IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THESTATE 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**

RESPONDENT-INTERVENOR CITY OF POCATELLO'S RESPONSE BRIEF
On Appeal from the Idaho Department of Water Resources

Before Honorable Eric J. Wildman

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I. ADDITIONAL ISSUES PRESENTED ON APPEAL

A. Whether Pocatello is entitled to attorneys fees pursuant to Idaho Code section 12–117 because A&B Irrigation District's ("A&B") Opening Brief raises issues already litigated or waived in this matter pursuant to the law of the case.

II. STATEMENT OF THE CASE

A. Procedural History

This matter comes before the Court on A&B's second appeal involving its delivery call before the Idaho Department of Water Resources ("IDWR" or "Department").

On January 29, 2008, the Director issued an *Order* ("2008 Order") denying A&B's Petition for Delivery Call ("Petition"), finding that A&B's 36-2080 water right had not suffered material injury. R. 1105−60. A hearing was conducted in December 2008 before Hearing Officer Gerald F. Schroeder ("Hearing Officer"). The Hearing Officer entered an *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations* on March 27, 2009, agreeing that A&B had not suffered material injury to its water right. R. 3078−120. On June 30, 2009, the Director issued the *Final Order Regarding the A&B Irrigation District Delivery Call* ("Final Order") accepting all substantive recommendations of the Hearing Officer. R. 3318−25.

In a *Memorandum Decision and Order on Petition for Judicial Review* ("Memorandum Decision"), May 4, 2010, this Court affirmed the Director's Final Order on all issues litigated and determined by the Department. Memorandum Decision, A&B Irrigation Dist. v. Idaho Dep't of Water Res., Case No. 2009-000647, Minidoka County Dist. Ct., Fifth Jud. Dist., May 4, 2010. However, the Court's agreement with the Director's finding of no material injury was limited by the "proviso" that the Director had failed "to apply the constitutionally protected presumptions and burdens of proof" in reaching his conclusion of no material injury. *Id.* at 24. The Court remanded the matter to the Department for consideration of the evidence in the record below under the clear and convincing standard of proof. On remand, the Director considered the

evidence in the record and determined, by clear and convincing evidence, A&B was not materially injured. R. 3469−91 (*Final Order on Remand Regarding the A&B Irrigation District Delivery Call* ("Remand Order")).

Meanwhile, the Idaho Supreme Court affirmed the District Court's decision in all aspects, finding *inter alia*, that (1) "the Ground Water Act applie[d] to the administration of A & B's water right"; (2) "the Director had substantial and competent evidence to support his decision not to set a reasonable groundwater pumping level and to analyze the water right on a system-wide as opposed to a well-by-well basis"; (3) and that the Director's determination regarding material injury in a delivery call is subject to a clear and convincing evidence standard. *A&B Irrigation Dist. v. Idaho Dep't Water Res.*, 153 Idaho 500, 284 P.3d 225, 249−50 (2012).

B. <u>Standard of Review</u>

Judicial review of a final decision of an agency is governed by the Idaho Administrative Procedure Act ("APA"). I.C. § 42-1701A(4). Review shall be based upon the record created before the agency. I.C. § 67-5277. The Department is the fact finder, and "its conclusions on the credibility and weight of the evidence will not be disturbed on appeal unless they are clearly erroneous." *Rivas v. K.C. Logging*, 134 Idaho 603, 607, 7 P.3d 212, 216 (2000). "This Court does not weigh the evidence or consider whether it would have reached a different conclusion from the evidence presented." *Id.* "In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record." *A&B Irrigation Dist.*, 284 P.3d at 231 (internal quotations and citation omitted). Pursuant to Idaho law, reviewing courts are to affirm factual determinations by a finder of fact if such findings are supported by "substantial evidence," even if the standard applied by the finder of fact is "clear and convincing evidence."

> [i]n determining whether evidence is clear and convincing, the trial court is entitled to weigh, compare, test and judge the worth of the evidence in light of all the facts and circumstances in evidence. That is, the court determines the testimony's probative force, and effect, not merely its quantity. Additionally, the trial judge is the arbiter of conflicting evidence; his determination of the weight, credibility, inference and implications thereof is not to be supplanted by [the reviewing] court's impressions or conclusions from the written record. **Thus if the trier of fact finds a fact to be established by clear and convincing evidence, that finding will not be reversed unless the finding is clearly erroneous or not supported by substantial and competent evidence**.

Jensen v. Bledsoe, 100 Idaho 84, 87, 593 P.2d 988, 991 (1979) (internal quotations and citations omitted (emphasis added). "Clearly erroneous" "means a reasonable person would not have relied on [the findings] in concluding as the fact finder did." *CASI Found., Inc. v. Doe*, 142 Idaho 397, 399, 128 P.3d 934, 936 (2006).

III. ARGUMENT

A. Introduction

The Director, pursuant to this Court's instructions on remand, has considered the evidence in the record of the A&B Delivery Call and concluded that there is clear and convincing evidence that A&B is not materially injured. This Court should affirm. A&B's Opening Brief attempts to raise additional issues on appeal, either attacking for the first time factual findings already established by the law of the case in the matter, or by construing the Director's Remand Order to include findings that simply are not present. In its *Memorandum Decision and Order on Petitions for Rehearing* ("Order on Rehearing"), this Court made clear the fact that the clear and convincing evidence standard applies to the determination of injury does not mean "that a senior right holder is guaranteed the maximum quantity decreed or that the Director is required to administer strictly according to the decree." Order on Rehearing at 7, A&B Irrigation Dist. v. Idaho Dep't of Water Res., Case No. 2009-000647, Minidoka County

Dist. Ct., Fifth Jud. Dist., Nov. 2, 2010. A&B failed to appeal this determination of the Court, and cannot now attempt a "second bite" at the apple by asking this Court to decide otherwise.

B. Review of the Remand Order is limited to the question of whether there is "substantial evidence" in the record to support a finding by clear and convincing evidence that A&B is not injured.

In the original appeal of the Department's finding of no injury, this Court remanded to the Department for one purpose: application of the clear and convincing standard of proof to the established record in this matter.

> [I]n order to give the proper presumptive weight to a decree any finding by the Director that the quantity decreed exceeds that being put to beneficial use must be supported by clear and convincing evidence. Accordingly, this Court holds the Director erred by failing to apply the correct presumptions and burdens of proof. . . .
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> . . . .
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> The Director erred by failing to apply the evidentiary standard of clear and convincing evidence in conjunction with the finding that the quantity decreed to 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 38-49 (emphasis added). The Court affirmed this limited scope of the remand in its *Order Granting Motion to Enforce In Part and Denying Motion to Enforce In Part*, where it determined that A&B could not require the Department to consider new evidence as part of the remand. R. 3412. Indeed, the Court recognized that it "does not have jurisdiction" to address any issues or order any action "outside the scope of the *Order on Remand*." *Id.*

Despite this limitation on this Court's jurisdiction, A&B's Opening Brief goes far afield from the limited issue of whether the Director's Remand Order is clearly erroneous or supported by substantial evidence. *Jensen*, 100 Idaho at 87, 593 P.2d at 991 ("if the trier of fact finds a fact to be established by clear and convincing evidence, that finding *will not be reversed* unless the

finding is clearly erroneous or not supported by substantial and competent evidence") (emphasis added). A&B's only pathway to success in the above-captioned matter is to demonstrate that the Director's finding of no injury is not supported by substantial evidence. *Id*. Instead, as demonstrated by A&B's expansive list of issues on appeal, A&B effectively seeks to have this Court substitute its judgment for the Director's by asking the Court to weigh the evidence in the record and re-evaluate factual findings of the Director. This is not allowed under Idaho law. *Rivas*, 134 Idaho at 607, 7 P.3d at 216.

Indeed, such a result would result in the polar opposite of this Court's observation that application of the clear and convincing evidence standard in delivery calls would

> provide[] for effective timely administration by reducing contests to the sufficiency of the Director's findings. The Director's determination in an organized water district will be difficult to challenge by either the senior or junior sought to be enjoined."

Order on Rehearing at 19 (emphasis added). A&B has not established that the Director's Remand Order is clearly erroneous or not supported by substantial evidence, or otherwise in violation of the APA. The Director's decision should be affirmed.

C. A&B's Opening Brief raises issues already litigated in this case that are beyond the scope of the limited remand.

In Idaho, the "law of the case" doctrine "precludes relitigation of issues" that either did or did not reach the Idaho Supreme Court during the first appeal. *Swanson v. Swanson*, 134 Idaho 512, 517, 5 P.3d 973, 978 (2000) ("Since George did not avail himself of this avenue for appealing the trial court's ruling on the characterization issue, we hold that the 'law of the case' doctrine precludes him from reopening the issue at this time."). "[O]n a second or subsequent appeal, the courts generally will not consider errors which arose prior to the first appeal and which might have been raised as issues in the earlier appeal. This approach discourages piecemeal appeals and is consistent with the broad scope of claim preclusion under the analogous

doctrine of res judicata." *Capps v. Wood*, 117 Idaho Ct. App. 614, 618, 790 P.2d 395, 399 (1990). "[A]n issue that could have been, but was not, presented in a previous appeal, is waived and will not be considered by an appellate court upon a second appeal in the same action." *Dopp v. Idaho Comm'n of Pardons & Parole*, 144 Idaho Ct. App. 402, 407, 162 P.3d 781, 786 n.3 (2007). Therefore, if A&B could have raised an issue in the original appeal in this matter in either the district court or Idaho Supreme Court, that issue should be deemed waived and not properly before the Court in the present appeal.

The table at Appendix A identifies A&B's issues and arguments in the present appeal that A&B has waived by its failure to timely appeal during the pre-remand litigation.[1] As demonstrated by Appendix A and this Response Brief, only one issue is properly before the Court in the present appeal—whether the Director's determination on remand that A&B is not materially injured is supported by substantial evidence in the record. The Court should accordingly find that A&B has waived the right to raise all other issues pursuant to the law of the case doctrine.

D. The Director's finding of no injury on remand is supported by clear and convincing evidence.

As explained above, the sole question properly before the Court for the first time in A&B's appeal of the Remand Order is whether or not the Director's finding of no material injury is supported by clear and convincing evidence. The Director's Remand Order is supported by clear and convincing—indeed, overwhelming and undisputed—evidence, including the following factual conclusions and evidence in the record:

[1] Pocatello also agrees with Idaho Ground Water Appropriators, Inc. ("IGWA") that A&B's Opening Brief repeats arguments already rejected by this Court and in blatant disregard of the law of the case in this matter, and hereby incorporates the table found in Section II of IGWA's Response Brief.

- "**In comparing peak season low flow well capacity from the Annual Report, Part 2 with actual diversions from [Exhibit 132], the Director concludes with reasonable certainty that A&B is not making full use of its diversion works during the peak season**." R. 3487 (emphasis added); Ex. 132; Ex. 133; R. 1118−19. Based on actual diversions, "the maximum amount of water actually diverted during the peak season was 0.76 miner's inches per acre in 1963 and 1967." R. 3486. "For example, in 2006, the year A&B filed its Motion to Proceed, 970 cfs (0.77 miner's inches per acre) was available for diversion; however, A&B actually diverted 0.65 miner's inches per acre." R. 3487. "[D]uring the peak season, A&B could divert additional water for irrigation purposes." *Id.* (applying Conjunctive Management Rule ("CMR") 42.01.e). "A&B has the capacity to pump more water if it in fact needs more water." *Id.* "A&B may not seek curtailment of junior-priority ground water rights when it is not fully utilizing its capacity to divert water." *Id.* (applying CMR 20.03).

- **A&B's water use and need "has decreased as a result of converting its project from gravity to sprinkler irrigation and employing other efficiency measures**." R. 3489 (emphasis added); R. 3474. "A&B has successfully implemented numerous measures that have reduced the amount of water required to irrigate the 62,604.3 acres under its calling water right, 36-2080." R. 3487. This includes conversion of certain acres from groundwater to surface water irrigation, reduction of conveyance losses, conversion of 96 percent of the project from gravity to sprinkler irrigation, and "near completion of a drain well elimination program, which provides for re-use of storm water and waste water for the irrigation of crops." *Id.*; R. 1116−17.

- **"[I]n spite of irrigating more acres than are authorized under 36-2080, not pumping to full capacity, and not utilizing all of its wells, crops are grown to full maturity on A&B lands**." R. 3489 (emphasis added). *See also* Tr. vol. X (Stevenson), 2074−76, 2088,

2090; Tr. vol. X (Maughan), 2138. Specifically, the Department's METRIC data was analyzed and showed that for A&B acres that were specifically "alleged by A&B as water short [Item-G lands]", "Item-G lands had the highest consumptive use per amount of vegetation of all acres analyzed" within A&B, including those acres that A&B did not allege were water short. R. 3479, 3480. *See also* Tr. vol. VI, 1105−09; R. 1124−27, Figures 10−13. Further, witnesses testified that A&B crop yields have generally increased over time. Tr. vol. X, 2042 (Carlquist), 2090−91 (Stevenson), 2139−40 (Maughan); Tr. vol. IV, 721−22 (Temple), 845−46 (Eames). "The higher consumptive use by crops on Item-G lands supports the conclusion that A&B is not water short." R. 3480. *See also* Tr. vol. VI, 1116−17, 1136. "A&B lands alleged to be water short have higher consumptive use and biomass than lands not alleged to be water short." R. 3488.

- **The southwestern portion of A&B is located in a geologic transition zone, which greatly effects well yield**. Ex. 106; Ex. 121 at A&B 1090. "[E]very problem well identified by A&B is located in the geologic transition zone," save one. R. 3473. "The problems associated with these wells derive from the inherent hydrogeologic environment." R. 3472. "[T]he inherent hydrogeologic environment in the southwestern area of the project—not depletions caused by junior-priority ground water users—is the primary cause of A&B's reduced pumping yields . . . ." R. 3488. "Wells placed in a poor hydrogeologic environment do not constitute a reasonable means of diversion." *Id.*

- **A&B is only pumping from 177 wells and is not utilizing all 188 authorized wells**. R. 3081; Tr. vol. VI, 1160−62. "Therefore, A&B has 11 additional wells that must be put to use if more water is needed to fully utilize its existing facilities before seeking curtailment of junior-priority ground water rights." R. 3486 (applying CMR 42.01.g, h).

- **"The Director concludes with reasonable certainty that if A&B limited irrigation under 36-2080 to 62,604.3 acres, it would satisfy the criteria set forth it its Motion to Proceed[]"—0.75 miner's inches per acre**. *Id.* A&B irrigates 4,081.9 more acres than are authorized under its calling right, and it does not have the ability to limit distribution of water under the calling water right to only the authorized acres. R. 1112, 1118; Tr. vol. IV, 742−43. *See also* Ex. 200, Figures 4-15, 4-16; Ex. 201AC; Ex. 201AD. "Before seeking curtailment of junior-priority ground water rights under 36-2080, A&B must have mechanisms in place to self-regulate its junior and subordinated enlargement acres." R. 3485. "[H]ad A&B limited its ground water use to irrigation of the 62,604.3 acres under water right 36-2080, or if it had not developed 4,081.9 additional acres of irrigation (junior and subordinated enlargement acres), mean annual ground water use between 1982 and 2007 would be lower than the mean annual use actually recorded for that period." R. 3488 (applying CMR 42.d, e).

1. <u>The Director did not find A&B's "conflicting" evidence persuasive, and is not required to pursuant to the substantial evidence standard.</u>

A&B's challenge to the Director's determination never alleges that the Director's consideration of the above evidence was arbitrary and capricious, clearly erroneous, an abuse of discretion, or otherwise in violation of the APA. Instead, A&B complains that the Department ignored testimony by A&B landowners who testified that "they could beneficially use 0.88 miner's inches per acre on their individual farms", and that "IGWA's own witnesses testified they . . . have applied quantities approaching the decreed diversion rate on their A&B project lands." Open. Br. at 14−15.

The Director did not ignore this evidence, but relied instead upon the fact that A&B's diversions have always been smaller than its available water supplies. R. 3476; Ex. 366 (Mr. Koreny testified that the highest system-wide monthly diversions translate to 0.71 miner's inches

per acre if deliveries have been limited to the 36-2080 acres, and 0.68 miner's inches per acre if the 36-2080 and water spread acres are considered.). *See also* Ex. 155. Therefore, the testimony of A&B's farmers is undercut by the established fact that when more than 0.75 miner's inches was available to them, they did not pump it. A&B's evidence cannot overcome the evidence in the record that (1) A&B has had capacity to pump more water if they need it; (2) A&B has grown crops to maturity on 0.75 miner's inches per acre; and (3) the lands A&B claims are water short are as a matter of fact not water short.

Part IV.D above establishes that that Director's findings are supported by substantial evidence. A&B's complaint that there is conflicting evidence in the record does not, as a matter of law, change this fact: "If the findings of fact are based on substantial evidence, even if the evidence is conflicting, they will not be overturned on appeal." *Benninger v. Derifield*, 142 Idaho 486, 489, 129 P.3d 1235, 1238 (2006). A&B has to do more than point out conflicting evidence to show an abuse of discretion or lack of substantial evidence. Substantial does not mean that the evidence was uncontradicted. To affirm the Director, the evidence must be of sufficient quantity and probative value that reasonable minds *could* conclude that the finding whether it be by a jury, trial judge, special master, or hearing officer—was proper. Therefore, a hearing officer's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusions the hearing officer reached. *See e.g. Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's Inc.*, 123 Idaho 473, 478, 849 P.2d 934, 939 (1993). Given the plethora of evidence upon which the Director's no-injury finding is based, the Director's determinations satisfy the substantive evidentiary standard.

2. The Director properly considered A&B's failure to utilize all 188 wells as evidence of injury.

A&B argues that the Director improperly considered the fact that A&B was not pumping from the total number of wells permitted under its decree, but was in fact 11 wells short, because said 11 wells "are not part of A&B's 'existing facilities' that can pump and deliver water." Open. Br. at 39. A&B argues that the CMR precludes consideration of anything but a user's "existing facilities"—therefore, because these 11 wells are not part of A&B's "existing facilities" that can pump and deliver water, they cannot be properly considered. A&B's logic is flawed—A&B's decree authorizes it to divert from 188 wells, and as a result, all 188 wells are its "existing facilities" for purposes of administration. If A&B believes itself to be short of water, it should either put those wells into production or construct them at another location. R. 3472. In other words, the fact that A&B's existing facilities that can deliver water *do not currently* include the maximum number of wells permitted under its decree is a proper consideration for the Director in determining material injury. CMR 42.01.g.[2]

3. The Director properly considered water availability during the peak season as part of its consideration of well capacity.

The Director examined A&B's historical diversions in comparison to the capacity of the A&B wells to pump groundwater ("pump capacity"). The pump capacity information is recorded by A&B in a column titled "low flow discharge"[3] in the A&B Annual Report. Ex. 132, Ex. 133; R. 3475. The available well capacity can be compared to actual A&B diversions in order to determine whether A&B diverted its available water supply. Tr. XI, 2169:2−2170:3. The Director concluded, based on this information, that A&B did not divert its decreed diversion

[2] This evidence is also properly considered under CMR 42.01.h (the extent to which the requirements of senior "could be met using alternate reasonable means of diversion or alternate points of diversion").

[3] "Low Flow Discharge," paradoxically, is the available pump capacity measured instantaneously for each well during the season of peak demand. *See* R. 3475 ¶ 32 and exhibits cited therein (e.g., Exhibit 132, page A&B 1451, which includes the monthly diversion data by well system beginning in 1998, along with A&B's discussion of the peak demand periods).

rate of 0.88 miner's inches per acre during the peak irrigation season, and that the maximum amount diverted during the peak season was 0.76 miner's inches per acre. R. 3476 ¶ 37. Further, the Director found that diversions during the peak season averaged 0.65 miner's inches per acre. R. 3486 ¶¶ 28−30. This information supports the Director's finding that A&B let available well capacity go to waste during the peak season, when water demand is highest. *See id.* ¶ 29.

Contrary to A&B's arguments, the Director's finding that A&B never diverted 0.88 miner's inches per acre during the peak irrigation season (or 1,100 cfs across the project) does not re-adjudicate A&B's water right.[4] The Director's determinations addressed A&B's actual beneficial use, and in that context the Director found that the greatest peak season low flow discharge of A&B's wells was 1,087 cfs or 0.87 miner's inches per acre. R. 3476 ¶ 34. The more important fact, however, is that A&B did not divert the full capacity of 1,087 cfs when it was available; in addition, this amount is much larger than the amount that A&B consistently alleged that it needs (970 cfs or 0.75 miner's inches per acre). R. 3489.

It is not clear how A&B gets from a finding of fact used by the Director to support the conclusion that A&B is not injured to its assertion of re-adjudication, but A&B's mischaracterization of the SRBA Court's *Order on Motion to Enforce Order Granting State of Idaho's Motion for Interim Administration* ("Order on Motion to Enforce") involving Rangen's water rights does not help. The SRBA Court's Order on Motion to Enforce made clear only that a partial decree cannot be collaterally attacked in a delivery call proceeding by invoking evidence regarding conditions that existed at the time of appropriation. However, the Court

[4] Although the Directors noted that A&B had a "high flow capacity" of 1100 cfs in 1973. R. 3976, FOF 34.

found that the Director may consider conditions existing prior to the entry of a partial decree in evaluating whether curtailment is proper[5]:

> [p]rior existing conditions might be relevant, however, in explaining why in a particular circumstance a call is futile. . . . it is not entirely clear why the Director included the conclusion that the Partial Decree was issued in error in the Second Amended Order . . . .
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> . . . .
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> Another plausible interpretation . . . is that the references to the existing conditions were included to explain why the call for [the water right] was futile. . . . In that case, the Director's conclusion is not a re-examination of an element of the underlying water right but instead an explanation as to why the curtailment of juniors would be futile.

Order on Motion to Enforce at 7−8, In Re SRBA, Case No. 39576, 9 SRBA 51 (2005), Subcase 92-00021 (Interim Administration) Twin Falls County Dist. Ct., Fifth Jud. Dist., Nov. 17, 2005. This is precisely what the Director determined here—the Director declined to curtail after considering existing conditions affecting A&B's water rights, including the inherent hydrogeologic challenges in the southwestern area, A&B's historical diversions during the peak season as compared with the water available to A&B during the peak season, and A&B's well capacity. R. 3487. Therefore, the SRBA Court's Order on Motion to Enforce stands for a conclusion to the contrary of A&B's position—that the Director may consider existing conditions as part of administration, and such consideration is not a re-adjudication of a senior's water right.

As a practical matter, what A&B seeks is not helpful. The legal significance of the Director's finding that A&B is not materially injured because, *inter alia*, it had available 1,087 cfs in well capacity that it failed to pump is the same regardless of whether the Director

[5] As did the Hearing Officer in this matter: "[t]he Director could consider information prior to the partial decree in considering material injury." R. 3089. A&B did not appeal this determination in its original appeal, and it should be considered waived in the present litigation. *See* Part III.D; Appendix A.

determined that the maximum low flow discharge was 1,100 cfs: A&B's diversion records demonstrate that it never diverted 1,100 cfs, and using either value, A&B is not injured.

4. The Director's reliance on average diversions to find no injury was appropriate.

A&B argues that only daily diversions should be used by the Director to determine whether A&B diverted at its decreed rate of 1,100 cfs because A&B is an "on demand" system that "only delivers the water needed by its landowners." Open. Br. at 40−41. The Director's evaluation of total pump capacity (*i.e.*, water availability) against historical diversions determines just that: how much water A&B's farmers demanded by comparison with the available water supply. As has been discussed previously in this Response Brief, the Director found that A&B has never diverted its available water supply and as such, is not entitled to an injury finding or to curtail the Eastern Snake Plain Aquifer ("ESPA") to deliver additional water.

The Director's review of A&B's diversions on an average monthly basis is compelled by A&B's historical practice of collecting data for each well system on a monthly basis. *See* Tr. vol. VI, 1175:10−15. At hearing, A&B's own diversion analysis was conducted on a monthly basis, using the same monthly data as the Director. *See e.g.* Ex. 200, ch. 4, Table 4-9. A&B was comfortable arguing for curtailment based on its analysis that favored its position; for it to argue against the use of the same data by the Director is inconsistent at best.

A&B did make available to the parties and the Director a limited amount of daily data—for the years 2003 through 2007[6]—but the analysis referred to by A&B in its Opening Brief does not establish that the average daily diversion rate in 2007 was 0.87 miner's inches per acre. *Cf.* Open. Br. at 41. A&B refers to Table 2 (R. 1965) which purports to be "Average Daily Pumping Rate". However, these average daily values do not include all of the wells on the B Unit, as the

[6] Water delivery data from approximately 2000 through 2006 was excluded because of a gag order in another case involving A&B farmers and the use of a pesticide called "Oust." *See* R. 3104.

parenthetical following the title establishes: "[s]tatistics do not include wells that can not [sic] produce 0.75 miner's-inch/acre at the headgate . . . ." R. 1965, Table 2. In addition, the A&B experts used the phrase "pumping rate" as an equivalent for "well capacity"—in other words the available water supply, not the amount diverted. Tr. XI at 2179:19−2180:24 (testifying that the information in Figure 3-13 (R. 1710) titled "Maximum Pumping Rate," is well capacity).

By its terms, A&B's analysis referenced in its Opening Brief at page 41 is a daily average of the pump capacity of *some* of the wells on the B Unit, over some period of days—neither the report or the table establish that the data averaged were collected on the same day. As the Director found (and as detailed *infra* at Part III.D) A&B was not injured because its well capacity exceeded its actual diversions and Table 2 (R. 1962, 1965) relied on by A&B provides no basis for the Director (or anyone else) to conclude otherwise.

E. The Director's Remand Order is within the narrow scope of this Court's remand and is consistent with the original findings of the Department and Hearing Officer.

A&B argues that the Director "exceeded the scope" of this Court's remand by finding that "A&B's means of diversion are unreasonable and that A&B only needs 0.65 inches per acre." Open. Br. at 27. A&B's argument that the Department has violated the "mandate rule"—a rule that has never been applied in published Idaho case law—must be rejected because it is based on two fundament misstatements of the record in this matter. First, the Remand Order does not find that A&B only needs 0.65 miner's inches per acre, but instead found that A&B can satisfy its beneficial uses with 0.75 miner's inches per acre—the same amount as in the original proceedings. R. 3486 ¶ 26 (affirming that the amount in question is 0.75 miners inches, i.e., the amount "set forth in [A&B's] Motion to Proceed"). Second, there was no finding in the original proceeding that A&B's means of diversion were reasonable.

Accordingly, the Director's determinations in the Remand Order do not violate the "mandate rule," should this Court find that it applies in Idaho. The Idaho Supreme Court has established that "a trial court has authority to take actions it is specifically directed to take, or those which are subsidiary to the actions directed by the appellate court." *Mountainview Landowners Coop. Ass'n, Inc. v. Cool*, 142 Idaho 861, 866, 136 P.3d 332, 336 (2006). The Director's recitation of factual findings from the record in this matter does not amount to a reconsideration of his prior determinations—the Director took the necessary steps to reach the limited issue that this Court instructed the Department to consider on remand by reviewing the evidence in the record and make findings as to whether "quantity decreed exceeds that being put to beneficial use" by clear and convincing evidence. Memorandum Decision at 38.

1. The Director and Hearing Officer originally concluded that A&B's means of diversion were not reasonable, and the Director's Remand Order is consistent with that determination.

A&B claims that the Director's finding that it has an unreasonable system of diversion in the Remand Order is in error because "these issues were already litigated and decided following administrative hearing – with both the Hearing Officer and the Director concluding that A&B's means of diversion are reasonable." Open. Br. at 29. A&B argues that the Director's finding of non-injury is thus not supported by clear and convincing evidence because "wells sited and drilled in the Southwest area were based on reliable drilling methods and are reasonable." *Id.* at 43. These arguments are simply incorrect and inconsistent with the record—the Director and the Hearing Officer each found that A&B's means of diversion were unreasonable. In addition, as discussed below this issue has already been briefed and decided against A&B by all reviewing courts, including the Idaho Supreme Court, A&B's attempt to have the issue decided again is without a reasonable basis in law or fact.

On remand, the Director found that problems associated with wells in the southwest area "derive[d] from the inherent hydrogeologic environment." R. 3473. "[T]he inherent hydrogeologic environment in the southwestern area of the project—not depletions caused by junior-priority ground water users—is the primary cause of A&B's reduced pumping yields . . . ." R. 3488. As such,

> [w]ells placed in a poor hydrogeologic environment do not constitute a reasonable means of diversion. CM Rule 42.01.g, h. 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.

Id. The Director's findings on remand are consistent with prior findings of the Hearing Officer and Director—simply put, A&B is wrong about the record in this matter. At no time during proceedings below did the Hearing Officer or the Director find that A&B's means of diversion was reasonable.

In fact, the Director originally found that A&B's system did not constitute a reasonable means of diversion. To wit:

- "A&B's own data shows that its inability to irrigate some portions of [its decreed place of use] is attributable to an inefficient well and delivery system." R. 1148 (emphasis added).
- "If A&B employed appropriate well drilling techniques . . . water would be available to supply its well production and on-farm deliveries." R. 1149 (emphasis added).
- The Director determined that A&B's method of diversion was not reasonable because it was not using technology "well suited for use in the geological environment in the southwestern portion of the District." R. 1148.

- A&B failed "to use appropriate technology [which] artificially limits access to available water supplies and [this] is not consistent with the requirement for the appropriator to use reasonable access." R. 1149 (emphasis added).

The Hearing Officer reached the same conclusion in his post-hearing recommendations:

> The conditions in the southwest area that make the recovery of water from the wells difficult do not justify curtailment or other mitigation. . . .
>
> . . . .
>
> That right can be used if the water is accessible, but the inability to access the amount of water to which A&B is entitled under the right by the current configuration of the system of diversion does not justify curtailing the extended development that has occurred over the ESPA with the blessing of State policy.
>
> . . . .
>
> Protection of A&B's water right cannot be based on its poorest performing wells. . . .

R. 3111−13. The Hearing Officer concluded that A&B had an obligation "to take reasonable steps to maximize the use of [its decreed] flexibility to move water within the system before it can seek curtailment or compensation from junior users." R. 3096. "A&B has a water right with points of diversion in the southwest region. That right can be used if the water is accessible, but the inability to access the amount of water to which A&B is entitled under the right by the current configuration of the system of diversion does not justify curtail[ment]." R. 3111 (emphasis added). "A&B must make efforts to reach water to satisfy its right until there is a determination that reasonable pumping levels have been reached and those levels are entitled to protection." R. 3113. "Protection of A&B's water right cannot be based on its poorest performing wells." *Id.* "If deepening wells is necessary to produce the amount of water A&B is

entitled to under the water right, that burden remains with A&B until it is established that it is unreasonable to drill deeper." *Id.*

Compounding A&B's error is the fact that the Idaho Supreme Court addressed the reasonableness of A&B's diversions on appeal, considering "whether the Director's discretion includes the ability to require reasonable methods of diversion and application by a senior right holder." *A&B Irrigation Dist.*, 284 P.3d at 240. The Court found that A&B "must take reasonable steps to divert some water throughout the project [by interconnecting wells] before junior members are impacted." *Id.* at 239. The Court affirmed that "[t]he Director did not impose a new condition, but rather he used his discretion to analyze A&B's delivery call using his statutory authority in the manner governed by the CM Rules." *Id.* at 240–41. The same logic applies here—the Director may properly consider the reasonableness of A&B's diversions in assessing material injury.

If the Court is to permit A&B to raise this already-litigated issue anew, it should find that the evidence in the record supports the Director's finding. "A&B's own data shows that its inability to irrigate some portions of [its decreed place of use] is attributable to an inefficient well and delivery system." R. 1148. "If A&B employed appropriate well drilling techniques . . . water would be available to supply its well production and on-farm deliveries." *Id.* A&B's method of diversion was not reasonable because "[w]hile cable tool continues to be used for deepening many of the existing wells and drilling new wells, this technology is not well suited for use in the geological environment in the southwestern portion of the District because it requires that the borehole diameter be successively reduced every time a new string of casing is emplaced to hold back the caving sediments." *Id.* A&B failed "to use appropriate technology [which] artificially limits access to available water supplies and [this] is not consistent with the

requirement for the appropriator to use reasonable access." R. 1149. A&B's witnesses did not convince the Director or the Hearing Officer otherwise, and the Department's findings are to be affirmed unless clearly erroneous. *Jensen*, 100 Idaho at 87, 593 P.2d at 991.

2. The Director did not find that A&B would be "wasting" water if it diverted more than 0.65 miner's inches per acre, nor that 0.65 is the "beneficial use standard."

A&B erroneously claims that "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." Open. Br. at 21. Contrary to A&B's claims, the Director's Remand Order does not use 0.65 miner's inches per acre as the "beneficial use standard" *Id.* at 19. Nor did the Director find that diversions in excess of 0.65 miner's inches per acre were waste. *Id.* at 6. This is a wholly inaccurate characterization of the Director's findings.

On remand, the Director merely noted as a factual matter that "A&B's actual diversions have averaged 0.65 miner's inches per acre during the peak season." R. 3489. This is the extent of the Director's finding—he did not go on to conclude that 0.65 miners inches "is the limit of A&B's entitlement to water." Open. Br. at 21. Instead, he concluded that this evidence supported a finding of no injury because it demonstrated that A&B did not pump more water even when it had the capacity to do so on its supposedly water short acres. R. 3486−87. Indeed, an appropriator is entitled to divert all of the water right confirmed by his partial decree, but an appropriator may only curtail juniors to receive additional water if it is being injured—in other words, depletion does not equal injury. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.* ("*AFRD#2*"), 143 Idaho 862, 868, 154 P.3d 433, 439 (2007). Further, the Director went on to find that there was water available to meet the needs demanded in A&B's Petition—0.75

miner's inches per acre—"the quantity available to A&B is sufficient for the purpose of irrigating crops." R. 3489.

In the Remand Order, the Director made clear that 0.75 is the amount that A&B requires to avoid material injury.[7] R. 3474 ¶¶ 26, 27 (finding 0.75 is the amount A&B has called for and desires from its wells); R. 3476 ¶ 35 (finding on farm deliveries in 2006 peak season was 0.75); *Id.* ¶ 37 (finding that A&B only met or exceeded 0.75 miners inches per acre three times in the 47 years of division data available). There are no "conflicting conclusions" to reconcile, and A&B's attempt to distract the Court with a finding that is simply not there should be given no quarter.

Further, and even though the Director did not find that 0.65 was the "beneficial use standard", A&B is incorrect that the Department cannot find that A&B needs an amount different from its decreed amount as a matter of law. Open. Br. at 16. This Court made clear that upon remand the Department could find that A&B needed less than its decreed amount to "accomplish the purpose of use", so long as such a finding was supported by clear and convincing evidence. Order on Rehearing at 4. Again, A&B did not appeal this finding. *See also* Memorandum Decision at 30−31 ("[The decree] is not conclusive that the water user is actually putting the full quantity to beneficial use. . . . . In this case, the Director determined that A & B successfully implemented a number of measures that have reduced the amount of water required to irrigate the [decreed] acres . . . . It should therefore come as no surprise that a water user can require less water than the decreed quantity to accomplish the purpose for which the right was decreed.").

[7] Further, the Director rejected A&B's claim of injury because "A&B lands alleged to be water short have higher consumptive use and biomass than lands not alleged to be water short." R. 3488.

A&B argues separately that the Remand Order contains an "implied finding that junior ground water rights could beneficially use" water beyond 0.65 miner's inches per acre and the Director did not properly apply CMR 20 because he "performed no evaluation of the exercise of junior priority water rights to determine whether juniors were 'using water efficiently and without waste.'" Open. Br. at 24, 26 (quoting CMR 40.03). Although difficult to decipher, A&B's actual complaint is that, although they never raised this issue at hearing or in the original appeal, the Director should have made a "specific evaluation" as to whether every junior water user in the ESPA would be wasting water if they diverted more than 0.65 miner's inches per acre. *Id.* at 27.

First, there is no "implied" finding in the Remand Order regarding junior water users' beneficial use needs—indeed, A&B did not raise this issue or present evidence on it at hearing. Second, the Hearing Officer did, in fact, consider water use by juniors per CMR 40.03. R. 3106−07. A&B did not appeal this finding in the original matter, and it is accordingly waived. *See* Part III.C. Finally, because the Director's no-injury finding was based on A&B's failure to utilize its full pump capacity to deliver additional water, he concluded that A&B was not making reasonable efforts to reach available water. The Director's determinations that A&B's diversion methods and practices are unreasonable stands on its own, without regard to the activities of junior water right holders. Until A&B corrects its own deficiencies it cannot seek total or partial curtailment of juniors' ground water pumping. As such the "reasonableness of diversion" of all other ESPA junior water right holders was not an issue the Director was required to reach. CMR 20.05.

F. In imposing the clear and convincing evidentiary standard, the Idaho Supreme Court did not overturn the well-established substantive standard for material injury.

A&B claims the Director's Remand Order sets a new standard of injury inconsistent with the CMR by stating that "[i]njury . . . 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." R. 3482 ¶ 11. "[A] senior water right holder cannot demand [replacement water] unless that water is necessary to accomplish an authorized beneficial use." R. 3483 ¶ 13; Open. Br. at 10. A&B characterizes the Director's "proper" evaluation of material injury as "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." Open. Br. at 9. This characterization of the law is fundamentally in error: depletion does not equal injury in a delivery call proceeding. R. 3482 ¶ 11; *AFRD#2*, 143 Idaho at 868, 154 P.3d at 439.[8] The Remand Order properly articulates the material injury standard under Idaho law as incorporating the concept of beneficial use.

Recognizing that "Idaho law prohibits a senior from calling for the regulation of juniors for more water than can be put to beneficial use", this Court in the original appeal found the

[8] Indeed, it has been established since *AFRD#2* that depletion of a decreed quantity does not equate to material injury. In *AFRD#2*, the Court pointed out an important distinction between adjudications and administrative delivery calls:

> [W]ater rights adjudications neither address, nor answer, the questions presented in delivery calls; thus, responding to delivery calls, as conducted pursuant to the CM Rules, do not constitute a re-adjudication. For example, the SRBA court determines the water sources, quantity, priority date, point of diversion, place, period and purpose of use. However, reasonableness is not an element of a water right; thus, evaluation of whether a diversion is reasonable in the administration context should not be deemed a re-adjudication. Moreover, a partial decree need not contain information on how each water right on a source physically interacts or affects other rights on the same source.

143 Idaho at 876−77, 154 P.3d at 447−48 (citations omitted). The Idaho Supreme Court recently affirmed this ruling, when it noted that the issue involved in administration included consideration of "whether the appropriator making the call is suffering material injury, the reasonableness of the appropriator's diversion, the appropriator's conveyance efficiency, whether the appropriator is putting the water to beneficial use, whether the appropriator is wasting water, and hydrology." *A&B Irrigation Dist.*, 284 P.3d at 249.

Department's investigation of A&B's water needs and diversion system to be proper. Memorandum Decision at 32. Further, this Court made clear that its imposition of the clear and convincing standard of evidence "does not result in the Director administering rights strictly in accordance with the decreed quantity." Order on Rehearing at 6. The Court recognized that injury does not equal depletion, and that A&B's partial decree does not *per se* preclude inquiry into its water needs:

> [A] water user can require less water than the decreed quantity to accomplish the purpose for which the right was decreed. As such, the quantity reflected in a license or decree is not conclusive as to whether or not all of the water diverted is being put to beneficial use in any given irrigation season.

Memorandum Decision at 31 (emphasis added). Furthermore,

> [c]onditions surrounding the use of water are not static. Post-adjudication circumstances can result where a senior may not require the full quantity decreed. The most obvious example would be if the senior is not irrigating the full number of acres for which the right was decreed. Efficiencies, new technologies and improvements in delivery systems that reduce conveyance losses can result in a circumstance where the full decreed quantity may not be required . . . . The subsequent lining or piping of a ditch or the conversion from gravity fed furrow irrigation to sprinkler irrigation can reduce the quantity of water needed to accomplish the purpose of use for which the right was decreed.

Id. at 30 (emphasis added). *See also* Order on Rehearing at 7 ("there are indeed circumstances where the senior making the call may not at the present time require the full decreed quantity and therefore is not entitled to administration based on the full decreed quantity.").

A&B claims that the Director's material injury analysis is in error because he evaluated "the minimum necessary to irrigate or to grow a crop to 'full maturity'", a standard that purportedly violates the *Clear Springs* imprecation against substituting a profit/loss analysis related to the senior's use of the water for a beneficial use analysis, rendering (so goes A&B's erroneous logic) meaningless an appropriator's decreed diversion rate. Open. Br. at 13. As a threshold matter, the *Clear Springs* decision rejected an argument that a senior appropriator was

required not merely to show, *inter alia*, that it could grow more fish with additional water, but that it could do so and make a profit.[9] *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 811, 252 P.3d 71, 92 (2011). By contrast, A&B can point to no analogous findings by the Hearing Officer or Director. In fact, A&B admits that the "crop maturity" language of which it complains originated from the Hearing Officer's original order in this matter, where the Hearing Officer stated that the question before the Department was "whether irrigators' crop needs in Unit B can be met with less than the full amount of the water right." R. 3108; Open. Br. at 11.

A&B's tortured construction of the law is simply wrong—as instructed by this Court on remand, one of the considerations in determining material injury is precisely to consider whether a water right can be met with "less than the decreed quantity of water." Memorandum Decision at 34. In its original consideration of this matter, this Court clarified that "the senior is not guaranteed the decreed quantity nor is the Director required to administer strictly in accordance with the decreed quantity. While a senior may not be guaranteed the decreed quantity in a delivery call, he should have assurances that any reduced quantity determined to be sufficient to satisfy current needs is indeed sufficient." Order on Rehearing at 7 (emphasis added). "Simply put, the senior is entitled to the quantity reflected in the decree unless is can be shown by clear and convincing evidence that the full quantity [of water] is not or would not be put to beneficial use." Memorandum Decision at 34 n.12(emphasis added). A&B did not appeal this finding of the Court to the Idaho Supreme Court, and cannot raise this issue belatedly (*see* Part III.C).

[9] This was the importance of IGWA's arguments as understood by the Idaho Supreme Court. However, a senior fish producer has the same burdens as A&B, including the requirement to show that it has a reasonable means of diversion, that it is using its water supplies efficiently (e.g., growing fish with available water rather than merely letting water run past the facility or through empty raceways), and that it has established interconnections to ensure the entire water supply can be made available to all structures in the facility.

G. *Clear Springs* did not void I.C. § 42-226 and CMR 20.03.

Contrary to A&B's claims, the Director did not "err[] in his reference to Idaho Code § 42-226 and Rule 20.03 as justifying the no-injury finding on remand." Open. Br. at 21. A&B's issue is not substantive: it does not challenge the findings of the Director that cite to Rule 20.03 and section 42-226 with any legal argument, but instead claims that said findings must *de facto* be erroneous because "[t]he Director cites Rule 20.03 and Idaho Code § 42-226 to justify his various conclusions." *Id.* at 24.

First, A&B neglects to inform the Court that in the original proceeding in this matter, the Hearing Officer applied section 42-226 to A&B's water right to support his conclusion that A&B "is not entitled to curtail junior pumpers to reach that full [decreed] amount if the full [decreed] amount is not necessary to develop crops to maturity." R. 3108, 3112. The *Clear Springs* decision was announced March 17, 2011—prior to A&B's deadline to submit an opening brief in Appeal No. 38403-2011 on June 30, 2011, where it was required to designate its issues. It did not appeal this finding of the Hearing Officer, and accordingly it has waived this issue. *See* Part III.C.

More importantly, A&B is incorrect in its claim that *Clear Springs* "voided" Rule 20.03 and section 42-226. The CMR were upheld as facially constitutional by *AFRD#2*. *AFRD#2*, 143 Idaho at 883, 154 P.3d at 454. *Clear Springs* did not overturn this decision, but instead rejected a particular interpretation of CMR 20.03. In *Clear Springs*, the Idaho Supreme Court rejected the proposition that 20.03 stated "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," and went on to clarify that the constitutional and statutory authority cited in 20.03 also do not stand for such a proposition. *Clear Springs*, 150 Idaho at 805, 252 P.3d at 86.

The *Clear Springs* Court went on to note its prior holding that "Idaho Code § 42–226 has no application to this case. It only modifies the rights of ground water users with respect to being protected in their historical pumping levels." *Id.* at 808, 252 P.3d at 89. A&B's claim that this sentence means that the doctrine of "full economic development" in section 42-226 "applies only in reference to a senior's reasonable groundwater pumping level" is disingenuous. A&B's interpretation ignores the rest of the Court's decision in *Clear Springs*, which made expressly clear that "full economic development" is the same principle as "optimum development," which applies to administration of all water rights in Idaho:

> 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. As we stated in *Parker v. Wallentine*, 103 Idaho 506, 513, 650 P.2d 648, 655 (1982), "[I]t is clearly state policy that water be put to its maximum use and benefit. That policy has long been recognized in this state and was reinforced in 1964 by the adoption of article XV, section 7 of the Idaho Constitution." When discussing the Ground Water Act and particularly Idaho Code § 42–226, we stated, "The Ground Water Act was the vehicle chosen by the legislature to implement the policy of optimum development of water resources." *Id.* at 512, 650 P.2d at 654. The policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources applies to both surface and underground waters, and it requires that they be managed conjunctively.

Id. (emphasis added). Just because "[f]irst in time and first in right, full economic development, and reasonable pumping levels are not three separate factors" does not somehow mean that "full economic development" only applies in the context of reasonable pumping levels. *Id.* at 802, 252 P.3d at 83; *cf.* Open. Br. at 24.

The Remand Order does not apply any of the "unreliable" provisions that were treated negatively in *Clear Springs*. Further, all of the Director's rulings that A&B challenges as impermissibly "citing" to these two provisions apply to the reasonableness of A&B's means of

diversion, which, even according to A&B, "survives" as an applicable Idaho water law doctrine after *Clear Springs*. Open. Br. at 23 ("[T]he only substantive reference that survives in Rule 20.03 is the concept of a 'reasonable means of diversion.'").

H. Should it prevail in this appeal, Pocatello requests an award of attorneys fees.

Pocatello has incurred attorneys fees because of A&B's decision to ignore the law of the case in this matter to impermissibly expand the issues before the Court. Idaho Code section 12-117 allows for an award of attorneys fees "in any proceeding involving as adverse parties a state agency or a political subdivision and a person," so long as "the nonprevailing party acted without a reasonable basis in fact or law," including "appeals" of agency decisions.[10] I.C. § 12-117(1). Idaho Rules of Civil Procedure address how to determine a prevailing party. "In any civil action the court may award reasonable attorney fees . . . to the prevailing party or parties as defined in Rule 54(d)(1)(B)." I.R.C.P. 54(e)(1). Rule 54(d)(1)(B) provides that "[i]n determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties." I.R.C.P. 54(d)(1)(B).

As outlined in Part III.C and Appendix A, A&B's Opening Brief raises almost exclusively issues that it either litigated and lost in the original proceeding on this matter, or that it failed to appeal to the district court or Idaho Supreme Court. The Court is without jurisdiction to consider these issues, which are already determined by the law of the case and accordingly waived. A&B cannot provide the Court with "a reasonable basis in fact or law" that would allow it to sidestep these well-established doctrines under Idaho law. Accordingly, should the Court

[10] Senate Bill No. 1332 amended I.C. section 12-117(1) effective March 27, 2012, "To Revise When Attorney's Fees . . . May be Awarded." S. 1332, 2nd Sess., at 1 (2012). As previously drafted, I.C. § 12-117(1) only permitted attorneys fees be awarded in administrative proceedings or civil judicial proceedings, and not in appeals of agency decisions on judicial review. The 2012 amendment eliminated this limitation and now allows attorneys fees to be awarded in "any proceeding" involving a state agency, including petitions for judicial review.

affirm the Director's Remand Order and find that Pocatello is a prevailing party in this matter, Pocatello respectfully requests the Court award it attorneys fees.

IV. CONCLUSION

This Court remanded to the Department for the limited task of determining whether the evidence in the record supported a finding of no material injury by clear and convincing evidence. In the Remand Order, the Director properly found that A&B's water right was not materially injured because, *inter alia*: (1) A&B does not utilize the capacity is has during the peak season when water is most needed; (2) A&B's water needs have decreased as a result of efficiency measures; (3) crops are grown to full maturity on A&B lands; (4) A&B is not utilizing all 188 authorized wells; and (5) if A&B limited irrigation under 36-2080 to the water rights' authorized acres, it would be able to satisfy its requested water delivery of 0.75 miner's inches per acre. Accordingly, this Court should affirm the Director's Remand Order as supported by substantial evidence. A&B's remaining issues on appeal attempt to re-litigate established holdings of the law of the case in this matter, and should not be entertained by the Court.

Dated this 15th day of February, 2013.

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ATTORNEYS FOR CITY OF POCATELLO

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February, 2013, a copy of **Respondent-Intervenor City of Pocatello's Response Brief** in **SRBA Case CV-2011-512, Minidoka County** was served by Federal Express to Snake River Basin Adjudication and by U.S. mail and electronic email to the following parties:

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APPENDIX A

A&B's Issue/Argument	Determination in Original Appeal
"Whether the Director unconstitutionally applied the CM Rules to A&B's decreed senior water right for purposes of administration." Open. Br. at 3. The question of material injury is not whether a water right can be met with less than the full quantity of a water right, but instead, can the decreed quantity be put to beneficial use.	The district court found that the Director has a duty to "administer to the quantity put to beneficial use." Memorandum Decision at 36 (emphasis added). "If circumstances do not require the full amount of the decreed quantity to accomplish the purpose of use but the senior nonetheless continues to divert the decreed quantity, the issue is one of waste." *Id.* at 31 (emphasis added).
"Whether the Director erred in using an undefined 'crop maturity' standard, not the water right, for purposes of administration." Open. Br. at 3.	The Idaho Supreme Court expressly stated that the district court affirmed the "pertinent finding" of the hearing officer that "Crops may be grown to full maturity on less water than demanded by A & B in this delivery call." *A&B Irrigation Dist. v. Idaho Dep't of Water Res.*, Idaho, 500 Idaho 500, 264 P.3d 225, 229 (2012).
"Only post adjudication factors… can be used to excuse providing [less than] the senior's decreed quantity." Open. Br. at 9.	The Hearing Officer found that "[t]he Director could consider information prior to the partial decree in considering material injury." R. 3089.
"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" by finding that A&B's means of diversion were not reasonable. Open. Br. at 3.	The Director and Hearing Officer both found that A&B's system did not constitute a reasonable means of diversion. *See generally* R. 1148−49, 3096, 3111−13.
"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." Open. Br. at 3.	The Hearing Officer considered water use by junior appropriators. R. 3106−07.
"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)." Open. Br. at 3.	The Hearing Officer applied the CMR and I.C. § 42-226 to A&B's water right in the original appeal, and A&B did not designate this issue on appeal after the *Clear Springs* decision was announced. R. 3108, 3112.