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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

A&B IRRIGATION DISTRICT, Petitioner, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his official capacity as Interim Director of the Idaho Department of Water Resources, Respondents.	CASE NO. CV-2011-512 **A&B'S RESPONSE TO IDWR'S MOTION TO DISMISS**
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	

COMES NOW, the Petitioner A&B Irrigation District ("A&B"), by and through its undersigned counsel, and hereby files this *Response to IDWR's Motion to Dismiss*.

INTRODUCTION

IDWR has no authority to go beyond the plain language of a statute that requires the Department to dispose of A&B's petition for reconsideration within 21 days. Therefore, the Department's June 9, 2011 and June 30, 2011 orders are *ultra vires* and have no bearing on these proceedings. Accordingly, this Court should deny the Department's *Motion to Dismiss A&B's Notice of Appeal* and allow A&B to proceed on its appeal of the April 27, 2011 Order, assuming A&B's petition was not "granted" by the Director's *June 1 Order*. *Infra* n.1.

BACKGROUND

On May 4, 2010, this Court issued its *Memorandum Decision and Order on Petition for Judicial Review* ("Memorandum Decision") in Case No. CV-2009-647, reversing and remanding the Director's finding of no material injury for application of the appropriate burden of proof and evidentiary standard. IGWA and Pocatello requested rehearing, challenging the Court's decision that the proper standard to apply in conjunctive administration is "clear and convincing." On November 2, 2010, the Court reaffirmed its previous holding regarding the appropriate standards and burden of proof.

On November 10, 2010, A&B requested confirmation that IDWR intended to "proceed with the remand as ordered by the District Court." *A&B November 10, 2010 Letter* (Ex. A to Petition). In the letter, A&B reminded the Department that "time is of the essence for water right administration decisions next year" and requested a timely response as to the Department's intentions. *Id.*

The Department refused to follow this Court's *Memorandum Order*. As such, A&B was forced to seek relief from this Court by filing a *Motion to Enforce the Remand Order*. This

Court again ordered the Director to analyze the A&B call under the correct standard of review. *Order Granting Motion to Enforce in Part and Denying Motion in Part* (February 15, 2011).

Over two months later, the Director finally complied with the *Remand Order* by issuing the *Final Order on Remand* (April 27, 2011). A&B filed a timely *Petition for Reconsideration of the Final Order on Remand* on May 11, 2011, pursuant to I.C. § 67-5246(4) and IDAPA 37.01.01.730.02(a).

Under the APA, the Department had 21 days to "issue a written order disposing of the petition." I.C. § 67-5246(4) (emphasis added). Exactly 21 days later, on June 1, 2011, the Director issued an *Order Granting Petition for Reconsideration to Allow Time for Further Review* ("*June 1 Order*"). In the *June 1 Order*, the Director "granted" A&B's petition but stated that he would not issue a decision on the merits until June 9, 2011.[1] The Director failed to comply with his order and did not issue a decision by June 9th. Instead, the Director issued a second order, the *Amended Order Granting Petition for Reconsideration to Allow for Further Review*, purporting to extend the date of his decision to June 30, 2011. Finally, on June 30, 2011, the Director issued an *Order Regarding Petition for Reconsideration* and *Amended Final Order on Remand Regarding the A&B Irrigation District Delivery Call.*

In the interim, A&B filed its *Notice of Appeal*, challenging the *April 27, 2011 Final Order* on June 24, 2011.

[1] In the *June 1 Order*, the Director stated A&B's petition was granted "for the sole purpose of allowing additional time for the Department to respond to the Petition" and that he would issue an order by June 9, 2011. It is A&B's position that based upon the plain terms of the order, A&B's petition has been granted and the Director is obligated to revise his Remand Order consistent with A&B's requested relief. Consequently, the Director has a duty to immediately administer hydraulically connected junior water rights that are injuring A&B's senior water right 36-2080 during the 2011 irrigation season. However, in order to preserve its legal rights, A&B filed its petition for judicial review with this Court. A&B has yet to receive confirmation that IDWR will administer hydraulically connected junior water that are injuring A&B's senior water right. A&B reserves the right to seek further judicial relief in this matter.

ARGUMENT

I. Since the Idaho APA Requires the Director to "dispose of" Petitions for Reconsideration within 21 days, the Director Had No Authority to Issue the June 9, 2011 or 30, 2011 Orders; Therefore, A&B Properly Appealed the April 27, 2011 Order.

The Director asserts that A&B's *Notice of Appeal* must be dismissed because the *June 30, 2011 Order* "supersedes" the *April 27, 2011 Order*. This assertion is made without citation to any legal authority justifying the Director's actions. In truth, the Director had no authority to issue the June 9 or June 30 Orders since the plain language of the statute requires the Director to dispose of a petition for reconsideration within 21 days. As such, the June 9 and June 30 Orders are *ultra vires* and have no bearing on these proceedings.

The relevant statutory provision provides:

> (4) Unless otherwise provided by statute or rule, any party may file a motion for reconsideration of any final order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
>
> (5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
>
> (a) The petition for reconsideration is disposed of; or
> (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

Idaho Code § 67-5246(4) and (5) (emphasis added). IDWR regulations include nearly identical language. IDAPA 37.01.01.740.02(a) ("The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law.") (Emphasis added).

This language is clear and provides no discretion in the Director's actions. Under Idaho law, where the statutory language is "unambiguous, the clearly expressed intent of the legislative body must be given effect..." *In re Idaho Dept. of Water Resources Amended Final Order Creating Water District 170*, 148 Idaho 200, 210, 220 P.3d 318, 328 (2009). A statute is ambiguous when:

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

Canty v. Idaho State Tax Commission, 138 Idaho 178, 182, 59 P.3d 983, 987 (2002) (internal citations and quotations omitted) (citing *Rim View Trout Co. v. Higginson*, 121 Idaho 819, 823, 828 P.2d 848, 852 (1992)). Importantly, "a statute is not ambiguous merely because an astute mind can devise more than one interpretation of it." *Canty*, 138 Idaho at 182, 59 P.3d at 987.

Based on the language of the statute, the filing of a petition for reconsideration commands one of two limited results from the agency: 1) the petition must be "disposed of" by action of the Director; or 2) the petition will be "disposed of" by operation of law.

Because the Director lacks any legal authority to issue an order on a petition for reconsideration after the 21 days, he certainly cannot "grant" a petition for the sole purpose of allowing indefinite time to rule on the merits. Nothing in the APA allows such a result. Yet that is exactly what the Director did in this case by extending the 21-day deadline "for the sole purpose of allowing additional time for the Department to respond to the Petition." *IDWR Motion to Dismiss*, at 2.

Applying the Supreme Court's guidance on statutory interpretation to Idaho Code section 67-5246, there is no question that the law requires the Director to "dispose of" the petition. The

statute prescribes a mandatory duty – that the Director "shall issue a written order"[2] – and limits that mandatory duty to a single action – "disposing of the petition." Idaho Code §67-5246(4)(emphasis added).

There is no room for construction of a statute where the terms, though not defined, have a plain, obvious, and rational meaning. *Roeder Holdings, L.L.C. v. Bd. of Equalization of Ada County*, 136 Idaho 809, 814, 41 P.3d 237, 242 (2001). The term "dispose of" has a "plain, obvious, and rational meaning," which is:

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

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

Nonetheless, the Department argues that the plain terms of this unambiguous statute somehow provide it the power to grant the petition "for the sole purpose of allowing additional time for the Department to respond to the Petition."[3] *IDWR Motion to Dismiss*, at 2. However, there is simply no basis for this position under Idaho law because a "statute is not ambiguous merely because an astute mind can devise more than one interpretation of it." *Canty v. Idaho State Tax Commission*, 138 Idaho at 182, 59 P.3d at 987. IDWR's attempt to redefine "dispose of" to "grant a petition for sole purpose of allowing additional time" must be rejected.

The Director is bound by law. Administrative agencies are "creatures of statute and, therefore, are limited to the power and authority granted them by the Legislature." *Henderson v.*

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[2] Furthermore, the *June 1, 2011 Order* did not dispose of the issues raised by A&B in its Petition for Reconsideration *in writing*, as expressly required under I.C. § 67-5246. In fact, the June 1 Order did nothing towards disposing of the issues raised in the *Petition for Reconsideration*, which is a clear violation of the statute.

[3] In addition to IDWR's complete lack of authority to undertake this action, IDWR fails to cite any law in support of its motion.

Eclipse Traffic Control & Flagging, Inc., 147 Idaho 628, 632, 213 P.3d 718, 722 (2009) (internal quotations omitted). It is therefore "axiomatic, under the principles of administrative law, that an agency cannot act *ultra vires*; that is, it cannot assume more power than the legislature delegated to it." *Burnside v. Gate City Steel Corp.*, 112 Idaho 1040, 1047, 739 P.2d 339, 346 (1987).

Idaho courts have observed that "Where the legislature enacted a statute requiring that an administrative agency carry out specific functions, that agency cannot validly subvert the legislation by promulgating contradictory rules." *Roeder Holdings, L.L.C. v. Bd. of Equalization of Ada County*, 136 Idaho 809, 814, 41 P.3d 237, 242 (2001) (abrogated by *Ada County Bd. of Equalization v. Highlands, Inc.*, 141 Idaho 202, 108 P.3d 349 (2005) on other grounds). The Idaho Supreme Court advises that the "goal of statutory interpretation is to discover the intention of the legislature in drafting a statute, and to apply the statute accordingly, examining not only the literal words of the statute, but also the reasonableness of proposed constructions, the public policy behind the statute, and its legislative history." *In re Idaho Dept. of Water Resources Amended Final Order Creating Water District 170*, 148 Idaho 200, 210, 220 P.3d 318, 328 (2009) (internal quotations omitted). Because the Director did not have the authority to issue the June 9 and June 30 Orders, they are products of *ultra vires* action and are therefore void as a matter of law and should be stricken.

In addition to being *ultra vires*, the Director's actions have failed to provide A&B timely relief prior to the 2011 irrigation season. In *Am. Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Res.*, the Idaho Supreme Court explained:

> ... the [CM] Rules clearly have incorporated the provisions of the Idaho Constitution, statutes and case law. We agree with the district court's exhaustive analysis of Idaho's Constitutional Convention and the court's conclusion that the drafters intended that there be no unnecessary delays in the delivery of water

> pursuant to a valid water right. Clearly, a timely response is required when a delivery call is made and water is necessary to respond to that call.

Am. Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Res.,143 Idaho 862, 874, 154 P.3d 433, 445 (2007).

By first delaying a response on the Court's ordered remand, without any legal basis, and now delaying action on A&B's petition until the middle of the irrigation season, the Department has "run out the clock" on A&B's call for this year. An untimely response to A&B's call is the very issue A&B warned the Director about in November, 2010. *See* Ex. A to Petition. This unwarranted delay is inexcusable under the law and unfairly prejudices A&B's landowners. The lack of agency action in the area of water right administration should not be tolerated.

Finally, A&B directs this Court's attention to a recent Idaho Supreme Court decision that utilized a strict reading of the APA. In *City of Eagle v. Idaho Department of Water Resources* IDWR failed to properly serve an order on reconsideration on the City of Eagle. It then reissued the order and postponed the City's deadline for filing an appeal because of the improper service – in effect tolling the City's deadline for appeal from the proper service date. The district court rejected the City's appeal as untimely and the Supreme Court affirmed, stating:

> I.C. § 67–5273 "requires that if reconsideration of the final order is sought, the petition for judicial review must be filed within twenty-eight days after the decision on the reconsideration." This Court dismissed the appeal and held that the twenty-eight-day appeal period began on the day that the agency issued the order on reconsideration, which was the day the order on reconsideration was signed and dated, not the day on which it was served.
>
> **
>
> We find that IDWR's actions on July 16, 2008, constitute nothing more than serving the original Order on Reconsideration issued July 3, 2008, and thus, Eagle's appeal is untimely under Erickson....IDWR's statement in the letter concerning the appeal period appears to be nothing more than the result of IDWR's erroneous belief that the appeal period begins when an order is served. IDWR made the same error—stating that the appeal period began when the Order on Reconsideration was served—in the Order on Reconsideration itself.

City of Eagle v. Idaho Dept. of Water Resources, 150 Idaho 449, 247 P.3d 1037, 1039-1040 (2011).

The plain language of the APA requires a decision on a petition for reconsideration within 21 days or it is deemed denied by operation of law. *See* I.C. § 67-5246(4) and (5). The law is clear and must be followed. *City of Eagle, supra.* Accordingly, A&B's *Notice of Appeal*, which was filed following the *June 1, 2011 Order*, is timely and the Director's *Motion to Dismiss* should be denied.

II. Alternatively, if the Court Determines the June 30, 2011 Order is Authorized by Law, A&B should be Permitted to Amend its Petition for Judicial Review.

If the Court determines that the Director did not exceed his authority in issuing the *June 30, 2011 Order*, then A&B should be permitted to amend its petition for judicial review. *See* I.R.C.P. 84(r); I.A.R. 17(m). As stated above, the plain language of the APA and IDWR regulations provide that a petition for reconsideration must be "disposed of" within 21 days. *Supra.* The APA further provides that notices of appeal must be filed within 28 days following the date that the petition for reconsideration is "disposed of." I.C. § 67-5273. A&B takes these provisions to mean that a petition for judicial review was due no later than 28 days following the *June 1, 2011 Order.*

If the Court determines that A&B's petition was premature, then the Court should permit A&B to amend its petition to include the June 9 and June 30 orders in light of the plain language of the APA. *See* I.A.R. 17(m).

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CONCLUSION

For the above stated reasons, A&B requests this Court to deny IDWR's *Motion to Dismiss A&B's Notice of Appeal.*

DATED this 21st day of July 2011.

BARKER ROSHOLT & SIMPSON LLP

Sarah W. Higer

Attorneys for Petitioner A&B Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of July, 2011, I served true and correct copies of *A&B's Response to IDWR's Motion to Dismiss* upon the following by U.S. Mail, postage prepaid:

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