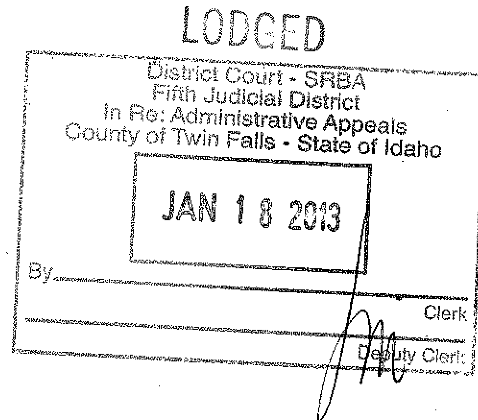
IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

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, and **THE IDAHO GROUND WATER APPROPRIATORS, INC., and THE CITY OF POCATELLO,** Respondents-Intervenors. ___ 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	**CASE NO. CV-2011-512**



PETITIONER A&B IRRIGATION DISTRICT'S OPENING BRIEF

On Appeal from the Idaho Department of Water Resources

Before Honorable Eric J. Wildman

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STATEMENT OF THE CASE

I. Nature of the Case.

This is an appeal of the Director of the Idaho Department of Water Resources' ("Department" or "IDWR") *Final Order on Remand Regarding the A&B Irrigation District Delivery Call* ("*Remand Order*"), dated April 27, 2011. R. 3469. The *Remand Order* follows this Court's *Memorandum Decision and Order on Petition for Judicial Review* ("*Memorandum Decision*") (*A&B Irr. Dist. v. IDWR et al.*, Minidoka County Dist. Ct., Fifth Jud. Dist., Case No. 2009-647, May 4, 2010).

II. Course of Proceedings.

A&B filed a *Petition for Delivery Call* in early 1994 seeking the administration of junior priority ground water rights that were interfering with the District's senior right. R. 12-14. Following a stay order entered in 1995, A&B filed a *Motion to Proceed* on March 16, 2007. R. 830. A&B requested IDWR to lift the stay and proceed with administration to prevent injury caused by junior priority ground water rights.

Former Director David R. Tuthill, Jr. issued an initial order on January 29, 2008, denying A&B's call. R. 1105. The *Order* erroneously concluded that A&B had not suffered material injury for various reasons, including wrongly assuming that A&B's physical delivery capacity was limited to 0.75 miner's inches per acre, that A&B's well drilling techniques were inappropriate, and that wells were not properly sited by the U.S. Bureau of Reclamation when the project was initially constructed.[1] R. 1147-49. Importantly, the Director applied the wrong legal standard and determined that despite its decreed water right, A&B carried the burden to establish "material injury" by "prima facie evidence". *Id.* 1147.

[1] The Hearing Officer's findings on these points demonstrated the errors made by the Director in the initial order. R. 3091, 3097-98; *see also* R. 3312-13.

A&B challenged this decision and IDWR held an administrative hearing in December 2008. R. 1182. The Hearing Officer, former Chief Justice Gerald Schroeder, issued a recommended order on March 27, 2009. R. 3078. Former Director Tuthill issued the final order on June 30, 2009 ("*Final Order*"). R. 3318. Current Director Gary Spackman adopted the *Final Order* and denied A&B' petition for reconsideration on August 4, 2009. R. 3360.

A&B filed a timely appeal to district court. R. 3363. This Court then issued its *Memorandum Decision* on May 4, 2010. The case was appealed to the Idaho Supreme Court resulting in a decision issued last year. *See A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 284 P.3d 225 (2012). Pending the appeal to the Idaho Supreme Court, the Director failed to comply with the ordered remand. Consequently A&B was forced to seek further relief from this Court. R. 3408. The Director finally issued his *Remand Order* on April 27, 2011. R. 3469. This appeal followed.

III. Statement of Facts.

A&B Irrigation District is the beneficial owner of water right 36-2080,[2] which authorizes the diversion of 1,100 cfs from 177 separate points of diversion, or wells, with a priority date of September 9, 1948. R. 3081. The SRBA Court decreed water right 36-2080 on May 7, 2003. Ex. 139. A&B measures water at each well and delivers it upon demand to its landowners. Tr. Vol. III, pp. 469-70, 514. A&B compiles annual reports each year to detail a well's performance and the total quantity pumped and delivered. Ex. 133 (Example Report: 2007 found at A&B 2782-98). A&B strives to deliver the decreed rate of diversion under its senior water right 36-2080 (0.88 miner's inch per acre). Tr. Vol. III. p. 541; R. 3101 ("A&B seeks to reach 0.85 to 0.90 and has gone as high as 0.95"). Once the demand on a particular well exceeds the water

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

supply, such as during the peak of the irrigation season when water is needed most, the District goes on "allotment" and each landowner receives a prorated rate of delivery per acre based upon the original acres under water right 36-2080. Tr. Vol. III, pp. 518-21.

ISSUES PRESENTED ON APPEAL

A&B presents the following issues on appeal:

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

b. 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.

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

d. 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.

e. 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).

f. 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.

g. 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.

STANDARD OF REVIEW

Any party "aggrieved by a final order in a contested case decided by an agency may file a petition for judicial review in the district court." *Sagewillow, Inc. v. IDWR*, 138 Idaho 831, 835 (2003). The Court reviews the matter "based on the record created before the agency." *Chisholm v. IDWR*, 142 Idaho 159, 162 (2005). Generally, a Court is charged with deferring to an agency's decision. *Mercy Medical Center v. Ada County,* 146 Idaho 220, 226 (2008). The Court, however, is "free to correct errors of law." *Id.* Furthermore, in the context of conjunctive administration, the Director's decision to deliver less than the decreed quantity to a senior water right must be supported by clear and convincing evidence. *A&B Irr. Dist. v. IDWR et al.*, 153 Idaho 500, 284 P.3d 225, 249 (2012) (imposing a clear and convincing evidence standard on the Director's determination of material injury in a delivery call).

An agency's decision must be overturned if it (a) violates "constitutional or statutory provisions," (b) "exceeds the agency's statutory authority," (c) "was made upon unlawful procedure, " (d) "is not supported by substantial evidence in the record as a whole" or (e) is "arbitrary, capricious or an abuse of discretion." *Chisholm*, 142 Idaho at 162 (citing Idaho Code § 67-5279(3)). This Court is not required to defer to an agency's decision that is not supported by the record. *Evans v. Board of Comm. of Cassia Cty.*, 137 Idaho 428, 431 (2002).

An agency action is "capricious" if it "was done without a rational basis." *American Lung Assoc. of Idaho/Nevada v. Dept. of Ag.*, 142 Idaho 544, 547 (2006). It is "arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles." *Id.* Although the Court grants the Director discretion in his decision making, *supra*, the Director <u>*cannot*</u> use this discretion as a shield to hide behind a decision that is not supported by the law or facts. Such decisions are "clearly erroneous" and must be reversed. *See Galli v.*

Idaho County, 146 Idaho 155, 159 (2008) ("A decision is clearly erroneous when it is not supported by substantial and competent evidence"). The Director's *Remand Order* in this case fails the above standards of review and therefore should be set aside.

SUMMARY OF ARGUMENT

IDWR used up its third and final strike at the proper administration of A&B's water right. The former Director failed with his initial order in 2008. Next, he failed to apply the proper presumptions and burdens of proof in the 2009 *Final Order*. Finally, the Director missed again in the 2011 *Remand Order*, repeating the failure to recognize A&B's decreed water right and properly implement the presumptions and standards required by Idaho law. Contrary to the CM Rules, the Director did not analyze injury to A&B's water right, but instead relied upon a "minimum" amount necessary, or "crop maturity" standard for administration. The Director failed to evaluate whether A&B's landowners could beneficially use the decreed diversion rate in favor of a new and arbitrary analysis not grounded in Idaho law.

Once again the Director turned the well-established burdens and presumptions on their head by unconstitutionally reducing A&B's decreed quantity nearly 30%. Although the Director originally concluded, based upon the same agency record, that A&B could beneficially use the decreed quantity (0.88 miner's inches per ace) and that 0.75 miner's inches per acre would be recognized in administration, he unlawfully retreated from those findings in the *Remand Order*. Despite overwhelming evidence in the record that 0.88 miner's inches could be put to beneficial use, the Director reduced A&B's decreed diversion rate to a quantity he originally rejected, 0.65 miner's inches per acre.

Moreover, contrary to IDWR's representations to this Court that A&B had a right to divert and use its decreed quantity, the agency now claims that amount constitutes "waste." The

arbitrary nature of this unexplained re-evaluation and changed finding cannot be understated. Stated simply, the Director's about-face violates Idaho law and is not supported by clear and convincing evidence in the record.

Next, the Director misapplied the CM Rules as it relates to the exercise of junior ground water rights. Although the Director concluded A&B would waste 0.88 miner's inches per acre, he authorized juniors to divert that same amount (growing the same crops with the same irrigation systems). The decision violates the CM Rules and Idaho's APA. The Director further erred in misinterpreting the concept of "full economic development" to deny A&B's call.

Finally, the Director erred in reconsidering settled findings and conclusions from the 2009 *Final Order*. The Director's about-face on these issues is prohibited by law and cannot survive judicial review. The Director had no legal basis to re-examine findings and conclusions that were not appealed and beyond the scope of the Court's ordered remand. The Director's actions in this regard violate the Court's prior decision, the mandate rule, and pose a dangerous precedent for Idaho administrative law.

In sum, the Director's erroneous "material injury" standard and the failure to properly analyze injury to A&B's senior water right must be rejected. Furthermore, the Court must hold the Director to the scope of the ordered remand. The Court should correct these errors of law and set aside the agency decision accordingly.

ARGUMENT

I. The Director's Injury Analysis Violates Idaho Law and the Waste Finding is Not Supported by Clear and Convincing Evidence.

A. The Director's Standard Does Not Follow the CM Rules.

Idaho law is clear on the presumptions and burdens of proof to apply in conjunctive administration:

> It is Idaho's longstanding rule that proof of "no injury" by a junior appropriator in a water delivery call must be by clear and convincing evidence. Once a decree is presented to an administrating agency or court, all changes to that decree, permanent or temporary, must be supported by clear and convincing evidence.

A&B Irr. Dist., 284 P.3d at 249.

The above holding follows prior decisions where the Court expressly held that a senior water right holder is entitled to the "full amount" specified in the water right decree. *See Clear Springs Foods, Inc.*, 150 Idaho at 811; *AFRD#2 v. IDWR*, 143 Idaho 862, 877-78 (2007); *Stevenson v. Steele*, 93 Idaho 4, 13 (1969); *The Cottonwood Water & Light Co. v. St. Michael's Monastery*, 29 Idaho 761, 769 (1916). Idaho law requires the Director and the watermaster to administer to water rights, not some other subjective calculation or theory on what the agency believes is "adequate" or provides a bare "minimum" amount to develop crops to "full maturity." *See also*, I.C. § 42-607; CM Rule 40.

Based on the law, A&B is "entitled" to its decreed diversion rate and the burden is on junior right holders to prove a defense to a call for the decreed quantity. *AFRD #2*, 143 at 878-79. The Director had no authority to force A&B "to demonstrate an entitlement to the water in the first place." *AFRD #2, supra*. Under Idaho law, A&B is afforded a presumption that it can use the water authorized under its decree, subject to "post-adjudication" factors (i.e. waste, forfeiture, abandonment, etc.) that would warrant distributing less than the decreed diversion

rate.[3] *AFRD#2, Id.* at 878-79. No such "post-adjudication" factors were proven by junior ground water users in this case.

Consistent with Supreme Court precedent, this Court also provided clear guidance for the Director to follow on remand:

> The 36-2080 right was licensed and ultimately decreed with a diversion rate of 0.88 miner's inches per acre for the 62,604 acre place of use. . . .
>
> Accordingly, both Idaho's licensure and adjudication statutory schemes expressly take into account the extent of the beneficial use in regards to the quantity element of a water right and expressly prohibit quantity from exceeding the amount that can be beneficially used. **In sum, the quantity specified in a decree of an adjudicated water right <u>is a judicial determination of beneficial use</u> consistent with the purpose of use for the water right.** . . .
>
> The Supreme Court acknowledged this same point in *AFRD #2* noting that there may be post-adjudication factors relevant to the determination of how much water is actually needed. . . .
>
> Waste or the failure to put the decreed quantity to beneficial use is a defense to a delivery call. . . . Idaho law provides that the burden of establishing waste is on the junior appropriator. . . .
>
> The problem arises with the initial determination of "material injury." In *AFRD #2* the Supreme Court held once the initial determination is made that "material injury" is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge in some other constitutionally permissible way, the senior's call. *AFRD #2*, 143 Idaho at 878, 154 P.3d at 449. However, the Director's "threshold" material injury determination includes what would otherwise be a defense to a delivery call. The problem with this approach is that it circumvents the constitutionally inculcated presumptions and burdens of proof.

Memorandum Decision at 24, 30, 33-34, 37-38 (emphasis in original).

The Court's directive on remand required the Director to analyze whether A&B's senior water right was materially injured using the "correct presumptions and burdens of proof." *Memorandum Decision* at 38. The Director failed to follow the Court's order.

[3] The Director erred in relying upon pre-decree information as a basis to find no-injury to A&B's senior water right. *See* R. 3473-74, 3476-77, 3486-87 & 3489.

The issue is straightforward, possession of a decree is a prior adjudication that a senior can beneficially use the decreed quantity and the Director and IDWR must deliver that amount in administration. If a senior is not receiving his decreed quantity and interfering juniors seek to continue their diversions they must prove a defense to the delivery call by clear and convincing evidence. Only "post adjudication" factors, proven by clear and convincing evidence, can be used to excuse providing the senior's decreed quantity. Moreover, the Director cannot assume or carry the juniors' burden because doing so "circumvents the constitutionally inculcated presumptions and burdens of proof." *Memorandum Decision* at 38.

The Director failed to follow this well-established process on remand. Instead, the Director disregarded A&B's decree, created a new standard for injury, and ignored the required procedure for administration. 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 deliveries from prior years to re-adjudicate A&B's water right.[4] The result is an unlawful and unconstitutional application of the CM Rules. The Court should correct these errors of law accordingly.

Ignoring the decreed diversion rate and its legal presumption, as well as the evidence that A&B could beneficially use this quantity, the Director created a new definition of material injury based upon a "minimum" or what he perceived to be the least amount of water to grow a crop to "full maturity." The Director defined his version of "material injury" as follows:

[4] In effect the Director wrongly assumed the juniors' "waste" defense to contrary to established law. Moreover, the Director's assertions that A&B has never diverted 1,100 cfs constitutes a prohibited re-adjudication of A&B's water right. *See Order on Motion to Enforce Order Granting State of Idaho's Motion for Interim Administration* at 8 (In re SRBA: Subcase No. 92-00021, November 17, 2005).

> 11. ***Injury*** to senior-priority water rights by diversion and use of junior-priority ground water rights ***occurs when diversions under the junior rights intercept a sufficient quantity of water to interfere with the exercise of the senior water right for the authorized beneficial use.*** CM Rule 10.14. Depletion does not automatically constitute material injury. *American Falls Reservoir No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 868, 154 P.3d 433, 439 (2007).

R. 3482 (emphasis added).

The Director further added:

> Thus, a senior water right holder cannot demand that junior ground water right holders diverting water from a hydraulically connected aquifer be required to make water available for diversion ***unless that water is necessary to accomplish an authorized beneficial use.***

R. 3483 (emphasis added).

Compared to the actual language in the CM Rules, it is clear the Director's definition of material injury is incorrect:

> 14. Material Injury. ***Hindrance to or impact upon the exercise of a water right*** caused by the use of water by another person determined in accordance with Idaho Law, as set forth in Rule 42.

CM Rule 10.14 (emphasis added).

The Director's definition strays away from the impact upon the exercise of a water right to whether a senior is prevented from accomplishing his end beneficial use, in this case irrigation. The two concepts are different. For example, a quantity necessary to "accomplish" irrigation is not necessarily the same quantity that is provided by a water right decree. A farmer can physically "accomplish" irrigation with little or no water.[5] However, that does not mean he will be successful or that a bare minimum satisfies the quantity of his water right.

[5] For example, IGWA witness Tim Deeg described the wide range of water diversion rates that he applies on his farms (ranging from 0.41 miner's inches to 1 miner's inch). Tr. Vol. V, p. 1071, lns 12-21; p. 1075, ln. 17 – p. 1076, ln. 6, p. 1080, lns. 12-17.

Relying upon his definition, a conglomeration of pre-decree information, and devised averages of historical water use, the Director made the following conclusions regarding injury to A&B's water right:

> The record establishes with reasonable certainty that since 1992 . . . 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 . . . demonstrate with reasonable certainty that . . . 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 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.

R. 3489 (emphasis added)

The Director uses the phrases "water necessary to accomplish an authorized beneficial use" and "sufficient for the purpose of irrigating crops" interchangeably with growing crops to "full maturity." R. 3488-89. The Director's reliance upon a "minimum" or "adequate" quantity to irrigate originates in the Hearing Officer's recommended order:

> **4. Crops may be grown to full maturity on less water than demanded by A&B in this delivery call.** Evidence from irrigators outside A&B is informative to the extent that it indicates that full crops can be produced on less water than demanded by A&B in this delivery call proceeding. In fact full maturity crops are grown on Unit B with less than the 0.75 amount. This may result in increased costs in power to the irrigators who may be required to run their pumps longer and increased labor to manage the water, but careful management by A&B and its irrigators has resulted in the production of crops to full maturity with less water than demanded by A&B.
>
> * * *
>
> [A&B] is not entitled to curtail junior pumpers to reach that full amount if the full amount is not necessary to develop crops to maturity. . . The question is whether irrigators' crop needs in Unit B can be met with less than the full amount of the water right.

* * *

> **6. The Director's determination is supported by substantial evidence.** Several factors support the Director's determination. It is consistent with the Motion to Proceed which indicates 0.75 to be a minimum need. <u>A minimum is not a desirable amount, but it is adequate.</u> The 0.75 is consistent with the policy of rectification adopted by A&B. It is unlikely rectification would be prompted at a level below the amount necessary for crop production. <u>More is sought, and more is better,</u> but 0.75 meets crop needs. There is persuasive evidence that 0.75 is above the amount nearby irrigators with similar needs consider adequate.

R. 3107, 3110 (underline added).[6]

Contrary to IDWR's theory, the proper injury analysis does not ask "whether a water user's needs can be met with less than the full quantity of the water right," but instead it must start with the question "can the decreed quantity be put to beneficial use?" An injury analysis must begin from the right starting line in order to comply with Idaho law.

The Supreme Court addressed this exact issue in *Clear Springs*. In that case junior Groundwater Users alleged that a decreased water supply was insufficient to show material injury. 150 Idaho at 810. The Groundwater Users argued that the senior Spring Users were required to put on evidence showing they could produce more fish or that any increased production could be marketed at profit. *Id.* at 810-11. Relying upon the plain language in the CM Rules the Court rejected such an injury standard:

> The Rule requires impact upon the exercise of a water right. It does not require showing an impact on the profitability of the senior appropriator's business.

Clear Springs, 150 Idaho at 811.

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[6] This finding plainly acknowledges that a "minimum" amount causes impacts to farming operations (i.e. increased power costs and labor), not to mention the impact on the exercise of a water right.

Since the CM Rules define injury as "hindrance to or impact upon the exercise of a water right," the Director's analysis of what is the minimum necessary to irrigate or to grow a crop to "full maturity" is flawed.[7] By evaluating whether crops are grown to "full maturity," not the water right, the Director admittedly creates a flawed standard that requires an impact to the irrigator's business. If an A&B irrigator does not grow a crop to maturity his "business" is impacted and the farming operation likely fails.[8] As clarified in *Clear Springs*, that is not what is required under the CM Rules in order to find material injury to the water right.

Moreover, such an evaluation is no different than a micro "project failure" analysis. Since this Court has already ruled that a "project failure" standard is inapplicable in administration, the same reasoning applies to a "crop maturity" standard as well. *See Memorandum Decision* at 42-43 ("Injury to a water right is still injury").

Finally, if the Director is correct, then individual irrigation water rights and their varying diversion rates are meaningless. *See Clear Springs*, 150 Idaho at 811 ("If business profitability was the basis for appropriation, decreed water rights would become meaningless"). If water users are held to what is minimally adequate to grow any crop to maturity, then the Director should set that quantity and apply it equally to all irrigators that grow the same crops with the same diversion and irrigation systems.[9] Yet, the law prohibits this type of water right

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[7] The CM Rules' definition of an "area having a common ground water supply" also illustrates how conjunctive administration must occur. First, Rule 10.01 recognizes that such an area constitutes a "ground water source . . . within which the diversion and use of water by a holder of a ground water right affects the ground water supply available to the holders of other ground water rights. (Section 42-237a.g., Idaho Code)" (emphasis added). Rule 50 establishes that the Eastern Snake Plain Aquifer is an "area of common ground water supply." When juniors divert their water rights on this common water source and a senior does not receive his decreed quantity that can be put to beneficial use, material injury results. Juniors carry the burden to prove affirmative defenses or no-injury to the senior water right. *See A&B*, 284 P.3d at 249.

[8] However, just because a crop can be grown to some standard of "full maturity" in the Director's eyes does not answer whether or not the water right is satisfied. *See Memorandum Decision* at 42 ("Injury to a water right is still injury").

[9] The standard diversion rate per acre set by Idaho law is 1 miner's inch per acre. *See* I.C. § 42-202.

administration. *See Kirk v. Bartholomew*, 3 Idaho 367 (1892) (rejecting apportionment of water among users as common property).

By not recognizing A&B's decreed quantity and beginning the injury analysis with the full water right, the Director unconstitutionally applied the CM Rules on remand. The question the law requires the Director to ask is whether A&B's landowners can beneficially use the decreed quantity, not what is the minimum these landowners can get by on to grow a crop to full maturity. The Court should correct this error of law and set aside the *Remand Order* accordingly.

B. The Director's Waste Finding is Not Supported by Clear and Convincing Evidence in the Record.

If a junior user claims waste or alleges the senior cannot apply water to beneficial use, the law requires the junior to prove that affirmative defense by clear and convincing evidence. *See A&B*, 284 P.3d at 225. In this proceeding the Director must determine whether A&B can beneficially use its decreed quantity, not ask what is the minimum "sufficient for the purpose of irrigating crops" or what is the least quantity to grow a crop to "full maturity." The agency record plainly proves that A&B's landowners can, and will, beneficially use the decreed quantity if the water is made available. In other words, the Director's finding of "waste" is not supported by clear and convincing evidence and therefore must be set aside.

At hearing, all of A&B's landowners testified they could beneficially use 0.88 miner's inches per acre on their individual farms.[10] *See* Tr. Vol. IV, pp. 815-16 (Timothy Eames testifying that he can beneficially use more than 0.75 miner's inches per acre and that the delivery rate is critical for his irrigation operations and water-sensitive crops), Ex. 229A; Tr. Vol.

[10] A&B's and Pocatello's experts, the only witnesses that performed an irrigation requirements analysis, both testified that 0.88 miner's inches per acre could be beneficially used on the A&B project. Tr. Vol. XI, p. 2240, lns. 13-20; p. 2243, lns. 3-6 (Dr. Brockway testimony); Tr. Vol. VIII, p. 1614, ln. 17 – p. 1615, ln. 5 (Greg Sullivan testimony).

V, pp. 888-89 & 893, lns. 2-13 (Timm Adams testifying that he needs the decreed rate of delivery and can beneficially use even more than what is decreed under A&B's water right #36-2080), Ex. 230A; Tr. Vol. V, p. 956-57; p. 960, lns. 13-25; p. 961, lns. 1-6, 13-16 (Ken Kostka testifying that he could use the decreed rate of delivery per acre), Ex. 231A; Tr. Vol. V, pp. 1016-17, 1020-21 (Harold Mohlman confirming he beneficially used 0.92 and 0.97 miner's inches per acre); Ex. 234A.

Even IGWA's own witnesses testified they need and have applied quantities approaching the decreed diversion rate on their A&B project lands. Tr. Vol. X, p. 2073, lns. 21-24, p. 2097, ln. 21 -25 (Dean Stevenson testifying he used 0.87 in 2006 and 0.83 miner's inches per acre in 2007); Tr. Vol. X, p. 2146, lns. 3-6, (Orlo Maughan testifying he could beneficially use 0.85 miner's inches per acre that was delivered in 2006). Finally, A&B's Manager Dan Temple also explained that when the District rectifies a well system it seeks to provide between .85 and .90 miner's inch per acre because "that is what they [A&B's landowners] need to meet their crop requirements."[11] Tr. Vol. III, p. 552, ln. 20 – p. 553, ln. 9; *see also*, R. 3101 ("A&B seeks to reach 0.85 to 0.90 and has gone as high as 0.95.")

The Hearing Officer and Director agreed that A&B's landowners can beneficially use the decreed quantity:

> ***A&B is entitled to the higher rate of delivery*** **[0.88 miner's inch]** ***if its delivery system can produce the higher rate and that amount can be applied to beneficial use. . . .***
>
> ***A&B is entitled to the amount of its water right.*** However, it is not entitled to curtail junior pumpers to reach that full amount if the full amount is not necessary to develop crops to maturity. . . . The question is whether irrigators' crop needs in Unit B can be met with less than the full amount of the water right.

[11] The record demonstrates that prior to depletions by junior ground water rights, A&B was able to divert more than 0.75 miner's inches per acre from nearly all of its wells for as many as thirty years, R. 3103, with some wells delivering more than 0.88 miner's inches per acre, *id.* 3108. *See also*, Ex. 200 at 3-8.

> The Director's determination [0.75 miner's inches/acre] is supported by substantial evidence. . . . A minimum amount is not a desirable amount, but it is adequate. . . . ***More is sought, and more is better***, but 0.75 meets crop needs.

R. 3102, 3108, 3110 (emphasis added); R. 3322-23 (final order accepting Hearing Officer's findings and conclusions).[12]

Finally, IDWR represented to this Court that A&B has the right to beneficially use its decreed quantity. *See IDWR Respondents' Brief* at 26 (Jan. 28, 2010, Case No. CV-2009-647) ("***A&B maintains the ability to exercise the full extent of its right***, ... at no time in these proceedings was A&B informed, or should it infer, that it was not authorized to exercise the full extent of its right") (emphasis added).

The Hearing Officer's reasoning reveals the fundamental flaw in the Director's present injury analysis. Although the Hearing Officer recognized A&B's right to divert its full amount, he qualified that right for purposes of administration. Instead of recognizing the full quantity in administration, the Hearing Officer reasoned A&B is only entitled to a "minimum" or "adequate" amount to develop "crops to maturity." Contrary to the agency's theory, a water user does not have two different entitlements to his decreed quantity depending on whether or not a delivery call is in place. *See Memorandum Decision* at 31, 43 ("Simply put, a water user has no right to waste water. . . . Injury to a water right is still injury").

Based upon the above undisputed facts, there is no question A&B's landowners <u>can and will beneficially use</u> the decreed quantity (0.88 miner's inches per acre). Contrary to the Director's *Remand Order*, there is no evidence, let alone clear and convincing evidence, that

[12] Contrary to the Hearing Officer's description, "more" water is not just "better" in this case, it is legally required for proper administration under Idaho law.

would support any finding that the decreed quantity would be wasted. By adopting and applying a "minimum" amount for "crop maturity" benchmark, the Director's standard excuses injury to A&B's water right contrary to the law and the plain language of the CM Rules.

Finally, A&B's water right is materially injured because diversions under junior priority water rights in the ESPA are causing a "hindrance to or impact upon" A&B's diversion and use of water under its senior water right. As such, the Director and watermaster are required to regulate "the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included with the district." CM Rule 40.01.a.

Contrary to the Director's analysis on remand, a water user's "minimum need" is not a valid basis for the Director and watermaster to distribute water. Although a landowner's "minimum need" will certainly change with cropping patterns, weather, precipitation, and other factors, that quantity does not set the standard for conjunctive administration. *See Memorandum Decision* at 30, n.11. A&B must be prepared to deliver the decreed quantity on demand, and the District cannot dictate what its landowners grow or how much water a particular landowner needs throughout the irrigation season. Under Idaho law a water user is not held to such a standard for purposes of water right appropriation or administration:

> So far as I am aware, ***it has never been held or contended that in making an appropriation of water from a natural stream the appropriator is limited in the right he can acquire to his minimum needs***, and no reason is apparent why one who contracts to receive water from another should be limited to such needs. Conservation of water is a wise public policy, but so also is the conservation of the energy and well-being of him who uses it. ***Economy of use is not synonymous with minimum use.*** Better four prosperous farmers than five who are unsuccessful because of the uncertainty in the water supply, and better four farms uniformly fruitful than five upon which failure is ever imminent, and to which it is bound to come on the average one year in five.

Caldwell v. Twin Falls Salmon River Land & Water Co., 225 F. 584, 596 (D. Idaho 1915) (emphasis added).

Moreover, it is the individual farmer, *not the Director*, who is best acquainted with the land and is in the best position to know how much water is needed.[13] *See Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383 (1930)**Error! Bookmark not defined.**.

> The water user is acquainted with his land and his crops and should be in better position to determine when water should be applied than any other person. Various provisions of our statutes recognize his right to demand water. The respondents are entitled to apply water to their lands for the purpose of irrigation as early as it may be beneficially applied.

Id. at 395.

The SRBA District Court has also acknowledged that the Department cannot limit what an individual farmer grows, or the amount of water he can beneficially use under his water right. *See Order on Challenge "Facility Volume" Decision* at 17 (Twin Falls Dist. Ct., Fifth Jud. Dist., In Re SRBA: Subcase No. 36-2708 *et al.*, Dec. 29, 1999) (the Department has no authority to "limit 'the extent of beneficial use of the water right' in the sense of limiting how much (of a crop) can be produced from that right").[14]

In summary, the Director cannot limit or reduce the decreed amount if the water can be beneficially used. Moreover, the Director cannot limit the use of water under a decreed senior water right for the purpose of allowing junior priority water rights to pump their full rights instead. *Lockwood v. Freeman*, 15 Idaho 395, 398 (1908) ("The state engineer has no authority to deprive a prior appropriator of water from any streams in this state and give it to another person. Vested rights cannot thus be taken away"). Idaho water law does not hold a senior water user to the "bare minimum" for purposes of administration, particularly where junior users

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[13] IDWR's witness Tim Luke acknowledged this principle at the hearing. *See* Tr. Vol. VI, p. 1213, lns. 2-11.

[14] The "minimum needed" standard is akin to the riparian doctrine that was rejected in Idaho over a century ago. *See* IDAHO CONST. art. XV, § 3; Idaho Code § 42-106; *Baker v. Ore Ida Foods, Inc.*, 95 Idaho 575, 583 (1973). Rather than only allow A&B a "minimum needed," or what the Director deems is "reasonable," Idaho's prior appropriation doctrine requires the Director and watermaster to distribute water to A&B pursuant to its decreed water right. A "minimum needed" standard renders a water right meaningless, provided there is sufficient water for all users, junior and senior, to meet their "minimum needs."

are not held to the same standard.[15] Since the record shows A&B's landowners can and will beneficially use the decreed quantity, they have a right to that full amount in administration. The Director's new injury standard and analysis is not supported by the facts or law and should therefore be reversed and set aside.

C. The Director Cannot Use 0.65 Miner's Inches Per Acre as the Beneficial Use Standard and Then Claim A&B's Failure to Divert Additional Water Justifies a No-Injury Finding.

The required rate of diversion was thoroughly examined at the administrative hearing. Although admitting A&B's decreed quantity could be put to beneficial use, Pocatello's expert offered 0.65 miner's inch per acre as a standard for administration based primarily upon a "soil moisture profile" theory. After reviewing the evidence the Hearing Officer expressly rejected this quantity, and the theory that the rate of delivery should be reduced according to that factor:

> A&B asserts that it is entitled to and needs the full rate of delivery that is authorized by the partial decree during the peak periods of demand when the weather is hot and dry. Under the water right that rate would be 0.88 miner's inches per acre. The range of the dispute as to whether the irrigators in Unit B suffer material injury if less than 0.88 miner's inches are delivered is represented by expert testimony. Dr. Brockway computed the amount to be 0.89 miner's inches per acre to avoid crop loss or yield reductions. Mr. Sullivan concluded that 0.65 miner's inches would be adequate with proper management of the water. The Director adopted a rate of 0.75 miner's inches. These amounts were water at the well.
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> * * *
>
> The evidence establishes that irrigators in A&B do utilize the practice of developing soil moisture to buffer against the peak irrigation period. There was extensive analysis of the practice of building a supply of water in the soil during the non-peak periods when water is plentiful in order to create a body of water in the soil to ameliorate shortages of available water during the period of peak demand. This is good practice and is routinely used by irrigators in A&B. Consequently, the amount they say they need to grow crops to full maturity cannot be reduced by a factor attributed to building a proper soil moisture profile. That factor already exists. Reducing a claim of need by a soil moisture factor would be duplicating a factor already in place.

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[15] *See infra* Part III.

The use of soil moisture to reduce peak demand for water is crop specific and does not substitute for an adequate supply of water during the peak period.

* * *

6. **The Director's determination is supported by substantial evidence**. Several factors support the Director's determination. It is consistent with the Motion to Proceed which indicates 0.75 to be a minimum need. A minimum is not a desirable amount, but it is adequate. The 0.75 is consistent with the policy of rectification adopted by A&B. It is unlikely rectification would be prompted at a level below the amount necessary for crop production. More is sought, and more is better, but 0.75 meets crops needs. There is persuasive evidence that 0.75 is above the amount nearby irrigators with similar needs consider adequate.

R. 3088, 3109-10.

The Director accepted the above findings in his *Final Order*. R. 3322-23. The Hearing Officer recognized the detrimental impacts caused by a rate of delivery below 0.75 miner's inches per acre. R. 3107 ("This may result in increased costs in power to the irrigators who may be required to run their pumps longer and increased labor to manage the water"). This finding was corroborated with the testimony of A&B's farmers, who described how a delivery of only 0.65 miner's inches per acre is insufficient and negatively impacts their cropping decisions. *See* Tr. Vol. V, pp. 893-94 (Timm Adams describing reduced yields and the inability to meet crop demands with a 0.65 delivery rate); Tr. Vol. V, p. 968, ln. 14 – p. 969, ln. 2 (Ken Kostka describing the impacts of the reduced delivery "Q. Have you thought about the consequences if you were just limited to a 0.65 delivery rate for the whole entire irrigation season? . . . A. If it was .65 I would find a new job").[16]

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[16] At hearing, Pocatello's expert admitted that 0.65 miner's inches per acre did not provide sufficient water for certain crops, notably potatoes, sugar beets, and beans. Tr. Vol. VIII, p. 1656, ln. 13 – p. 1657, ln. 12; p. 1713, lns. 1-8, p. 1714, lns. 12-20, p. 1715, lns. 2-11. In addition, Tim Eames, an A&B landowner that grow potatoes confirmed that reduced water delivery negatively impacts crop yields. Tr. Vol. IV, p. 818, lns. 16-19, p. 819, lns. 3-12, p. 820, lns. 2-15. Ken Kostka, another A&B landowner, testified that even 0.73 miner's inches per acre was not sufficient for his potato operation and that reduced water deliveries have negatively affected his cropping decisions. Tr. Vol. V, p. 960, lns. 13-19, p. 962, lns. 3-6, p. 963, ln. 11 – p. 966, ln. 1.

Despite the evidence and prior findings, the Director now concludes that A&B would "waste" its decreed diversion rate because 0.65 miner's inches per acre represents the actual "average" diversions that can be beneficially used. R. 3489. The Director relies upon his calculated peak season diversions in 2006 to show that A&B only diverted 0.65 miner's inches per acre that year.[17] R. 3488. Despite finding this is the limit of A&B's entitlement to water, the Director then claims that A&B is not injured because it failed to pump additional capacity that year (i.e. 59,643 acre-feet based upon a maximum well capacity of 970 cfs, or 0.77 miner's inches per acre). R. 3487. The Director cannot have it both ways.

If A&B is limited to beneficially use 0.65 miner's inches per acre then any water pumped above that rate is prohibited since it would constitute waste. *Memorandum Decision* at 31 ("a water user has no right to waste water"). However, the Director overlooks this finding by using the alleged additional well capacity against the District to conclude that A&B's water right is not injured. R. 3487. The conflicting conclusions cannot be reconciled. The Director's arbitrary and capricious conclusion on this issue is not supported by a rational basis and therefore should be set aside. *See American Lung Assoc. of Idaho/Nevada*, 142 Idaho at 547.

II. The Director's application of I.C. § 42-226 and CM Rule 20.03 is Misplaced and Void Pursuant to the Idaho Supreme Court's Ruling in *Clear Springs*.

The Director erred in his reference to Idaho Code § 42-226 and Rule 20.03 as justifying the no-injury finding on remand. As explained below, Rule 20.03 contains several misinterpretations and unreliable references that the Idaho Supreme Court declared void in *Clear Springs*.

[17] The Director's analysis of water use in 2006 is based upon the total volume pumped (49,855.3 acre-feet) during his claimed "peak period" and converting that volume into a cubic feet per second and miner's inch per acre rate averaged across the entire 62,604.3 acre place of use. R. 3487-88. The analysis does depict the actual rate of delivery or "criteria" for each well system. Ex. 133 (A&B 2765-75) (2006 Annual Pump Report).

Moreover, the Court clarified that the concept of "full economic development" is limited to Idaho Code § 42-226 and only applies to a senior's reasonable pumping level. The Director's misinterpretation of the statute and rule are erroneous and should be set aside. In *Clear Springs* the Groundwater Users relied upon Rule 20.03 and alleged the references therein protected their junior rights from curtailment. 150 Idaho at 804. The Court analyzed the Rule and held the following:

> On its face, the rule does not state that priority of right as between a senior surface water user and junior ground water users is to be disregarded as long as the Aquifer is not being overdrawn by ground water users. Likewise, the authorities cited in the Rule do not so state. . . .
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> Finally, neither section governs conjunctive management. They only govern the distribution of certain surface waters. . . .
>
> There is nothing in the wording of Article XV, § 7, that indicates that it grants the legislature or the Idaho Water Resource Board the authority to modify that portion of Artricle XV, § 3, which states, "Priority of appropriation shall give the better right as between those using the water [of any natural stream]...." . . .
>
> Conjunctive Management Rule 20.03 also refers to "full economic development as defined by Idaho law." ***The words "full economic development" only appear in Idaho Code § 42-226 and the cases discussing that statute***. . . . As explained above, Idaho Code § 42-226 has no application in this case. ***It only modifies the rights of ground water users with respect to being protected in their historic pumping levels.***
>
> The Groundwater Users' argument that full economic development means that priority of right is taken into consideration in managing the Aquifer only as necessary to prevent over-drafting of the Aquifer is not consistent with Idaho law. It would, in essence, preclude conjunctive management of the Aquifer. . . .
>
> There is no difference between securing the maximum use and benefit, and least wasteful use, of this State's water resources and the optimum development of water resources in the public interest. Likewise, there is no material difference between "full economic development" and the "optimum development of water resources in the public interest." They are two sides of the same coin. Full economic development is the result of the optimum development of water resources in the public interest. . . .

> Under the law, the Groundwater Users' arguments regarding reasonable aquifer levels and full economic development must challenge the Spring Users' means of diversion.

150 Idaho at 805, 807-09 (emphasis added).

Based upon the above decision, the only substantive reference that survives in Rule 20.03 is the concept of a "reasonable means of diversion." *Id.* at 809; *see also*, CM Rule 42. The remaining references are inaccurate statements of existing law and are thus void. Consequently, the Court's *Clear Springs* decision affects the following conclusions in the Director's *Remand Order*:

> 14. As between junior- and senior-priority ground water users, ***Idaho Code § 42-226's dual principles of full economic development and reasonable pumping levels apply.*** *Clear Springs* at *14, 18; *Baker v. Ore-Ida*, 95 Idaho 575, 513 P.2d 627 (1973). In responding to delivery calls under the CM Rules, the Director is required to evaluate all principles of the prior appropriation doctrine. CM Rule 20.03.
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> 33. . . . Requiring curtailment when there are sufficient reasonable alternative means of diversion is ***contrary to the full economic development of the State's water resources.*** CM Rule 20.03; Idaho Code § 42-226.
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> 34. The Director concludes with reasonable certainty that A&B has the capacity to pump more water if it in fact needs more water. For purposes of conjunctive administration, A&B may not seek curtailment of junior-priority ground water rights when it is not fully utilizing its capacity to divert water. CM Rule 20.03; Idaho Code § 42-226.
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> * * *
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> 41. . . . To curtail junior-priority ground water rights because of a poor hydrogeologic environment would countenance unreasonableness of diversion ***and hinder full economic development of the State's water resources.*** CM Rule 20.03; Idaho Code § 42-226; *Clear Springs* *21 (a senior appropriator's means of diversion must be reasonable to sustain a delivery call).

R. 3483, 3487-88.

The Director cites Rule 20.03 and Idaho Code § 42-226 to justify his various conclusions. The Director wrongly claims that the Rule and statute contain "dual principles" of "full economic development" and "reasonable pumping levels." R. 3483. As explained by the Court in *Clear Springs*, the concept of "full economic development" is not some separate doctrine that subjectively qualifies administration of a senior water right, it applies only in reference to a senior's reasonable groundwater pumping level.[18] *See* 150 Idaho at 802-03, 808 ("First in time and first in right, full economic development, and reasonable pumping levels are not three separate factors that can determine the allocation of ground water among competing appropriators.")

Therefore, the Director has no legal basis to preclude or qualify administration of A&B's senior water right on the theory that it would violate or hinder "full economic development" of the State's water resources. The Director's conclusions and reliance upon Idaho Code § 42-226 and Rule 20.03 are flawed as a matter of law and should be set aside.

III. The Director Erred in Applying CM Rules 20.03 and 40.05 by Finding Junior Ground Water Rights Could Beneficially Use Quantities Greater Than 0.65 Miner's Inches Per Acre But A&B's Landowners Could Not.

Compounding the error that A&B would waste any use of water beyond 0.65 miner's inches per acre is the Director's implied finding that junior ground water rights could beneficially use the same quantity. The Director concluded that A&B's landowners would waste 0.88 miner's inches per acre while their neighbors across the street, using the same irrigation systems and growing the same crops, would not. *Compare* A&B witnesses, Tr. Vol. IV, p. 809, lns. 5-11, p. 810, lns. 11-16 (Tim Eames testifying he grows sugar beets, potatoes, and wheat and irrigates with wheel lines, hand lines, and pivots); Tr. Vol. V, p. 870, lns. 4-9, p. 872, lns. 9-13

[18] Although the Director did not establish a reasonable pumping level, he nonetheless concluded A&B's pumping did not exceed that level. As recognized by this Court, the Director's decision on this issue may need to be revisited given the erroneous finding on material injury. *See Memorandum Decision* at 24.

(Timm Adams testifying he grows sugar beets, barley, potatoes, wheat, alfalfa and beans and irrigates with wheel lines, pivots, and hand lines) *with* IGWA witnesses, Tr. Vol. X, p. 2062, lns. 13-17, p. 2077, lns. 14-18 (Dean Stevenson testifying he grows sugar beets, barley, wheat and potatoes and irrigates with pivots, wheel lines and hand lines); Tr. Vol. X, p. 2118, lns. 8-11, p. 2125, lns. 4-6 (Orlo Maughan testifying he grows sugar beets, wheat, and leases his land for potatoes and irrigates with pivots, hand lines, and wheel lines). The decision violates the CM Rules and is also clearly erroneous, arbitrary and capricious. *See* I.C. § 67-5279.

Idaho law prohibits junior rights from taking water away from senior rights. IDAHO CONST. art. XV, § 3, I.C. §§ 42-602, 607; CM Rule 40; *Lockwood,* 15 Idaho at 398. Stated another way, junior water rights cannot injure senior water rights. As part of the material injury analysis, the CM Rules also require the Director to evaluate the use of water under junior water rights on the common water resource. Notably, Rules 20 and 40 provide:

> **05. Exercise of Water Rights.** These rules provide the basis for determining the reasonableness of the diversion and use of water by both the holder of a senior-priority water right who requests priority delivery and the holder of a junior-priority water right against whom the call is made.

CM Rule 20.05.

> **03. Reasonable Exercise of Rights.** In determining whether diversion and use of water under rights will be regulated under Rule Subsection 040.01.a or 040.01.b, the Director shall consider whether the petitioner making the delivery call is suffering material injury to a senior-priority water right and is diverting and using water efficiently and without waste, and in a manner consistent with the goal of reasonable use of surface and ground waters as described in Rule 42. ***The Director will also consider whether the respondent junior-priority water right holder is using water efficiently and without waste.***

CM Rule 40.03 (italicized emphasis added).

The Hearing Officer and Director originally concluded A&B was diverting and using water efficiently and without waste. R. 3098-99, 3109 ("A&B uses acceptable drilling techniques . . . The current system wide conveyance loss of water is between three and five percent"). R. 3322-23. The Hearing Officer and Director also both recognized A&B's right to divert and use its full decreed quantity. R. 3102; 3322-23. The Director and IDWR agreed as represented to this Court. *See IDWR Respondents' Brief* at 26 (Jan. 28, 2010, Case No. CV-2009-647).

On remand, despite reviewing the exact same evidence that resulted in the original findings above, the Director reversed himself and concluded A&B's landowners would "waste" the decreed diversion rate and can only beneficially use 0.65 miner's inches per acre. R. 3489. At the same time the Director performed <u>no evaluation</u> of the exercise of junior priority water rights to determine whether juniors were "using water efficiently and without waste." CM Rule 40.03. The Director plainly violated his duty under the CM Rules by not making specific findings on this issue.

By not making any findings required by the Rules, the implication is that the Director accepted that junior ground water users could beneficially use their decreed quantities. Evidence presented at the hearing demonstrates the range of diversion pumping capacities by area private ground water users in Water District 130. R. 1962-63, 1970. Notably, the average well pumping capacity rate for those irrigators is 0.89 miner's inches per acre.[19] R. 1963. About 59% of the private wells have capacities exceeding 0.75 miner's inches per acre, 44% are greater than .85 miner's inches acre and 25% are greater than the statutory standard of 1 miner's inch per acre.

[19] This compares to the testimony presented by IGWA's witnesses at the hearing. Tr. Vol. X, p. 2073, lns. 21-24, p. 2097, ln. 21 -25 (Dean Stevenson testifying he used 0.87 in 2006 and 0.83 miner's inches per acre in 2007); Tr. Vol. X, p. 2146, lns. 3-6, (Orlo Maughan testifying he could beneficially use 0.85 miner's inches per acre that was delivered in 2006). Tr. Vol. V, p. 1075-76 (Tim Deeg testifying that he has used 1 miner's inch per acre and obtained a ground water right for that quantity).

R. 1963, 1970. In addition to this data, Water District 130 records showed nearly 50% of the private wells unlawfully exceeded their authorized diversion rates. R. 1955, 1967.

Although the Director initially referenced some general annual water use from a 1995-96 water measurement report and concluded some junior users could grow crops to "full maturity" on less water than is used on A&B lands,[20] he performed no specific evaluation as to whether the juniors' diversions beyond 0.65 miner's inches per acre would be wasted. The failure to hold junior ground water rights to the same standard used to slash A&B's senior water right violates Idaho law.[21] The Court should set aside the Director's *Remand Order* accordingly.

IV. The Director Exceeded the Scope of the Court's Ordered Remand and Violated the Mandate Rule.

This Court defined the Director's limited authority on remand as follows:

> The Director erred by failing to apply the evidentiary standard of clear and convincing evidence in conjunction with the finding that the quantity decreed in A&B's 36-2080 exceeds the quantity being put to beneficial use for purposes of determining material injury. ***The case is remanded for the limited purpose of the Director to apply the appropriate evidentiary standard to the existing record. No further evidence is required.***

Memorandum Decision at 49 (emphasis added).

Rather than acting within the narrow limits of this decision, the Director violated the order and reconsidered findings outside the scope of the remand. In particular, the Director reversed his prior conclusion and alleged that A&B's means of diversion are unreasonable and that A&B only needs 0.65 inches per acre. R. 3488, 3485. In addition to violating the Court's *Memorandum Decision*, these findings violate the mandate rule and should be reversed.

[20] R. 1117-18, 3106-3107; 3322-23 (Director accepting Hearing Officer's findings).

[21] A&B does not suggest that water rights should be administered as "common property." However, the Director cannot conclude A&B's landowners would waste a quantity greater than 0.65 miner's inches per acre, but that juniors employing the same irrigation systems and irrigating the same crops can beneficially use that quantity. Such a finding is the epitome of clearly erroneous, arbitrary and capricious agency action. *See* I.C. § 67-5279; *Galli,* 146 Idaho at 159.

A. The Mandate Rule

The "mandate rule" governs a lower court's or agency's consideration of issues when a case has been remanded by a higher court for further action.[22] The rule, well-established in American jurisprudence, was described by the U.S. Supreme Court in 1895:

> When a case has been once decided by this court on appeal, and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree as the law of the case, and ***must carry it into execution according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.***

In re Sanford Fork & Tool Co., 160 U.S. 247, 255-56 (1895) (citation omitted) (emphasis added); *see also Mirchandani v. United States,* 836 F.2d 1223, 1225 (9th Cir.1988) ("district courts are not free to decide issues on remand that were previously decided either expressly or by necessary implication on appeal").

The mandate rule also applies to administrative actions on remand from a court's judicial review. *Ischay v. Marnhart*, 383 F. Supp.2d 1199, 1216 (C.D. Cal. 2005) (recognizing that the "hierarchical parallel is clear: In Social Security proceedings, the district court's position to the Appeals Council (and indirectly, the ALJ) is analogous to that of the court of appeals' position with respect to a trial court"); *id.* ("the Court ... concludes that the doctrine of the law of the case

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[22] There are limited exceptions to the mandate rule. Although the rule prohibits a lower court from deviating from the mandates of the remand order, the rule "does not necessarily operate as a complete 'straightjacket' on the district court on remand." *Magnesystems, Inc. v. Nikken, Inc.*, 933 F. Supp. 944, 950 (C.D. Cal. 1996). "District courts can generally deviate from the mandate if one of the same 'exceptional' circumstances discussed above applies: (1) an intervening change in the law; (2) new and substantially different evidence is presented subsequent to the appeal; or (3) when the prior decision "was clearly erroneous and would work a manifest injustice if implemented." *Id.* (quoting *Leggett v. Badger,* 798 F.2d 1387, 1389 (11th Cir.1986)). Importantly, however, "a district court on remand must ***construe these exceptions extremely narrowly*** and may deviate from the mandate in only ***extraordinary situations***." *Id.* (emphasis added). None of the exceptions to the mandate rule apply in this case. First, there is no claim that "extraordinary situations" exist. Second, the law has not been changed and there is no claim that the Director's initial findings were "clearly erroneous and would work a manifest injustice if implemented." *Magnesystems, Inc., supra.* Likewise, there is no "new and substantially different evidence" since the Court did not authorize the consideration of any additional evidence on remand. *Memorandum Decision* at 49.

and the rule of mandate apply to matters remanded to the Agency for further proceedings"). The U.S. Supreme Court recognized that an agency cannot disregard an appellate court's marching orders:

> Where a court finds that the Secretary has committed a legal or factual error in evaluating a particular claim, the district court's remand order will often include detailed instructions concerning the scope of the remand, the evidence to be adduced, and the legal or factual issues to be addressed. Often, complex legal issues are involved, including classification of the claimant's alleged disability or his or her prior work experience within the Secretary's guidelines or "grids" used for determining claimant disability. ***Deviation from the court's remand order in the subsequent administrative proceedings is itself legal error, subject to reversal on further judicial review.***

Sullivan v. Hudson, 490 U.S. 877, 886 (1989) (emphasis added).

Stated plainly, upon receiving the mandate of a court, an agency "cannot vary it or examine it for any other purpose than execution." *United States v. Cote,* 51 F.3d 178, 181 (9th Cir. 1995); *see also Mirchandani,* 836 F.2d at 1225 (Lower courts' adherence to the mandate rule is absolutely "necessary to the operation of a hierarchical judicial system"). Indeed, "a district court ***could not revisit*** its already final determinations ***unless the mandate allowed it.***" *United States v. Thrasher*, 483 F.3d 977, 981 (9th Cir. 2007) (citation omitted) (emphasis added).

B. The Director's Unlawful Reconsideration of Settled Findings in the 2009 *Final Order.*

The Director's *Remand Order* violates the mandate rule. For example, on remand, the Director, for the first time and contrary to the 2009 *Final Order*, determined that A&B has an unreasonable means of diversion and only needs 0.65 miner's inches of water. R. 3488, 3485. Importantly, these issues were ***already litigated*** and decided following the administrative hearing – with both the Hearing Officer and Director concluding that A&B's means of diversion are reasonable and that the District's landowners are entitled to 0.75 miner's inches of water in

administration as well as the decreed quantity in a non-administration setting.[23] R. 3098-99, 3110, 3321. Nothing in the Court's *Memorandum Decision* authorized the Director to reconsider these matters.

The Hearing Officer found that A&B's means of diversions "were reasonable." R. 3091, 3098. He specifically recognized that the original design and location of the wells by Reclamation was "reasonable" and that A&B uses "acceptable drilling techniques for the conditions that exist." R. 3098-99. Similarly, the Hearing Officer concluded A&B uses efficient water conveyance systems to deliver water to the landowner:

> 1. **The system in Unit B was designed as an open delivery discharge system in which water from the aquifer is discharged into a large pool where it is measured.** Water then flows across cipolletti weirs out of the pond down an open conveyance lateral system to the individual farm gates. . . .
>
> 2. **The closed delivery system exists now.** An alternative system in use today is a closed system in which water users have hooked their pumps directly to the district pumps and move the water through their sprinkler systems to the farm units, eliminating the open conveyance facility.
>
> 3. **Another alternative that has developed is the installation of pipelines in the open conveyance facilities, injecting the water into the pipeline where it flows to the farm units where it is pumped onto the fields by the farmers.**
>
> 4. **The alternative systems that have been developed by A&B over the years are more efficient than the open conveyance system, eliminating ditch loss and evaporation. The current system wide conveyance loss of water is between three and five percent.**
>
> * * *
>
> 6. **There has been a significant reduction in the laterals and drains since the project was developed.** According to exhibit 200L the original conveyance system included 109.71 miles of laterals and 333 miles of drains. Exhibit 200K, which shows the current system, indicates 51 miles of laterals, 138 miles of drains and 27 miles of distribution piping.

R. 3098-99 (emphasis in original).

[23] This alleged "dual" standard of water use is not permissible under Idaho law. *See supra,* Part I.B. at 16.

Importantly, these findings were not challenged by any party and the Director did not alter them in the 2009 *Final Order*. R. 3318; *see* R. 3321. No party appealed these issues to district court. Notwithstanding these settled findings, the Director arbitrarily reversed course on remand, finding that "wells placed in a poor hydrogeologic environment do not constitute a reasonable means of diversion." R. 3488. These are the exact same means of diversion that the Director previously found to be reasonable. *Supra*. The Director analyzed the exact same evidence, *Memorandum Decision* at 49, but, this time, concluded that A&B's diversions are not reasonable because of the original siting and well design. The Director's about-face on an issue that was never appealed or ordered to be reconsidered violates the mandate rule.[24]

A lower court does not have the authority to reconsider, on remand, an issue that was not challenged on appeal. In *Nissan Fire & Marine Ins. Co. Ltd. v. Bax Global Inc.*, 2009 WL 1364870 (N.D. Cal. 2009), a party sought to have the court consider a matter outside the scope of remand that was not previously appealed to the Ninth Circuit. The court rejected the invitation, and held:

> In the Order setting forth the Court's findings of facts and conclusions of law after the bench trial, the Court held that BAX was entitled to a set-off in the amount of the settlement paid by co-defendant, Cathay Pacific, to Plaintiffs, which was $15,000. Plaintiffs now argue that the BAX is not entitled to the set-off because Plaintiffs are not being fully compensated based on the Hague Protocol's weight limitations on damages. However, Plaintiffs did not appeal the set-off issue to the Ninth Circuit. Therefore, the "rule of mandate" doctrine precludes the Court from addressing this issue on remand.

Id.

According to the Court, "pursuant to the mandate rule, a district court cannot 'revisit its already final determinations unless the mandate allowed it." *Id.* (quoting *United States v. Cote*,

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[24] The Director's actions are also arbitrary and capricious. *See American Lung Assoc. of Idaho/Nevada,* 142 Idaho at 547 (An agency action is "capricious" if it "was done without a rational basis." It is "arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles").

51 F.3d 178, 181 (9th Cir. 1995)). Accordingly, since the "Ninth Circuit's mandate directed this Court to determine Hitachi's damages ... the Court finds that it does not have jurisdiction pursuant to the 'mandate rule' to consider the set-off issue." *Id.*

In this case, the Court's *Memorandum Decision* did not authorize the Director to re-evaluate the reasonableness of A&B's means of diversions. Indeed, that issue was not even before this Court because no party challenged the Director's original finding that A&B's employs reasonable means of diversion. Accordingly, the Director's reconsideration of the reasonableness of A&B's means of diversion on remand was prohibited and his new finding should be reversed and set aside. Likewise, the Director's new claim that A&B can only beneficially use 0.65 not 0.75 miner's inches of water in administration exceeded the scope of the ordered remand. Similar to the reasonable means of diversion findings discussed above, the required diversion rate was litigated at the administrative hearing with the Director determining that A&B was entitled to use its decreed rate (0.88 miner's inches) in a non-call setting and could expect 0.75 miner's inches in administration.[25]

The parties offered expert testimony on the District's irrigation diversion requirements, and Pocatello's expert specifically claimed that A&B only needed 0.65 miner's inches. R. 3108-09. Evaluating the evidence, the Hearing Officer made the following findings:

> 4. **The analysis of experts varies dramatically**. Farmers with comparable experience differ on the amount needed to meet minimum requirements. Experts with comparable education have similar disagreements.
>
> a. **Gregory Sullivan**, an expert on behalf of Pocatello, conducted an original conditions scenario and a current conditions scenario, taking into account farm efficiencies since Unit B was originally developed. He concluded that at the time of the original development a 0.84 miner's inch per acre was adequate to meet the dry year consumptive irrigation water requirements for Unit B and that with current efficiencies a 0.65 miner's inch delivery is sufficient. . . .

[25] The faults in this alleged "dual" standard of water use theory are discussed at Part I.B. at 16.

> b. **Doctor Brockway**, an expert for A&B testified that 0.89 is necessary to meet crop needs. Using his calculations there would be some 110 Unit B well systems that cannot meet crop needs in the peak period. . . .
>
> c. **The Director** used 0.75 which significantly reduced the number of well systems that are inadequate to meet crop needs and which would not be a sufficient breakdown of the system to constitute material injury.
>
> * * *
>
> 6. **The Director's determination is supported by substantial evidence**. Several factors support the Director's determination. It is consistent with the Motion to Proceed which indicates 0.75 to be a minimum need. A minimum is not a desirable amount, but it is adequate. The 0.75 is consistent with the policy of rectification adopted by A&B. It is unlikely rectification would be prompted at a level below the amount necessary for crop production. More is sought, and more is better, but 0.75 meets crop needs. There is persuasive evidence that 0.75 is above the amount nearby irrigators with similar needs consider adequate.

R. 3110 (emphasis in original).

The Director accepted this conclusion in his 2009 *Final Order*. R. 3321 ("Unless discussed herein, the recommendations of the Hearing Officer are accepted"). Although A&B appealed this finding in regards to the Director's failure to recognize the decreed quantity, no party challenged this finding alleging that 0.75 miner's inches was <u>too high</u> or could not be put to beneficial use. Consequently, the Director's finding settled the issue of a "minimum" amount that A&B is entitled to use.

Notwithstanding the law and this settled finding, the Director wrongly reconsidered the authorized minimum quantity A&B could beneficially use on remand. Reviewing the <u>*same evidence*</u>, the Director reversed himself to conclude that A&B only needs 0.65 miner's inches for purposes of administration. R. 3489. The Director had no authority or right to reduce the quantity in this manner.

The Director's action in this case is analogous to the attempted reconsideration of settled findings that was rejected by the Ninth Circuit under the mandate rule. In *Sunrich Food Group, Inc. v. Pacific Foods of Oregon, Inc.*, 304 Fed. Appx. 518 (9th Cir. 2008) ("*Sunrich II*") the Ninth Circuit rejected a decision by a district court that did not comply with a remand order. That case concerned an award of attorneys' fees against the defendant. On appeal of the first district court decision, the defendant <u>did not challenge</u> the award of fees. The plaintiff, however, challenged the amount of the award – arguing that it should have been higher. *Sunrich Food Group, Inc. v. Pacific Foods of Oregon, Inc.*, 207 Fed. Appx. 745 (9th Cir. 2006) ("*Sunrich I*").

In its first decision, the Ninth Circuit found the district erred by not considering attorneys fees for all legal work performed, not just that work relating to the trade secrets claim. *Sunrich II* at 519. The Court "instructed" the district court that it should consider the entire attorneys fees amount and "that it could reduce the amount of fees claimed" due to "generalized time entries, multiple attorney conferences" and other matters "if the court explained the reasoning." Importantly, no one argued that the initial award of fees should have been reduced. The Ninth Circuit described the district court's unlawful action:

> On remand, the district court decided, instead, to deny fees altogether. In doing so, the court failed to implement the letter and spirit of the mandate, especially because entitlement to fees was not questioned in the earlier appeal and because our previous disposition clearly implied that the district court's original decision to award fees was proper. Indeed, we suggested that a reduction of the amount claimed had been inadequately supported. We instructed the court to recalculate the amount of fees to correct its legal error about the scope of a permissible award and to explain its reasoning for reaching a specific amount in enough detail to permit meaningful appellate review. The court did neither.

Id. at 520. As a result, the Ninth Circuit reversed, stating that "we again instruct the district court to recalculate the amount of fees pursuant to our original instructions." *Id.*

Similarly, in this case, no party has argued that the Director's initial determination that A&B needed at least 0.75 miner's inches was too high. The issue was not appealed and this Court did not conclude that 0.75 miner's inches was too high. Rather, the Court remanded the case to the Director to specifically apply the appropriate standard to his "finding that ***the quantity decreed*** in A&B's 36-2080 exceeds the quantity being put to beneficial use for purposes of determining material injury." *Memorandum Decision* at 49 (emphasis added). Accordingly, the Director's finding reducing the minimum quantity A&B is entitled to use exceeds the scope of remand and should be reversed and set aside.

The findings relating to the reasonableness of A&B's diversions and the need for at least 0.75 miner's inches cannot be altered by the Director on remand based upon the law of the case doctrine as well. In *Ischay v. Barnhart, supra*, the court rejected an agency's attempt to alter the law of the case on remand. That case involved a claim for social security income benefits ("SSI"). 383 F. Supp.2d at 1199. When the applicant's request for benefits was denied, he sought a hearing before the Social Security Administration (the agency). *Id.* at 1200-08. During a second hearing on the matter, the agency concluded that the applicant met steps 1 through 4 of the SSI benefits analysis and was "limited to essentially light exertional work." *Id.* at 1207. However, the agency concluded that the applicant was not disabled under the statute because there were two transferrable-skills jobs that the applicant could perform – therefore, he did not meet step 5 of the analysis. *Id.* at 1207.

The agency's decision was appealed and the Court remanded for further consideration of the issue of "vocational adjustment" under step 5. *Id.* The Court did not authorize the agency to reconsider its analysis under steps 1 through 4. However, following a third and fourth hearing, the agency reversed its prior decision and concluded that the applicant did not meet *step 4* of the

analysis because he was able to perform all functions without limitation. *Id.* at 1213. The agency concluded that the step 5 analysis was, therefore, moot. *Id.*

On appeal, the Court overturned the agency decision, finding that "to the extent the ALJ reopened the case beyond the issues identified in the June 15, 1999 and December 12, 2001 Orders of this Court, ***he violated this Court's mandate and adjudicated issues already settled by the law of the case.***" *Id* at 1214 (emphasis added). The Court rejected the agency's argument that the law of the case and rule of mandate did not apply because the Court had not specifically addressed the step 4 findings in its prior decisions. According to the Court, "the doctrine does not require that any issue actually have been adjudicated; rather, it applies to this Court's 'explicit decisions as well as those issues decided by necessary implication.'" *Id.* at 1219. In reversing the agency decision, the Court concluded:

> Given that this Court's remand instructions are undeniably part of the same case, there is no way around the conclusion that the ALJ's third decision violated not only the law of the case as set forth in Magistrate Judge Jones's Order of June 15, 1999, but also exceeded the mandate of the December 12, 2001 Order. The remand stipulation that the parties proposed to this Court came in the wake of the ALJ's second decision, which had held that Plaintiff had met his burden of proof as to steps one through four of the sequential process, but that he was not disabled at step five. (See AR 298-305.) ***The stipulation nowhere indicated that remand was necessary to enable the ALJ to revisit any of the findings he had made in steps one through four of the second decision.***

Id. at 1218 (emphasis added).

Similar to the *Ischay* case, nothing in this Court's *Memorandum Decision* "indicated that remand was necessary to enable the [Director] to revisit any of the findings he had made" relative to the reasonableness of A&B's diversions and the need for at least 0.75 miner's inches. Those issues were disputed, subject to testimony and evidence, and decided by the Hearing Officer and Director. *Supra.*

The Director's findings and conclusions on these issues were not appealed. Moreover, no party, including IDWR, argued that the Director's determination relative to 0.75 miner's inches was excessive. Just the opposite, IDWR and the junior ground water users expressly represented to this Court that A&B retained the right to use its decreed quantity (0.88 miner's inches) in a non-administration setting. *See IDWR Br.* at 26; *IGWA Br.* at 23, 26; *Poc. Br.* at 18 (Case No. 2009-647). Accordingly, the Director's decision is in error and should be reversed.

Similarly, the Director should be estopped from altering his prior findings under the doctrine of collateral estoppel (i.e. issue preclusion). Indeed, the exact issues were decided after the administrative hearing and all parties to this proceeding were also parties to the original case. *See, e.g., Ticor Title Co. v. Stanion*, 144 Idaho 119 (2007) ("Five factors are required in order for issue preclusion to bar the relitigation of an issue determined in a prior proceeding: (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation.")

Finally, this Court has already recognized that the *Memorandum Decision* limited the Director's authority on remand. As described in the procedural history, A&B was forced to file a *Motion to Enforce* the Court's decision seeking the agency's compliance with order. *See* R. 3408. A&B asked the Court to compel the Director to "consider A&B's proposed 'interconnection' feasibility study in connection with the remand." R. 3409. Although this Court granted A&B's motion in part and ordered the Director to comply with the *Memorandum Decision*, it also denied A&B's request as to the feasibility study. This Court concluded A&B's

request was "outside the scope of the *Order of Remand.*" R. 3412. Since it was outside the scope of remand, the Court did not have jurisdiction over the matter. *Id.* Similarly, the settled findings discussed above are outside the scope of the ordered remand as well. Stated simply, the Director had no authority to reconsider those findings and conclusions.

Finally, notwithstanding the Director's violation of the mandate rule, these findings illuminate the arbitrary and capricious nature of the Director's decisions. Indeed, based on the same evidence presented at the administrative hearing, the Director has now completely changed course. This is the case even though the original findings were never challenged by any party. Indeed, no party challenged the Director's review of the evidence and conclusion that A&B's diversions are reasonable. Likewise, no party disputed the Director's conclusions regarding A&B's diversions by asserting that 0.75 miner's inches was too high. The evidence in the agency record did not change. Not only, therefore, did the Director have no legal authority to reverse himself on these decisions, *supra*, without new evidence, the Director had no factual basis to reverse himself either. Therefore, the Director's findings on these points should be reversed and set aside accordingly.

V. The Director's Various Reasons for his No-Injury Finding are Not Supported by Clear and Convincing Evidence.

This Court required the Director to "apply the appropriate evidentiary standard to the existing record" on remand. *Memorandum Decision* at 49. In addition to violating the presumptions under Idaho law and misapplying the CM Rules as to A&B's decreed water right as well as the mandate rule described above, several of the Director's "findings" that purportedly justified his no-injury decision are not based upon clear and convincing evidence.

A. The Director's Findings on the 11 Abandoned and Injection Wells is Contrary to the CM Rules and Not Supported by the Record.

The Director concludes that A&B's water right is not materially injured, in part, because A&B has "11 unused wells" that it could put "into production." R. 3489. This conclusion, however, is not supported by either the CM Rules or clear and convincing evidence in the record. First, Rule 42.01.g grants the Director the authority to determine the "extent to which the requirements ... could be met with the user's ***existing facilities*** and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices." (Emphasis added). Importantly, the 11 wells to which the Director relies upon are not part of A&B's "existing facilities" that can pump and deliver water.

The Director ignores the evidence in the record that those 11 wells include 6 that have been abandoned due to a lack of water and 5 that are former "injection wells" that have not been modified for production. R. 3081; Tr. Vol. III, p. 467; Ex. 208. Four of the five former injection wells have never been used for, or even determined capable of producing water for delivery. Indeed, as explained by A&B's manager Dan Temple at the hearing, the conversion of an injection well to a production well requires new drilling and the development of new infrastructure. Tr. Vol. III, p. 610-11. Each new well costs A&B approximately $64,000. *Id.* at Tr. Vol. III, p. 563. Accordingly, the Director's finding that A&B has 11 unused wells capable of supplying water is misleading and does not show that A&B's water right is not materially injured by clear and convincing evidence.

B. Consideration of Average Diversions Does Not Support a Conclusion that A&B Has Never Diverted 0.88 Miner's Inches Per Acre.

The Director's review is based on A&B's "average" diversions. *See, e.g.,* R. 3476; 3486. In doing so, the Director concluded that A&B has "never" diverted its decreed diversion rate, R.

3486, 3489, and that A&B "is not making full use of its diversion works during the peak season," R. 3487. Drawing a conclusion based on A&B's average diversions cannot support the Director's conclusion that A&B does not need, and cannot use, its full decreed diversion rate.

A&B operates "an 'on demand' irrigation system and each irrigation system needs to provide the full irrigation diversion requirement at the time it is needed." R. 1946; Tr. Vol. III, p. 514, lns. 16-21. This means that A&B only delivers the water needed by its landowners: "The amount and timing of irrigation demands varies between well systems depending on crop types, farming practices, acreage and other factors." R. 1946. Indeed, one water user on a well system may need the entire decreed diversion rate while his neighbor on the same system may not. It all depends on the particular crop mix, farming practices, and weather conditions.

There is no basis to hold A&B to a lower diversion rate simply because a ***monthly*** average does not equal the decreed diversion rate. Indeed, water users could demand 0.88 miner's inches for only 15 days out of the month and then less water the rest of the month. Just because the "monthly average" would be less than 0.88 miner's inches does not mean that A&B could have met the water users' demands at all times during the entire month with that reduced diversion rate.

The use of monthly or average data assumes that undiverted water from low-demand times of the irrigation season can be used during the peak of the irrigation season. This is not the case as explained by A&B's expert witnesses at hearing. Tr. Vol. XI, p. 2192, ln. 21 – p. 2193, ln. 16; Tr. Vol. XI, p. 2163, lns. 4-11; R. 1806, ¶ 26; *see also* R. 3109-10 ("Building soil moisture in the fall and spring is not a substitute for an adequate water supply during the peak

period of heat during the summer. Shallow rooted crops may utilize the moisture in the soil in a matter of days during hot periods").[26]

Furthermore, the present daily diversion data from 2007 shows that A&B is pumping almost the full rate provided by its water right in wells with the capacity to pump this amount. The 2007 daily diversion data indicates that the well systems with the capacity to pump more than .75 miner's inches per acre did, in fact, pump on an average daily basis more than 0.87 miner's inches per acre. R. 1962, 1965 (Table 2).

Given the above evidence in the record, the Director's conclusion that A&B's water right is not injured because the District has not needed its entire diversion rate or that A&B does not use its full capacity during peak season is not supported by clear and convincing evidence.

C. The Director's Finding that 1,100 cfs Has Not Been Available for Diversion During the Peak Season Unlawfully Re-Adjudicates A&B's Water Right.

Water right 36-2080 was partially decreed in by SRBA District Court in 2003. Ex.139. The partial decree authorizes the diversion of 1,100 c.f.s (0.88 miner's inches per ace). The decree resulted from (i) IDWR's examination of A&B's claim for 1,100 cfs; and (ii) a recommendation to the SRBA District Court, by the Director, that the water right be adjudicated with a diversion rate of 1,100 cfs. *See* I.C. §§ 42-1410, 42-1411. Prior to that, the Director issued a license for water right 36-2080 granting A&B the entire 1,100 cfs diversion rate. *See* I.C. § 42-219 (Director shall issue a license reflecting the water put to beneficial use).

Notwithstanding the license, the Director's recommendation to the SRBA Court and the partial decree – all of which conclude that A&B has developed a water right for 1,100 cfs – the Director now argues that A&B has never had the entire diversion rate available during the peak

[26] Average diversions from selected years also ignores the historical diversion records that show that the average A&B well produced 0.86 to 0.88 (i.e. 1,080 to 1,098 cfs total) from 1967 to 1970 and the vast majority produced between 0.80 to over 1.0 miner's inch per acre. Ex. 200 (*A&B Expert Report*) at 3-69 (Figure 3-20); Ex. 200 (*A&B Expert* Report) at App. A (Annual Report Part I, "Inches Per Acre Available at Well").

season. R. 3486. The Director cannot have it both ways. This deviation from his prior decisions regarding A&B's water right constitutes an unlawful re-adjudication and should be rejected by this Court.

In its *Order on Motion to Enforce Order Granting State of Idaho's Motion for Interim Administration*, Subcase No. 92-00021 (Nov. 17, 2005), the SRBA District Court rejected an argument that the Director could look behind a partial decree to reexamine an element of a decreed water right. In that case, Rangen filed a motion with the SRBA Court seeking enforcement of an interim administration order, alleging that the Director refused to properly administer its water right 36-7694. In its administrative orders, the Director concluded that water right 36-7694 "was licensed and subsequently decreed in error." *Id.* at 4. The State advanced this argument before the SRBA District Court, with the Court rejecting that argument. According to the Court:

> Rangen argues that the Director simply refused to administer the water right because the *Partial Decree* and the license which formed the basis for the recommendation were issued in error. Refusal to administer Rangen's water right on that basis would be contrary to this Court's *Order* and Idaho law. A partial decree in the SRBA is conclusive as to the nature and extent of the water right. I.C. § 42-1401A (5) and I.C. § 42-1420. . . .
>
> The *Partial Decree* issued for 36-07694 is a judgment certified as final pursuant to I.R.C.P. 54(b). To the extent the license, director's recommendation and *Partial Decree* were alleged to be issued in error; ***those issues should have been timely raised in the SRBA Court. Collateral attack of the elements of a partial decree cannot be made in an administrative forum. As such, the Director cannot re-examine the basis for the water right as a condition of administration by looking behind the partial decree to the conditions as they existed at the time the right was appropriated. This includes a reexamination of prior existing conditions in the context of applying a "material injury" analysis through the application of IDWR's Rules for Conjunctive Management of Surface and Groundwater Resources,*** IDAPA 37.03.11 *et seq.* . . .

Id. at 7-8 (emphasis added).

The law does not allow the Director to go behind A&B's decree and determine that A&B has never diverted 1,100 cfs. Therefore, the Director's finding that A&B has not diverted 1,100 cfs is without merit and should be set aside.

In addition to the clear legal error, the Director's findings are not supported by clear and convincing evidence. The record shows that A&B did divert and use its entire diversion rate before diversions by junior ground water users depleted the aquifer. Notably, from 1967 to 1970, the average A&B well produced 0.86 to 0.88 (i.e. 1,080 to 1,098 cfs total) – with the vast majority producing between 0.80 to over 1.0 miner's inch per acre. Ex. 200 (*A&B Expert Report*) at 3-69 (Figure 3-20); Ex. 200 (*A&B Expert* Report) at App. A (Annual Report Part I, "Inches Per Acre Available at Well"). Contrary to the Director's conclusion, well capacities were sufficient to support A&B's decreed diversion rate in the late 1960s, when the project was first put into full operation, and have declined since due to lowered ground water levels. *Compare* Ex. 200 (*A&B Expert* Report) at 3-69 (Figure 3-20) to 3-73 (Figure 3-27).

D. Well Sited and Drilled in the Southwest Area Were Based on Reliable Drilling Methods and are Reasonable.

The Director's conclusion that wells placed in the southwest area "do not constitute a reasonable means of diversion" is not supported by clear and convincing evidence. Indeed, the record shows that the wells were drilled deep enough to produce an average of 0.89 miner's inches per acre, with a least 5-10 feet of submergence over the pump bowls in almost all wells when A&B began operating the project in the mid-1960s. R. 1802; Ex. 200 (*A&B Expert Report*) at 3-69 (Figures 3-19 & 3-20); Ex. 200 (*A&B Expert* Report) at App. A (Annual Report Part I, "Inches Per Acre Available at Well").

At the hearing IDWR witness Dr. Wylie testified that the test of adequacy for a production well is to consider whether the well can produce the desired yield at the completion of the drilling depth, and if so, this indicates the well is adequate for the intended purpose:

> Q. [BY MR. SIMPSON] Okay. And Dr. Wylie, this morning when you were describing your experience in designing a well and the criteria you look at, was one of the criteria you would consider is whether there's sufficient capacity in the design to meet crop demand?
>
> A. Yeah. After you finish drilling a well, you've designed it all with their demand, the amount of water that they need, so it will accommodate an appropriate size pump. And then after drilling the well, you run a test to make sure the well will supply that amount of water.
>
> Q. So you design it to meet the demand, and then you run the pump test to ensure that after you've undertaken the effort to drill the well that it will meet the demand; correct?
>
> A. Correct.
>
> Q. And it has the capacity to meet demand?
>
> A. That it will be able to pump that much water.

Tr. Vol. VII, p. 1465, ln. 13 – p. 1466, ln. 8.

Virgil Temple, who worked with a well driller on the ground at the time wells were initially drilled on the A&B project, confirmed that the procedure described by IDWR's witness was followed, with well and pump testing to verify the production rate, alignment and depth of the well by Reclamation. Tr. Vol. II, pp. 262-263.

Data in the agency record indicates that the wells were drilled as deep as or deeper than other wells in the region. R. 1802-03; Ex. 200 (*A&B Expert Report*) at 3-16 to 3-17. IDWR staff admitted that the original cable-tool drilling method used for these wells was an appropriate method that is still used today. Tr. Vol. IX, pp. 1855-56. Dr. Wylie further testified that the well depth was adequate and "reasonable." Tr. Vol. VII, pp. 1428-29.

Not only were the wells constructed using reasonable means, they did provide an adequate supply of water when they were originally constructed. All but a few of the southwest area wells produced greater than 0.75 miner's inches per acre – with most producing between 0.80 to more than 0.90 miner's inches per acre. R. 1802; Ex. 200 (*A&B Expert Report*) at 3-70 (Figure 3-22). Using IDWR's own analysis, these wells, therefore, were adequate to meet the intended purpose. Tr. Vol. VII, pp.1465-66 (testifying that so long as the well "has the capacity to meet demand" it is has sufficient capacity).

As referenced above, the Hearing Officer concluded that A&B's diversions are reasonable. The record supports the Hearing Officer's conclusions and the Director did not alter that conclusion in his 2009 *Final Order*. R. 3321 ("Unless discussed herein, the recommendations of the Hearing Officer are accepted"). The evidence has not changed. As such, the Director's findings regarding the siting and design of wells in the southwest area of A&B as justifying a no-injury finding are not supported by clear and convincing evidence and therefore should be reversed and set aside.

CONCLUSION

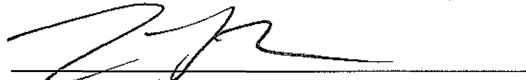
Despite this Court's clear and unequivocal directives on remand, the Director once again misapplied the proper presumptions and burdens of proof relative to A&B Irrigation District's decreed water right. Although water right 36-2080 was decreed for 1,100 cfs (or 0.88 miner's inches per acre), the Director unconstitutionally slashed this rate of diversion nearly 30% in violation of the evidentiary standard required by law and contrary to the undisputed facts that show A&B's landowners can and will beneficially use the decreed diversion rate for irrigation purposes. The Director misapplied the law by creating and substituting a crop "full maturity" standard in place of the decreed quantity under A&B's senior water right.

The Director further erred in his application of the CM Rules to junior water rights and exceeded the scope of the Court's *Memorandum Decision* on remand. The mandate rule prohibits reconsideration of settled findings therefore the Director had no authority to revisit the prior conclusion that A&B's means of diversion are reasonable and the quantity A&B's landowners can beneficially use.

In summary, the Director's *Remand Order* is not supported by Idaho law and should be reversed and set aside. A&B respectfully requests this Court to correct the agency errors and order the Director to properly implement the required standards and burdens in administration of A&B's senior water right.

DATED this 18th day of January, 2013.

BARKER ROSHOLT & SIMPSON LLP



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of January, 2013, I served true and correct copies of **A&B IRRIGATION DISTRICT'S OPENING BRIEF** upon the following by the method indicated:

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