

A&B Irrigation District (“A&B”) filed a *Response to IDWR’s Motion to Dismiss* (“Response”). IDWR hereby files this Reply and *Second Affidavit of Chris M. Bromley* in support of its Motion.

ARGUMENT

Based on A&B’s Response, the only issue is whether Idaho Code § 67-5246(5) allowed IDWR to timely grant A&B’s May 11, 2011 *Petition for Reconsideration* (“Petition”) “for the sole purpose of allowing additional time for the Department to respond to the Petition[.]”¹ *see Second Affidavit of Chris M. Bromley*, Exhibits 1 & 2, then subsequently issue its June 30, 2011 *Amended Final Order on Remand Regarding the A&B Irrigation District Delivery Call*. Central to resolution of this dispute is what the phrase “disposed of” means.

Idaho Code § 67-5246(5) states in full:

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.

Emphasis added.

A&B argues the phrase “disposed of” means that IDWR must issue an order on the merits within twenty-one days. A&B says the plain meaning of the statute supports its

¹ In footnote 1 to its Response, A&B argues that the Director’s decision to grant its Petition on June 1 and again on June 9, 2011 evidences that “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.” *Response* at 3, fn. 1. As can be seen from the plain language of Exhibits 1 and 2, the basis for granting A&B’s Petition was “for the sole purpose of allowing additional time for the Department to respond to the Petition.” Emphasis added. IDWR’s decision to grant the Petition cannot be interpreted as posited by A&B. IDWR has not found material injury to A&B.

construction. Ironically, IDWR also believes that the plain meaning of the statute supports its position that A&B's action for judicial review should be dismissed.

As cited by A&B, Black's Law Dictionary supports IDWR's position. According to Black's, the phrase "dispose of" means:

To alienate or direct the ownership of property, as disposition by will. Used also in the determination of suits. Called a word of large extent. *Koerner v. Wilkinson*, 96 Mo. App. 510, 70 S.W. 509; *Love v. Pamplin* (C.C.), 21 F. 760; *U.S. v. Hacker* (D.C.) 73 F. 294; *Benz v. Fabian*, 54 N.J. Eq. 615, 35 A. 760; *Elston v. Schilling*, 42 N.Y. 79; *Beard v. Knox*, 5 Cal. 256, 63 Am. Dec. 125. 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.

Black's Law Dictionary, 3rd Ed. (1933) (emphasis added). *Koerner v. Wilkinson*, 70 S.W. 509, 511 (Mo. App. 1902) ("Disposal' is a word of broad significance The word being so varied in its meaning").

The use of the terms "large extent" and "broad significance" to define the phrase support a broad interpretation, not the narrow interpretation suggested by A&B. This broad interpretation is also supported by the University of Idaho's seminal law review article on Idaho's Administrative Procedure Act. Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273 (1993). There, the authors specifically discussed Idaho Code § 67-5246 and the meaning ascribed to disposal of a petition for reconsideration:

A petition for reconsideration that is not acted upon within twenty-one days is presumed denied.²⁹⁶ It is not necessary, however, that the officer decide the issues presented by the petition within twenty-one days; it is only necessary that the petition be accepted, which can be accomplished through notification of the parties that the officer will reconsider the order.²⁹⁷

Id. at 329 (emphasis in original).

In footnote 297, the authors provide the following citation:

See Comments to the Attorney General's Rules 710 through 789 ("Reconsideration can be granted by issuing an order that says, 'The petition for

reconsideration is granted,’ then proceeding to schedule further hearings, briefing, etc., on reconsideration.”).

Id.

A&B’s “one size fits all” interpretation of Idaho Code § 67-5246 cannot be reconciled. As this Court is aware, petitions for reconsideration vary widely in their content, form, and substance. Some petitions for reconsideration are easily addressed, while others are not. Of course, this cannot be known until the petition for reconsideration is filed and reviewed by the agency. In the case of a complex petition for reconsideration, A&B’s “one size fits all” approach would prevent an agency, for lack of time, from requesting additional hearings, briefing, oral argument, or taking the necessary amount of time to properly respond. 30 Idaho L. Rev. at 329. This is precisely why Idaho Code § 67-5246(5) uses such a varied phrase as “disposed of” in its construction. The phrase provides agencies with the necessary flexibility to properly analyze and respond to the myriad petitions for reconsideration they face. Given the burden of presumption that attaches to final agency orders, Idaho Code § 67-5279(3), it makes sense that the legislature would provide the agency with the flexibility to examine each petition for reconsideration based on its particular circumstances before issuance of a reviewable order.

Here, A&B’s Petition “raised numerous technical issues with the *Final Order on Remand* that deserved the Department’s full attention and thorough analysis. This required a detailed investigation of facts from the large and complex administrative record.” *Second Affidavit of Chris M. Bromley*, Exhibit 3 at 1.² “When it became evident that the Department’s technical review and written response to the *Petition for Reconsideration* could not be issued [within 21 days], [the Director] extended the deadline to June 30, 2011.” *Id.* The parties were timely

² Exhibit 3 is a written response from Interim Director Gary Spackman to Travis L. Thompson, counsel for A&B. Exhibit 4 to the *Second Affidavit of Chris M. Bromley* is Mr. Thompson’s initial letter to Interim Director Spackman.

notified on June 1, and then again on June 9, 2011, of IDWR's decision to grant the Petition in order to take the necessary time to properly review and respond.³ *Id.* at Exhibits 1 & 2. On June 30, 2011, IDWR issued its *Order Regarding Petition for Reconsideration* ("Order on Reconsideration") and *Amended Final Order on Remand Regarding the A&B Irrigation District Delivery Call* ("Amended Final Order on Remand"). *Affidavit of Chris M. Bromley* at Exhibits A & B (July 6, 2011).

Given the complexity of A&B's Petition and the administrative record, it was reasonable for IDWR to take 30 additional days to issue its Order on Reconsideration and Amended Final Order on Remand. Yet A&B asserts that IDWR's delay "failed to provide A&B timely relief prior to the 2011 irrigation season." *Response* at 7. This argument is unclear. IDWR's April 27, 2011 *Final Order on Remand Regarding the A&B Irrigation District Delivery Call*, upon which A&B currently seeks judicial review, was issued well after the start of the 2011 irrigation season. That order found, by clear and convincing evidence, that A&B was not materially injured. A&B specifically sought reconsideration of the April 27, 2011 order, and IDWR acted on A&B's request. A&B cannot explain how IDWR's decision to issue its Order on Reconsideration and Amended Final Order on Remand on June 30, 2011, rather than June 1, 2011, results in prejudice.

In an attempt to explain prejudice, A&B directs the Court's attention to *American Falls Reservoir District No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2007) to prove that the Director acted untimely. While the Court in *American Falls* was certainly concerned about the timeliness of responding to delivery calls, "neither the Constitution nor the statutes place any specific timeframes on this process, despite ample opportunity to do so." *Id.* at

³ If IDWR had not issued its June 1 order, A&B's *Petition for Reconsideration* ("Petition") it would have been denied because the agency failed to "dispose of the petition within twenty-one (21) days." Idaho Code §67-5246(5).

875, 154 P.3d at 446. “Given the complexity of the factual determinations that must be made in determining material injury . . . [i]t is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts.” *Id.* (emphasis added).

The Court’s reasoning in *American Falls* is consistent with the legislature’s use of the phrase “disposed of” in Idaho Code § 67-5246. As explained by Director Spackman in his letter to Mr. Thompson, it was important that IDWR properly analyze A&B’s Petition and provide a thorough, well-reasoned response. *Second Affidavit of Chris M. Bromley* at Exhibit 3. It was reasonable, given the Petition’s technical complexity and the directive from the Supreme Court that IDWR get its decisions right, for IDWR to take 30 additional days to issue its Order on Reconsideration and Amended Final Order on Remand.

Based on the foregoing, A&B’s “one size fits all” approach is inconsistent with the legislature’s use of the phrase “disposed of” in Idaho Code § 67-5246. Therefore, IDWR respectfully moves the Court to dismiss A&B’s June 24, 2011 *Notice of Appeal and Petition for Judicial Review of Agency Action*. The only final agency action that A&B may seek judicial review from is the June 30 Amended Final Order. I.R.C.P. 84(b); Idaho Code § 67-5246.

DATED this 1st day of August 2011.



CHRIS M. BROMLEY
Deputy Attorney General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the State of Idaho, employed by the Attorney General of the State of Idaho and residing in Boise, Idaho; and that I served one (1) true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 15th day of August 2011.

Document(s) served: **IDWR REPLY IN SUPPORT OF ITS MOTION TO DISMISS**

Person(s) served:

John K. Simpson Travis L. Thompson Barker Rosholt & Simpson 113 Main Ave W., Ste. 303 P.O. Box 485 Twin Falls, ID 83303-0485	Randall C. Budge Candice M. McHugh Racine Olson Nye Budge & Bailey P.O. Box 1391 201 E. Center St. Pocatello, ID 83204-1391	Sarah A. Klahn Mitra Pemberton White & Jankowski LLP 511 Sixteenth St., Ste. 500 Denver, CO 80202
Jerry Rigby Rigby Andrus 25 North Second East P.O. Box 250 Rexburg, ID 83440	A. Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83201	



CHRIS M. BROMLEY
Deputy Attorney General
Idaho Department of Water Resources