 6 and 7 to this Court. *See* Open. Br. at 6−7. A&B did not appeal the Court's determination of issues 4 and 5, and argument on those issues is thus waived.

IV. ARGUMENT

A. Summary of Argument

Contrary to A&B's representations, the district court did not "dismiss" its appeal and place A&B in a procedural "Catch-22." Open. Br. at 8. While the district court found three of A&B's issues on appeal moot, the court provided A&B with a pathway forward: once A&B takes reasonable interconnection steps and has a reasonable means of diversion, it can proceed with its delivery call.[5] When A&B complies with the interconnection requirement, and if it desires to continue its delivery call, the Director will then be in a position to consider the question of whether A&B—after (1) reasonably interconnecting its system, (2) limiting deliveries of water to the place of use for the senior right (and not junior or enlargement acres),

[5] Pursuant to *A&B I* and the Director's Remand Order, interconnection is not the only barrier in the way to re-commencing this delivery call—A&B must also first limit its water delivery to exclude over 4,000 enlargement acres and that it use all 188 authorized points of diversion. *See* Part IV.G of this brief. For the sake of brevity, this brief will focus on the interconnection precondition, which was the basis of the district court's opinion.

and (3) exercising all of its appurtenant points of diversion—is short of water.[6] Accordingly, A&B holds the key to its salvation. But, until A&B has complied with the interconnection requirement, as found by the district court, consideration of the existing evidence pursuant to the clear and convincing standard would amount to an advisory opinion, as such a "judicial determination will have no practical effect upon the outcome." *Goodson v. Nez Perce County Bd. of County Comm'rs*, 133 Idaho 851, 853, 993 P.2d 614, 616 (2000). A&B had the opportunity to thoroughly litigate the interconnection obligation in the prior appeal. A&B's attempts to find inconsistency in the law of the case in order to resuscitate the interconnection issue should be rejected.

If the relief A&B seeks is granted in this appeal—specifically, if this Court declines to affirm the district court and finds instead that issues 2, 6 and 7 are not moot—the matter would be remanded to the district court for a decision on those issues. The district court's job would then be to evaluate whether the Director had substantial evidence to conclude that A&B could not beneficially use its decreed water right based on clear and convincing evidence (issue 2) and that A&B was not water short based on clear and convincing evidence (issue 7); and whether the Remand Order exceeded the Director's discretion under the so-called "mandate rule" (issue 6). However, the answer to these questions is not relevant and does not provide any relief to A&B, as it must still interconnect its system before it may request curtailment of junior water users. A&B achieves nothing by this appeal except delaying the day that it must comply with *all* of the requirements imposed upon it by the law of the case and as affirmed by this Court.

[6] R. 3490; *see* Part IV.G of this brief.

A&B also appeals the district court's determination that it waived issues 1 and 3 because those issues were previously addressed by the district court's decision in *A&B I*, and affirmed by this Court. Idaho law does not permit A&B to litigate these resolved issues simply because it is not happy with its failures in *A&B I*.

B. The District Court's Determination of Issues 2, 6 and 7 As Moot Should Be Affirmed

1. The Hearing Officer, district court, and this Court have all held that A&B lacks a reasonable means of diversion and that interconnection is a prerequisite to continuing its delivery call.

Following development of an evidentiary record after extensive discovery and a lengthy hearing, the Hearing Officer in *A&B I* concluded that A&B had an obligation "to take reasonable steps to maximize the use of [its decreed] flexibility to move water within the system before it can seek curtailment or compensation from junior users." R. 3096 (emphasis added). The Director affirmed, as did the district court. R. 1105; Clerk's Supp. R. 366. Upon appeal, this Court found that A&B "must take reasonable steps to divert some water throughout the project [by interconnecting wells] before junior members are impacted." *A&B I*, 153 Idaho at 239, 284 P.3d at 514 (emphasis added).

A&B had every opportunity to argue the interconnection issue, and did; yet, the Hearing Officer, Director, district court and Idaho Supreme Court all made explicit findings that A&B's system did not constitute a reasonable means of diversion. *See* Appendix 1 to this brief for a detailed list of supporting record cites. A&B's opportunity to litigate and appeal the question of whether its means of diversion is reasonable, and whether it must interconnect prior to advancing its delivery call, has ended.

In this appeal, A&B now argues that the Director "could" have imposed the interconnection requirement and found injury to A&B, but instead stayed curtailment until A&B had complied with interconnection. Open. Br. at 16−18. Importantly, A&B was not found to be injured in its delivery call for a multitude of reasons. This Court found that the Director properly exercised his discretion when he imposed the interconnection requirement—accordingly, what the Director "could" have done is not a basis for challenge, especially in light of the evidence in this case that A&B is not suffering water shortages. *A&B I*, 153 Idaho at 515−16, 284 P.3d at 240−41. Second, A&B had its opportunity during the appeal of *A&B I* to make this argument to the Court, and thus the argument is waived. *Dopp*, 144 Idaho Ct. App. at 407, 162 P.3d at 786.

A&B framed the "interconnection" issue on appeal in *A&B I* as follows:

> 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.

A&B I, 153 Idaho at 505, 284 P.3d at 230. A&B's new allegation that it caused this Court to "misinterpret" the issue in *A&B I*, without further explanation, is self-serving and not consistent with the record. A&B never asked for reconsideration of this Court's 2012 decision—accordingly, the interconnection "precondition" language—which is also found in the findings of the Director, Hearing Officer, and district court—is law of the case, waived, and cannot be re-argued to this Court. *Taylor v. Maile*, 146 Idaho 705, 709, 201 P.3d 1282, 1286 (2009); *see* Appendix 1. "'The law of the case' doctrine provides that when 'the Supreme Court, in deciding a case presented 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 the trial court and upon subsequent appeal.'" *Id.* (citation

omitted). A claim of "mistake" does not entitle A&B to avoid settled rules of finality. Relitigation of the interconnection issue should not be considered by this Court.

2. Because of A&B's decision to pursue the remand during the pendency of the appeal of *A&B I*, the 2013 district court decision in the captioned matter provided the first opportunity to impose the interconnection requirement.

Only after this Court's decision was released in August, 2012 was it proper for a decision-maker—in this case, the district court in responding to A&B's appeal of the Remand Order—to impose on A&B the practical result of the interconnection requirement. *See generally* timeline in Appendix 2. To wit: A&B must have a reasonable means of diversion before the Director can consider what amount of water it is entitled to call for.

Instead of recognizing the district court's obligation to comply with this Court's opinion, A&B ignores the precedent of the prior appeal and focuses solely on the court's limited *Order Granting Motion to Enforce In Part and Denying Motion to Enforce in Part* ("Order Granting Motion to Enforce"), remanding the clear and convincing issue to the Director, as the "the law of the case." Open. Br. at 8. The district court did order a limited remand for application of the clear and convincing evidence standard—but again, this was prior to the Court's decision in *A&B I* mooting other issues in this matter until A&B complied with the interconnection requirement.[7]

[7] Indeed, no party argued, and the district court did not find, that the Remand Order was not subject to judicial review—simply that A&B is subject to all conclusions that constitute the law of the case in this matter, including the interconnection prerequisite. As stated by IDWR before the district court, "A&B is authorized to seek judicial review of the Final Order on Remand. However, A&B's petition for judicial review is subject to the underlying record, this Court's *Memorandum Decision* and *Memorandum Decision and Order on Petitions for Rehearing*, and the Idaho Supreme Court's decision in *A&B*." Clerk's R. 120 n.3 (internal citation omitted).

A&B filed a motion requesting that the district court order the Director to issue the Remand Order while the appeal of *A&B I* was pending, which the district court granted. Clerk's Supp. R. 790. Indeed, A&B's decision to force the limited remand before this Court had decided its first appeal is the cause of A&B's "procedural quandary." *See* Appendix 2. A&B did not appeal the district court's limited Order Granting Motion to Enforce, which they allege should have ordered the Director must consider a nonexistent interconnection study.[8] Accordingly, the propriety of the Court's Order Granting Motion to Enforce is waived.

To be clear, A&B has not submitted anything to the Department to demonstrate that it has complied with this Court's decision regarding interconnection. And to proceed, A&B must do more than an "interconnection study." The Hearing Officer's interconnection requirement was stated as thus:

> 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.

R. 3096−97 (emphasis added); *A&B I*, 153 Idaho at 516, 284 P.3d at 241 ("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 . . . .") (emphasis added).

A&B also takes issue with the characterization of the interconnection requirement as a "prerequisite" to proceeding with its delivery call because "[a]t the outset in 1994 the Director

[8] Contrary to A&B's contentions, the district court did not "deny" A&B's request to complete and submit an interconnection study, nor did it precluded A&B from complying with the interconnection requirement. The district court held that consideration of any such evidence was outside the record in *A&B I*, and rejected A&B's request that it give an advisory opinion as to whether the Director was required to consider such a study in response to the district court's limited remand. *Cf.* Open. Br. at 11.

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." Open. Br. at 18. The fact that the Department concluded A&B did not have a reasonable means of diversion after a hearing on A&B's delivery call—rather than before hearing, and the development of an evidentiary record—does not place A&B in a procedural quandary.

3. Following the Supreme Court's decision in *A&B I* affirming the interconnection requirement, the district court's finding of mootness is required under the law of the case.

The result of this Court's decision in *A&B I* is simple: if a senior appropriator lacks a reasonable means of diversion, it may not proceed with a delivery call until its system is remedied. Indeed it is a well-established principle in Idaho law that a reasonable means of diversion is a limitation on decreed water rights. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 154 P.3d 433 (2007); *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 32 S.Ct. 470 (1912). That a senior must have a reasonable means of diversion to succeed in a delivery call was recently affirmed by this Court. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 809, 252 P.3d 71, 90 (2011).

The Court's conclusions in *A&B I* arise out of an obligation on the part of the senior water user to maintain a reasonable means of diversion. As a result of that obligation, A&B must take several steps to make its means of diversion reasonable, including actually interconnecting at least a portion of its well system. To find otherwise would mean that a senior who does not have a reasonable means of diversion can pursue a delivery call before the Department and require juniors to litigate hypothetical questions, such as how much water A&B would be entitled to if it had a reasonable means of diversion.

When A&B satisfies the interconnection requirement affirmed by this Court, the Director may examine the issue remanded and affirmed by this Court: what amount of water, supported by clear and convincing evidence, A&B is entitled to call for if injury is found. Until then, the answer to this question is moot. "A case becomes moot when 'the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.' . . . '[A]n issue is moot if it presents no justiciable controversy and a judicial determination will have no practical effect upon the outcome.'" *Idaho Sch. for Equal Educ. Opportunity v. Idaho State Bd. of Educ.*, 128 Idaho 276, 281, 912 P.2d 644, 649 (1996) (citations omitted); *see also Bettwieser v. New York Irrigation Dist.*, 154 Idaho 317, 297 P.3d 1134, 1143 (2013) (citation omitted) ("a justiciable controversy is: '[D]istinguished from a difference or dispute of hypothetical or abstract character; from one that is academic or moot . . . .'").

Until A&B has a reasonable means of diversion, any consideration of evidence on the amount of water A&B may currently need is a waste of judicial resources and unnecessary. Accordingly, issues 2, 6 and 7 were found "moot" by the district court because A&B will need to take steps, regardless of this Court's decision, to improve its means of diversion. This Court should affirm the district court's mootness finding.

C. The District Court Properly Found No Exception to Mootness for Issues 2, 6 and 7

A&B disputes the district court's finding that issues 2, 6 and 7 are moot, and argues that these issues qualify for an exception to mootness because the issues are likely to evade judicial review and are capable of repetition. Open. Br. at 28.

For an issue to qualify for the "capable of repetition" requirement, the situation must be that "the case is repetitive or continuing, but is incapable of being resolved." *Idaho Sch. for*

Equal Educ. Opportunity By & Through Eikum v. Idaho State Bd. of Educ. By & Through Mossman, 128 Idaho 276, 283, 912 P.2d 644, 651 (1996) (emphasis added). In other words, the manner in which the appeal is mooted must be caused by a procedural or other constraint that precludes judicial review on the merits, and that procedural constraint is likely to repeat itself in other cases. *Freeman v. Idaho Dep't of Corr.*, 138 Idaho Ct. App. 872, 876, 71 P.3d 471, 475 (2003).

A&B has made no argument in its Opening Brief to support its contention that issues 2, 6 and 7 substantively qualify for this exception, and instead argue that the district court has announced a new "general issue" standard. This is incorrect—the district court found that A&B's challenge to the specific factual findings of the Director were not likely to evade judicial review in any future litigation in which they were raised, and accordingly were moot and should not be considered. Clerk's R. 288. Importantly, issues 2, 6 and 7 are not indefinitely moot, and can be re-raised once A&B has complied with the delivery call prerequisites. Issues 2, 6 and 7 are thus capable of repetition (and given A&B's track record, will certainly be repeated) once A&B has complied with the prerequisites to a delivery call, these issues may then be the subject of judicial review. In other words, the cause of "mootness" in this case—A&B's failure to comply with an Idaho Supreme Court decision, affirming a prerequisite to further litigation of certain issues—is not a procedural constraint that is likely to repeat itself and escape review.

A&B's reliance on *American Lung Association of Idaho/Nevada v. State Department of Agriculture* is misplaced: there, the Court found that the "capable of repetition" exception applied because the Director of the Department of Agriculture made a determination regarding field burning on an annual basis, and if the Court were to hold that subsequent annual

determinations mooted an appeal of a previous year's decision, an appeal of any order by the Director would always be precluded from judicial review. 142 Idaho 544, 546, 130 P.3d 1082, 1084 (2006). The question of what issues the parties raised with respect to their appeal was not considered by the Court: the Court found the "evasive of review" exception applied because the Director's annual determinations would otherwise always be moot and escape review. *Id.* Accordingly, *American Lung* is inapposite.

D. A&B's Analogy to Crystal Springs Is a Waived Argument and Is Not Contrary to the Proper Exercise of the Director's Discretion

A&B argues that the Director's administrative decision in Clear Springs Foods, Inc.'s delivery call at its Crystal Springs facility demonstrates that the Director's decision to require A&B to have a reasonable means of diversion is arbitrary and capricious because the Director's determination in the captioned matter purportedly shows inconsistent action. Open. Br. at 16. A&B is in error.

First, the question of whether the interconnection requirement violates I.C. section 67-5279(3) was answered in *A&B I*: there, this Court found that the question is "whether the Director's discretion includes the ability to require reasonable methods of diversion and application by a senior right holder. . . . The Director . . . used his discretion to analyze A & B's delivery call using his statutory authority in the manner governed by the CM Rules." *A&B I*, 153 Idaho at 515−16, 284 P.3d at 240−41 (emphasis added). A&B cannot raise this issue again. A&B did not raise this argument regarding the Director's Crystal Springs decision (which predates the Court's opinion in *A&B I*) in *A&B I* or at any time prior in this present appeal, and accordingly this argument is waived. *Capps v. Wood*, 117 Idaho Ct. App. 614, 618, 790 P.2d 395, 399 (1990).

Second, the interconnection requirement affirmed by this Court is not in conflict with the Director's findings in Crystal Springs. In Crystal Springs, the Director found material injury, but withheld curtailment of junior groundwater users until Crystal Springs demonstrated that it had a reasonable means of diversion. Clerk's R. 273. In *A&B I*, the Director also reached the question of injury, finding for a myriad of reasons that A&B was not injured, and also found that A&B could not proceed further until it had a reasonable means of diversion. The Director's treatment of both cases was the same, except Clear Springs was found to be injured, and A&B was not. The Director's proper exercise of discretion, as already affirmed by this Court, is not arbitrary and capricious.

E. The District Court Properly Found Issues 1 and 3 Waived

The district court dismissed issues 1 and 3 as improperly raised in the case at hand because those issues were raised in the first appeal. A&B challenges that determination on the grounds that the district court "was not in a position" to make such findings, due to the district court's determination that "the reduction in A&B's decreed quantity must be 'supported by clear and convincing evidence.'" Open. Br. at 23 (citation omitted).

This argument ignores whole portions of this Court's decision and the district court's decision in *A&B I*. With respect to both issues, as the district court explained,

> The [district] Court did not reject the evidence considered by the Director in the injury analysis nor did the Court reject the conclusion that pursuant to the application of the CM Rules it is possible for a senior water right holder to receive less than the decreed quantity and not suffer material injury, provided the Director's determination is supported by clear and convincing evidence.

Clerk's R. 289. The district court noted that the Idaho Supreme Court "affirmed the Director's *Final Order* on all pertinent substantive issues." *Id.* at 290. In particular, with respect to issue 3,

the Idaho Supreme Court expressly acknowledged the "pertinent finding" of the hearing officer that "[c]rops may be grown to full maturity on less water than demanded by A & B in this delivery call." *A&B I*, 153 Idaho at 504, 284 P.3d at 229.

Once again, the "law of the case" doctrine is applicable, which "precludes relitigation of issues" that either did or did not reach the Idaho Supreme Court during the first appeal. *Swanson*, 134 Idaho at 517, 5 P.3d at 978. "[O]n a second or subsequent appeal, the courts generally will not consider errors which arose prior to the first appeal and which might have been raised as issues in the earlier appeal. This approach discourages piecemeal appeals and is consistent with the broad scope of claim preclusion under the analogous doctrine of res judicata." *Capps*, 117 Idaho Ct. App. at 618, 790 P.2d at 399 (internal citation omitted). This Court should affirm the district court's determination that issues 1 and 3 were raised and decided in the prior litigation and thus were not properly before the district court.

F. The District Court Did Not Violate Due Process

The fact that Idaho law precludes A&B's ability to pursue certain issues on appeal does not violate due process. It bears repeating that A&B's "case" was not dismissed, nor was the entire appeal rendered moot: only issues 1, 3 and 4 were dismissed with prejudice on the grounds that A&B raised those issues, or could have raised those issues, in the prior appeal. Issues 2, 6 and 7 were found moot, and issue 5 was decided on its merits. Accordingly, the district court dismissed issues 1, 3 and 4 with prejudice to prevent A&B from raising them again. *See Castle v. Hays*, 131 Idaho 373, 374, 957 P.2d 351, 352 (1998) ("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 refiling of the dismissed complaint.").

Due process entitles a party to appeal an administrative decision to a court of law; it does not require that said court of law address every issue raised, such as issues waived by the appellant in prior appeals, or mooted by decisions of the Idaho Supreme Court. In *A&B I*, A&B was afforded and participated in a hearing, district court appeal, and Idaho Supreme Court appeal of its delivery call. Indeed, A&B admits that "IDWR accepted the call and allowed the case to proceed to a full administrative hearing on the merits." Open. Br. at 15 n.9. A&B's displeasure with the result of the prior hearing and subsequent appeals does not amount to a due process violation. Contrary to A&B's briefing, A&B has a decision in *A&B I* on the merits—the fact that it did not prevail on the interconnection issue in the original appeal of this matter does not amount to a procedural "Catch-22."

This is not an instance in which A&B has no procedural pathway forward to seek remedy—once A&B complies with the prerequisites of re-commencing its delivery call, it may proceed before the Department. *Cf.* Open. Br. at 12 (citing *Graves v. Cogswell*, 97 Idaho 716, 717, 552 P.2d 224, 225 (1976)) (due process violated where an indigent could not appeal an agency decision without paying a filing fee that she could not afford). The district court's decision to comply with the plain language of this Court's decision to affirm the interconnection prerequisite does not violate A&B's right to due process.

G. The Court May Affirm the District Court's Decision On Issues 2, 6 and 7 On Alternative Grounds

This Court "will uphold the decision of a trial court if any alternative legal basis can be found to support it." *See, e.g., Hanf v. Syringa Realty, Inc.*, 120 Idaho 364, 326, 816 P.2d 320,

370 (1991). Although the focus of the district court's decision on mootness was the interconnection prerequisite, that is not the only "precondition" that A&B must satisfy before it can re-commence its delivery call. Pursuant to *A&B I*, before A&B can pursue its delivery call and request curtailment of junior appropriators, A&B must, *inter alia*:

1. reasonably interconnect its system. *See* Appendix 1.
2. have mechanisms in place to ensure its senior water right is not used to irrigate junior or enlargement acres outside of its decree. Clerk's Supp. R. 406[9];

The Idaho Supreme Court affirmed all substantive findings below, specifically finding that A&B could not be found to be water short unless it stopped irrigating junior and enlargement acres with its senior right, and that reasonable interconnection was required. *A&B I*, 153 Idaho at 525, 284 P.3d at 250 ("We therefore affirm the decision of the district court."). Accordingly, the district court could have rejected A&B's appeal of issues 2, 6 and 7 because, in addition to failing to reasonably interconnect, A&B has continued to irrigate its junior and enlargement acres with its senior water right.

Further, in the Remand Order the Director found that A&B must utilize all 188 decreed points of diversion prior to seeking curtailment of juniors.[10] In considering issue 5, the district court affirmed this holding, finding the Director properly applied I.C. section 42-226 in not "'requiring curtailment when there are sufficient reasonable alternative means of diversion.'"

[9] The district court found "it would be incumbent on A&B to first apply the water servicing the enlargement acres on its original lands or alternatively to factor that quantity of water used in conjunction with the enlargement acres into the Director's material injury analysis in determining water shortages if any, to the 36-2080 right." Clerk's Supp. R. 406.

[10] To wit, the Director found that "[p]rior to seeking curtailment of junior-priority ground water users, A&B must exercise all of its appurtenant points of diversion." R. 3490.

Clerk's R. 294. A&B did not appeal the resolution of issue 5 to this Court.[11] *See* Open. Br. at 6−7. "[I]ssues not raised below but raised for the first time on appeal will not be considered or reviewed." *Whitted v. Canyon County Bd. of Comm'rs*, 137 Idaho 118, 122, 44 P.3d 1173, 1177 (2002). Thus, there are alternative grounds to affirm the 2013 Memorandum Decision's treatment of issues 2, 6 and 7 based on additional unsatisfied prerequisites from *A&B I* (irrigation of junior and enlargement acres) and based on the holdings of the Director and district court that A&B did not appeal (issue 5, use of all decreed points of diversion).

Further, although not argued before the district court, this Court may affirm the district court's findings on issue 2, 6 and 7 under the ripeness doctrine. The "ripeness doctrine requires a petitioner or plaintiff to prove 1) that the case presents definite and concrete issues, 2) that a real and substantial controversy exists, and 3) that there is a present need for adjudication." *Noh v. Cennarrusa*, 137 Idaho 798, 801, 53 P.3d 1217, 1220 (2002). Because A&B has not complied with this Court's holding in *A&B I*, A&B's attempt to proceed with its delivery call is not ripe because there is no "present need for adjudication."

CONCLUSION

A&B's characterization of the proceedings below as the "ultimate administrative 'Catch-22'" ignores the above-recited procedural history, and demonstrates that any "Catch-22" is of A&B's own making. The present appeal, which will not afford it any relief, should not be entertained by this Court. Simply put, all A&B must do to recommence its delivery call is comply with the prerequisites ordered by this Court in *A&B I*, and those enumerated by the

[11] Accordingly, A&B is in error in arguing that the Remand Order should be vacated. Even if this Court agrees that the Director's findings on issues 2, 6 and 7 must be vacated, the entire Remand Order cannot be vacated, as it contains additional findings that A&B has not appealed and accordingly must considered established law of the case.

Director in the Remand Order, which were not appealed. Instead, A&B's motives in filing its appeal appear to be to overturn the interconnection requirement. This is not A&B's first appeal of questionable motivation: as noted in *A&B II*, when "reluctantly concur[ing]" with the result, Justice Jones, who was joined by Justice Burdick:

> 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.

A&B II, 154 Idaho 652, 301 P.3d at 1274−75 (emphasis added). Simply put, A&B cannot avoid the interconnection requirement, and until it complies with this Court's order in *A&B I*, it is not entitled to relief. The repetitive cycle of litigation demonstrated by Appendix 2 must end. This Court should affirm the district court.

Respectfully submitted, this 14th day of November, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November, 2013, a copy of **City of Pocatello's Response Brief** in **Idaho Supreme Court Docket No. 41069-2013** was served to the following parties by the method indicated:

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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 following email address(es) provided above.

Dated and certified this 14th day of November, 2013.

Sarah A. Klahn

APPENDIX 1

Record Citations Regarding A&B's Unreasonable Means of Diversion

A. Director's Final Order, January 29, 2008

1. "A&B's own data shows that its inability to irrigate some portions of [its decreed place of use] is attributable to an inefficient well and delivery system." R. 1148 (emphasis added).
2. "If A&B employed appropriate well drilling techniques . . . water would be available to supply its well production and on-farm deliveries." *Id.* at 1149 (emphasis added).
3. A&B it was not using technology "well suited for use in the geological environment in the southwestern portion of the District." *Id.* at 1148.
4. A&B failed "to use appropriate technology [which] artificially limits access to available water supplies and [this] is not consistent with the requirement for the appropriator to use reasonable access." *Id.* at 1149 (emphasis added).

B. Hearing Officer's Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations, March 27, 2009

1. "Protection of A&B's water right cannot be based on its poorest performing wells." R. 3113.
2. A&B had an obligation "to take reasonable steps to maximize the use of [its decreed] flexibility to move water within the system before it can seek curtailment or compensation from junior users." *Id.* at 3096 (emphasis added).
3. "A&B has a water right with points of diversion in the southwest region. That right can be used if the water is accessible, but the inability to access the amount of water to which

A&B is entitled under the right by the current configuration of the system of diversion does not justify curtail[ment] . . . ." *Id.* at 3111 (emphasis added).

4. "A&B must make efforts to reach water to satisfy its right until there is a determination that reasonable pumping levels have been reached and those levels are entitled to protection." *Id.* at 3113 (emphasis added).
5. "If deepening wells is necessary to produce the amount of water A&B is entitled to under the water right, that burden remains with A&B until it is established that it is unreasonable to drill deeper." *Id.*

C. District Court's Memorandum Decision and Order on Petition for Judicial Review, May 4, 2010

1. "[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.

D. Idaho Supreme Court Decision, A & *B Irrigation District v. Idaho Department of Water Resources*, 153 Idaho 500, 284 P.3d 225 (2012)

1. This Court considered "whether the Director's discretion includes the ability to require reasonable methods of diversion and application by a senior right holder." *A & B Irrigation Dist.*, 153 Idaho at 515, 284 P.3d at 240.

2. This Court found that A&B "must take reasonable steps to divert some water throughout the project [by interconnecting wells] before junior members are impacted." *Id.* at 514, 284 P.3d at 239.
3. The Court affirmed that "[t]he 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." *Id.* at 515−16, 284 P.3d at 240−41.

APPENDIX 2
Timeline of *A&B I*, *II* and *III*